



**Kajuju v Trustees of the Kenya Railways Staff Retirement Benefits Scheme  
(Cause E957 of 2021) [2024] KEELRC 1935 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1935 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E957 OF 2021  
NZIOKI WA MAKAU, J  
JULY 18, 2024**

**BETWEEN**

**JUDITH KAJUJU ..... CLAIMANT**

**AND**

**TRUSTEES OF THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS  
SCHEME ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed a Memorandum of Claim dated 19<sup>th</sup> November 2021 against the Respondent Company alleging wrongful, unfair and unlawful dismissal from employment. She prays for orders against the Respondent as follows:
  - a. A Declaration that the Claimant was unfairly, wrongfully and unlawfully sent on an indefinite compulsory leave.
  - b. An Order that the Claimant be reinstated back to her position without loss of position and the entitled benefits.
  - c. Order for payment to the Claimant of the actual pecuniary loss suffered as result of indefinite compulsory leave from date of such compulsory leave to the date of retirement.
  - d. A Declaration that the Claimant is entitled to be compensated for violation of her Constitutional rights as envisaged under Article 41(1), 47 and 50 of the *Constitution of Kenya* 2010.
  - e. Costs of the suit at court rates from the date of filing this suit until payment in full.



- f. Any other relief this Honourable Court may deem fair and fit to grant.
1. Or in the alternative:
- g. A declaration that the Claimant was unfairly terminated and denied a right to earn a just living;
  - h. Three (3) months payment in lieu of notice - Kshs 426,972/-
  - i. Compensation for Unfair Termination totalling to (142,324/- x 12 Months) = Kshs. 1,707,888/-
  - j. Accumulated leave days (56 days) totalling to Kshs. 265,671.47/-
  - k. Salary due from January 2020 to retirement being April 2028 totalling to Kshs. 14,232,400/- as tabulated in the claim
  - l. Issuance of the Certificate of service
  - m. Interest is due on the sums above; and
  - n. Costs of the suit at court rates from the date of filing this suit until payment in full.
  - o. Any other relief this Honourable Court may deem fair and fit to grant.
2. The Claimant averred that she joined Kenya Railways Retirement Benefits Scheme on 1<sup>st</sup> July 2007 as an Administrative Executive in the Human Resource Department and held various other roles before her appointment to the role of Head of Human Resource and Administration. She asserted that in the 13 years she served the Scheme, she was never involved in any cases of underperformance, indiscipline or misconduct and that her monthly salary resultantly gradually increased from Kshs. 76,000/- to Kshs. 142,324/- and as detailed in her October 2019 pay slip. Her case was that on 29<sup>th</sup> October 2019 at 4.30pm, she received a letter of even date asking her to proceed to an indefinite compulsory leave pending an investigation on accumulated rent arrears and that she was never paid her salary since the start of January 2020. She further averred that the disciplinary hearing held on 17<sup>th</sup> February 2020 was unfair and flawed because she was neither issued with any investigation report nor had a chance to respond to specific accusations allegedly contained in the investigation report. According to the Claimant, she was subjected to emotional and professional turmoil owing to the draconian manner in which the Respondent effected the indefinite compulsory leave and/or termination of her employment. She averred that the Respondent wrongfully and unfairly placed her on an indefinite compulsory leave while interfering with her terms of service without according her a fair hearing. She maintained that the Respondent never issued her with a notice of termination of employment and has denied her salary for the period of the compulsory leave. Further, the Claimant stated that she neither went on annual leave nor was paid in lieu thereof and that she had equally not been issued with her certificate of service. The Claimant notably also seeks her gross salary from January 2020 until April 2028 when she is supposed to have attained retirement age.
3. In response, the Respondent filed a Memorandum of Response and Counterclaim dated 4<sup>th</sup> March 2022 wherein it averred that the Claimant was sent on compulsory leave to give way for a detailed investigation into the accumulated rent arrears, general conduct and work performance. It asserted that the Claimant's disciplinary hearing was fair because she was invited to respond to specific charges of gross misconduct, she made her response before being invited for hearing on 21<sup>st</sup> February 2020, the outcome of the investigation was contained in the letter dated 6<sup>th</sup> February 2020, she was afforded an opportunity to present her case in writing and orally, and it considered her response which it found



unsatisfactory. The Respondent's case was that it therefore terminated the Claimant's employment by a letter dated 25<sup>th</sup> February 2020 and that the Claimant was aware of the same as evidenced in her Demand Letter dated 18<sup>th</sup> October 2021. It contended that when the Claimant refused to pick the letter terminating her contract and the letter terminating her occupancy of the Respondent's property, both letters were served upon her by pushing under her door. The Respondent denied that the Claimant's compulsory leave was indefinite as alleged, asserting that the Claimant was issued with a termination letter and paid all salaries while on compulsory leave. It stated that the Claimant took her annual leave and that her certificate of service is available for collection. It averred that the Claimant's claim for service pay is unnecessary and unjustified as she was a member of a pension scheme and pension deductions were made from her salary.

4. In the Counterclaim, the Respondent averred that the Claimant continued to illegally occupy the Respondent's dwelling house leading to accumulation of rent, which she has never settled. The Respondent thus counterclaims the rent arrears in respect of the Respondent's residential premises as at 25<sup>th</sup> January 2022 and commercial premises numbers 7548 and 7628 as at 3<sup>rd</sup> March 2020. The Respondent prays for judgment against the Claimant as follows:
  - a) The Memorandum of Claim herein dated 19<sup>th</sup> November, 2021 be dismissed with costs to the Respondent.
  - b) Kshs. 1,927,400/- in respect of the residential premises as at 25<sup>th</sup> January 2022 and more as may be accrued up to the date the Claimant vacates the dwelling house.
  - c) Kshs. 160,070/ in respect of Commercial premises, that is, No. 7548 as at 3<sup>rd</sup> March 2020.
  - d) Kshs 569,870/- in respect of Commercial premises, that is, No. 7628 as at 3<sup>rd</sup> March 2020.
  - e) Interest on b), c) and d) above at prevailing commercial rates from the date they were due till payment in full.
  - f) An order of eviction from the dwelling house.
  - g) Any other relief that this Court may deem just to grant in the circumstances.
5. In a rejoinder through Reply dated 31<sup>st</sup> March 2022, the Claimant averred that her right to fair labour practices under Article 41 of the Constitution of Kenya was violated through the indefinite compulsory leave and that matters were made worse with the failure to pay her salary. She noted that under clause 6.2.6 of the Staff Policy, "Any unspent leave at the time of separation for whatever reason shall be commuted for cash" thus her claim for cash payment for the period she was sent on compulsory leave. The Claimant pleaded that the issues raised in the Respondent's Counterclaim were pending determination before the Business Premises Rent Tribunal under Case No. 229 of 2020 and that the said Counterclaim was thus sub judice.

### **Claimant's Submissions**

6. The Claimant submitted that the Court in the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR observed that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. On substantive fairness, the Claimant averred that the termination of her employment was never based on any contravention of work ethics and she was never furnished with information, material and evidence to that effect to prepare for her defence. She argued that she was terminated from employment as a result of arrears in rent of a rental premise that was governed by a contract separate from her contract of employment and that the Respondent never proved that her employment was attached to the said rental premises. As regards



procedural fairness, the Claimant maintained that her right to be heard was violated as she was not given any notice for termination of her employment and the termination was without any legal basis or otherwise. She relied on the case of *Freddy Kipkorir Lang'at v Co-operative University of Kenya* [2021] eKLR in which this Court found that the tenets of procedural fairness encompass advance and reasonable notice of not only the steps to be taken in the disciplinary process but also documentation to prepare a defence where such documentation is in the custody of the respondent in the case. It was the Claimant's submission that the Respondent violated and breached her fundamental right to fair labour practice and fair administrative action. That the decision to send her on an indefinite compulsory leave was reached unilaterally by the Board of the Respondent and then communicated to her, against the provisions of section 10(5) of the *Employment Act*. That the Respondent consequently unlawfully and unfairly terminated in terms of section 45 of the *Employment Act*. On the allegation of forgery having been a ground for termination of her employment, the Claimant submitted that the same was never proved and thus remained mere allegations as affirmed in case law per the decision of the Court of Appeal in *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR. She argued that section 109 of the *Evidence Act* places the burden of proof on the Respondent to prove the allegations of forgery and urged this Court to consider the provisions of section 43(1) of the *Employment Act* as an indicator that there was no valid reason offered for her termination of employment.

7. The Claimant further submitted that she is therefore deserving of the reliefs sought having demonstrated unfair termination of employment as per section 47(5) of the *Employment Act*. On the prayer for compensation for the unfair termination of employment, she submitted that section 49 of the *Employment Act* authorizes this Court to grant such compensation up to a maximum of 12 months' gross salary. She invited the Court to consider the circumstances of her termination from employment, particularly the Respondent's disregard of the law, its act of sending her on forced indefinite leave for almost one year, the 13 years she worked for the Respondent, and the fact that she did not contribute to the termination of her employment, to grant her the maximum permissible compensation for unfair termination of employment. She asserted that she is entitled to a certificate of service as under section 51 of the *Employment Act* and maintained that this Court lacks the jurisdiction to determine the Respondent's Counterclaim that is commercial in nature. She asked the Court to strike out the Counterclaim in limine with costs payable by the Respondent to the Claimant. As regards costs, the Claimant urged the Court to apply the principle that costs normally follow the event and thus award the costs of the Claim and Counterclaim to her.

### **Respondent's Submissions**

8. The Respondent submitted that the Claimant chose to blatantly ignore the forgery allegations of the letter dated 24<sup>th</sup> April 2019. It maintained that the forgery was an act of gross misconduct that compromised the reputation or image of the Scheme and amounts to abuse of office. It denied that the Claimant was singled out for compulsory leave and submitted that the existing jurisprudence from a majority of local courts on compulsory leave is that such leave is necessary in order to allow for investigations to be carried out in respect of any alleged misconduct on the part of an employee and referenced the Court of Appeal decision of *Mutwol v Moi University* (Civil Appeal 118 of 2019) [2022] KECA 537 (KLR) (28 April 2022) (Judgment). The Respondent submitted that the Claimant did not at any point, or at all, indicate that any of the charges were not clear enough for her to respond and that it was justified in its actions given the accusations levelled against her, which she failed to exonerate herself and considering it had also lost trust and confidence in her. It submitted that the Claimant was neither unfairly nor unlawfully terminated and that this suit therefore be dismissed with costs to the Respondents.



9. Respondent further submitted that if this Court finds that there was a fair reason for dismissal but procedural unfairness, the Court should be guided by the decisions by several courts including in *Alvine Obuya Odima v One Acre Fund* [2021] eKLR, and issue three (3) months' salary in compensation for unfair and/or unlawful termination of employment. The Respondent further submitted that leave earned before termination of the contract in February 2020 is calculated for five (5) days, which is what is payable to the Claimant. That the claim for salary until retirement is an excuse towards unjust enrichment and that when there is no contribution, there is no compensation, as guided by the principle based on an employment relationship of equal and reciprocal responsibility in the case of *David Mwangi Gioko and 51 others v Nairobi City Water & Sewerage Company Limited* [2011] eKLR.
10. On the Counterclaim, the Respondent submitted that the Claimant's occupancy of the suit residential house (staff quarters) and commercial space was attributable to her employment. It argued that the Claimant continued to illegally occupy the dwelling house leading to accumulation of rent, which she never settled. The Respondent further submitted that the Claimant's entire claim is unsustainable in the light of the foregoing averments and is fit for dismissal.
11. The Claimant was employed by the Respondent which is a scheme for Kenya Railways Staff. She rented premises from the Respondent prompting the Respondent to allege forgery against her. That is apparently what led to her suspension and ultimately termination of employment. The Claimant thus seeks a slew of reliefs chief among them the payment of her salary till the year 2028 when she was to retire. At the onset, this Court would like to bring to her attention that this aspect of the claim cannot be granted as the award of anticipatory salary is not provided for either in law or from the plethora of cases in our realm relating to salary payments. It is only in exceptional circumstances that salary to the end of the contract can be given. See the case of *Pravin Bowry v Ethics and Anti-Corruption Commission* [2013] eKLR. Where a Court finds an employee suffered ignominy at the hands of an employer, the recourse is normally to the provisions of section 49 of the *Employment Act*. In the case before the Court, the Respondent counterclaimed arrears of rent et al relating to the Claimant's occupancy of the premises demised from it. It was asserted by the Claimant without any answer from the Respondent that the claim is subject of the Business Premises Rent Tribunal in Case No. 229 of 2020. In my considered view the counterclaim before me is misplaced as it is sub judice.
12. That leaves for determination the matter of the employment of the Claimant and the termination of her contract. Her case was that on 29<sup>th</sup> October 2019 at 4.30pm, she received a letter of even date asking her to proceed to an indefinite compulsory leave pending an investigation on accumulated rent arrears and that she was never paid her salary since the start of January 2020. She further asserted that the disciplinary hearing held on 17<sup>th</sup> February 2020 was unfair and flawed because she was neither issued with any investigation report nor was she offered a chance to respond to specific accusations allegedly contained in the investigation report. According to the Claimant, she was subjected to emotional and professional turmoil owing to the draconian manner in which the Respondent effected the indefinite compulsory leave and/or termination of her employment. She asserted that the Respondent wrongfully and unfairly placed her on an indefinite compulsory leave while interfering with her terms of service without according her a fair hearing. She maintained that the Respondent never issued her with a notice of termination of employment and denied her salary for the period of the compulsory leave. Further, the Claimant asserted that she neither went on annual leave nor was paid in lieu thereof and that she had equally not been issued with her certificate of service. These allegations are the gravamen of the Claimant's suit. She was sent on indefinite compulsory leave and was hauled before the disciplinary committee of the Respondent.



13. In the report of the Special Board of Trustees meeting held on 21<sup>st</sup> February 2020, the Claimant was subject of Minute No. 03/02 of 2020 – Staff Matters. Under the minute, the Board discussed the disciplinary case of the Claimant. It is recorded that on 25<sup>th</sup> October 2019, the Claimant alongside other members of staff were sent on compulsory leave with immediate effect. The Claimant was indicated to have been issued a show cause letter on 9<sup>th</sup> August 2019 and in her response did not explain why she had issued the letter and signed on behalf of the CEO. She was later interdicted on 23<sup>rd</sup> December 2019 to pave way for investigations of her poor performance in respect of rent collections and the pecuniary embarrassment caused to the Respondent by being a rent defaulter. She was then issued with another show cause letter on 6<sup>th</sup> February 2020 and the letter contained the details of the allegation which need not be repeated here. The Claimant was then given a hearing in person where she stated that she was financially constrained while admitting she had arrears of over 1.8 million in respect of the residential and commercial buildings. She was alleged to have refused to surrender commercial space once a resolution was passed to that effect and continued to harass the tenants. It was recorded that the Claimant had been found to have performed her duties as HR poorly with staff having unexplained leave days. The recommendation was that she should be terminated from employment. The Board recorded that her lawyer’s demand and denial of rent arrears was dishonest.
14. The Claimant it would seem was granted all the benefits of section 41 for a fair hearing. She was given two occasions to make an explanation in writing and on the final occasion was even heard by the Board. She had tried to delay the inevitable by having her lawyers issue a demand and denial of the rent arrears. The Claimant when she appeared before this Court did not seem contrite nor did she come across as an honest person. She got what she deserved when the employer terminated her services. She therefore brought the termination upon herself as she had occasion to remedy the matter by paying the arrears sought on the premises she occupied. It is not clear why she chose the path of chaos resulting in her own dismissal from employment. The suit is unmerited and is accordingly dismissed with costs. The Respondent’s counterclaim is dismissed albeit with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

