



**Thairo v Sap East Africa Limited (Cause E659 of 2022)  
[2024] KEELRC 2048 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2048 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E659 OF 2022**

**B ONGAYA, J  
JULY 26, 2024**

**BETWEEN**

**FM THAIRO ..... CLAIMANT**

**AND**

**SAP EAST AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim dated 19.09.2022 through Mudeshi Muhanda & Co. Advocates praying for judgment against the respondent for:
  - a. A declaration that the respondent unfairly terminated the services of the claimant.
  - b. An order for payment of the claimant's terminal dues and compensatory damages totalling to Kshs 21,516,852/= including:
    - i. House allowance from March 2017 to July 2022 at 15% of Kshs912, 477.75 thus, Kshs8, 759, 786.00.
    - ii. Compensation for VISA charges paid to secure South African Embassy VISA Kshs11, 950.00.
    - iii. Compensation for unfair termination 12 months' salary Kshs 21, 516,852.00
  - c. An order for the respondent to pay costs of the suit plus interest thereon.
  - d. Any other relief as the Court may deem just.
2. The claimant averred that on 9<sup>th</sup> March 2017, the respondent engaged him in the position of Industry Value Advisor based in Nairobi, Kenya at a monthly salary of Kshs 687,500/=. He was later promoted on 12<sup>th</sup> August 2019 to the position of Industry Value Senior Advisor and his salary increased to a gross of Kshs 1,062,093.10 per month.



3. The claimant's case was that on 28<sup>th</sup> June 2022, he received a letter inviting him for a disciplinary meeting to be held on 7<sup>th</sup> July 2022, for purposes of giving his explanations to the two allegations of insubordination as particularised in the said letter. He pleaded that the said allegations were untrue as he was able to give the Disciplinary Committee different non-counteracted reasons including:
  - a) That he had not been formally invited to the meeting known as the summit and that WhatsApp, as directed in an email dated 13<sup>th</sup> December 2020 from the respondent, was not a recognized mode of communication. The said email read that, "...The security guidance from the IT is very clear that employees are not permitted to use WhatsApp for SAP business or as communication tools where business information is exchanged".
  - b) That the respondent, through the claimant's immediate boss, did not express any concern about any of his work being substandard.
  - c) That the respondent made unfounded accusations on his failure to attend meetings as no evidence was availed at the disciplinary meeting despite the respondent having undertaken to avail the same.
4. It was the claimant's case that he was issued with a termination letter on 15<sup>th</sup> July 2022 on grounds of summary dismissal under section 44 (4)(c) of the *Employment Act*. He stated that in terminating his services, the respondent failed to follow the laid down rules of termination under the *Employment Act*. According to the claimant, the respondent's reasons for terminating his employment were not valid because it failed to note as follows:
  - i. The termination of the claimant's employment was premeditated as shown by an urgent email dated 30<sup>th</sup> March, 2022 sent in the wee hours of the night by his immediate boss, one Matsite Mpho, to Koolen Genevieve and De Beer Estelle who were the HR and the Head of Industry Customer advisory respectively, concluding that the Claimant was to be dismissed on the ground of misconduct.
  - ii. No defence from the claimant would have stopped the respondent from the already made conclusion to terminate his services.
  - iii. The Disciplinary Meeting was not chaired by a neutral person as required under clause 2.3 of the Disciplinary Policy and Procedure Manual, but by a lawyer appointed and paid by the respondent.
  - iv. To the extent that the respondent's lawyer, who had a duty to secure respondent's interest as her client, chaired the Disciplinary Meeting, the said meeting was biased.
  - v. The respondent concealed from him all supporting documents despite mentioning them in the disciplinary notice and only allowed him to have access to them at the hearing.
  - vi. Most evidence produced at the hearing by the respondent was intentionally drawn to secure a termination of employment verdict; the affidavits of Mpho Matsitse and Girtna Kassa were particularly non-existent at the time the notice to attend disciplinary hearing was sent on 28<sup>th</sup> June 2022 and were only availed to the claimant on the hearing date of 7<sup>th</sup> July 2022 with their prototypes attached thereto.
  - vii. The respondent's invitation to attend the disciplinary hearing implied a predetermined mind-set that the claimant had committed the offences mentioned in the said notice considering it saw no need to invite him to show cause.



5. The claimant further pleaded that at his disciplinary hearing, the respondent introduced new issues that had not been listed in the disciplinary notice. He asserted that it was due to the respondent's aforementioned actions that he makes claims for: House Allowance from March 2017 to July 2022 at 15% of 912,477.75 (Kshs 8,759,786/=); compensation for VISA charges paid to secure South African Embassy VISA (Kshs11,950/=); compensation for unfair damages equivalent to 12 months' salary (Kshs 12,745,116/=).
6. The respondent's statement of defence is dated 19.10.2022 and was filed through Kieti Law LLP. It prayed that the claimant's claim and the reliefs be dismissed with costs to the respondent.
7. The respondent's case is that the issuance of the notice to attend a Disciplinary Hearing dated 28<sup>th</sup> June 2022 was occasioned by various factors, first being the claimant's failure and refusal to execute his duties across various projects, despite the concerns raised by his direct supervisors. Secondly, the claimant was dishonest regarding his work execution such as his statements that he was working on an Ethiopian Airlines project were false as the respondent's regional team was handling the project without any input from the claimant. Thirdly, the claimant had failed to generate any considerable output since 2020. The respondent pleaded that the aforementioned factors amounted to a stage 4 violation of the respondent's Disciplinary Policy and Procedure, which requires an employee whose misconduct is sufficiently serious to be called to a disciplinary hearing.
8. The respondent pleaded that it complied with its obligations and respected the claimant's rights by giving him sufficient time to prepare a defence, being 10 days from the date of the notice to the date of the hearing. That it further informed him of the allegations against him, all the documents that would be adduced at the hearing, the process that would be followed at the hearing, the individuals who would form part of the disciplinary hearing panel, his right to lodge an appeal within three (3) working days of receipt of the disciplinary panel's decision; and his rights to be heard, to be accompanied by a colleague, to state his case during the hearing, and to receive written reasons for the disciplinary panel's decision.
9. It was the respondent's case that the claimant disobeyed a proper and lawful command when he failed to attend the East Africa PKOM Summit on time on 9<sup>th</sup> March 2022 despite prior communication from the respondent's representatives. It was pleaded that the claimant had previously engaged in WhatsApp communication for official use and cannot thus claim that he did not recognise the said medium. The respondent also pleaded that the claimant frequently failed to attend meetings, as provided in allegation one (1) of the notice.
10. Regarding the procedure followed, the respondent asserted that it complied with the law and its internal policy. It denied that the termination of the claimant's services was pre-meditated or that the wording of the notice inferred this intention. It maintained that the notice to attend the disciplinary hearing was issued in accordance with the provisions of the respondent's Disciplinary Policy and Procedure. It also denied that the disciplinary panel was improperly constituted, because, the said panel was neutral, unbiased and constituted in accordance with policy. The respondent further maintained that it informed the claimant of his right to obtain reasonable access to documents and further inquired whether he was ready to proceed prior to the hearing. It asserted that the claimant neither requested for access to any documents nor indicated that he was not ready to proceed at the hearing because he had not been furnished with the required documentation.
11. The respondent's case was that the claimant did not therefore provide sufficient reasons during the disciplinary hearing to rebut the allegations of insubordination. That the decision to terminate the claimant's employment was reached after due consideration of his representations and all circumstances of the case. It concluded that the termination letter was lawful, justified and in accordance with the Respondent's internal policy.



12. The parties tendered their evidence before the Court and thereafter filed their respective submissions. The Court has considered all material on record and returns as follows.
13. To answer the 1<sup>st</sup> issue, the Court returns that the parties are in agreement that they were in a contract of service as pleaded for the claimant and his last monthly gross pay was Kshs1, 062, 093.10 designated as the respondent's Industry Value Adviser.
14. To answer the 2<sup>nd</sup> issue the contract of service was terminated by the letter dated 15.07.2022. The reasons for termination included failing to attend several meetings, failing to excuse himself from meetings and failing to respond to calls or messages from the line manager despite having been instructed to do so; and, failing or refusing to execute his duties as the Industry Value Advisor for the respondent in various projects as provided in his employment contract. The reasons were said to amount to breach of clause 2 of the respondent's Disciplinary Policy and section 44(4) (c) of the [Employment Act](#).
15. The 3<sup>rd</sup> issue is whether the termination was unfair. The claimant testified that he received the invitation to attend the disciplinary hearing and understood the allegations as were levelled; he responded to the allegations; the invitation notice explained to him his rights; he was informed about members of the disciplinary panel and he did not ask any of them to recuse but informed the panel that he was happy to proceed; he asked for extension of time and it was granted; he was allowed to bring a representative at the hearing but he opted to attend alone; and he signed the minutes of the disciplinary hearing. By that claimant's testimony, the Court returns that per submissions made for the respondent, the procedure the respondent adopted was fair entailing a notice and a hearing per sections 41 and 45 of the [Employment Act](#), 2007. As relates the reasons for termination, the claimant confirmed that his role included attending meetings. He testified that he was informed about the summit and he failed to attend or that he had not been informed but that he attended the second session. The claimant's contradictory testimony cannot be trusted and the Court returns that he did not attend the summit in circumstances that he had been informed to attend. He testified that he had previously attended the summit and he knew it was important that he attend. The claimant admitted in his testimony that he could have managed meetings and communications better. Confirming his failure to attend as expected he testified, "I say night before summit I informed supervisor I had not received invite and supervisor told me about importance to attend. I attended afternoon for my presentation. In the morning, I did not attend. 1.00pm to 3pm I attended." By that claimant's testimony, the Court returns that the termination was not unfair in both procedure and substance.
16. The claimant lamented that the panel was not fair as was not impartial but the Court has already found that by his own testimony, the claimant was happy to proceed with knowledge of all the panellists. In any event the chairperson of the panel has not been shown to have been previously directly or indirectly involved in the allegations levelled against the claimant and the mere fact that he was the respondent's lawyer did not render him incompetent in view of the nature of administrative disciplinary proceedings.
17. While the claimant further lamented that there were documents he ought to have been given and then allowed time to study, he confirmed in his testimony that he was happy to proceed with the hearing and in any event, by his own testimony in Court, he has shown that the reasons for termination existed as at termination as valid or genuine, and, were fair as they related to his conduct, compatibility, capability, and, the respondent's operational requirements as per section 45 of the [Employment Act](#), 2007.
18. To answer the 4<sup>th</sup> issue the Court returns that the signing of the discharge acknowledging the final payment of terminal dues did not preclude the claimant from alleging unfair termination. The



respondent asserted in its submissions that the claimant signed a discharge clause dated 12<sup>th</sup> August 2022 per page 27 of the claimant's bundle of documents thereby voluntarily waiving any further claims against the Respondent and had not protested in his pleadings that he did so through mistake, coercion, misrepresentation or undue influence from the respondent. The respondent posited that the claimant also admitted in his testimony that he was paid his dues as set out in the termination letter. However, the Court holds that section 45(1) declares thus, "(1) No employer shall terminate the employment of an employee unfairly." The Court returns that the discharge, which at best is contractual, cannot be relied upon to defeat the express obligation imposed upon the employer and breach of which amounts to a strict statutory liability not subject to contractual arrangements. In other words, contractual arrangements cannot be relied upon to defeat express constitutional obligations. Further, section 35(4)(a) of *the Act* provides that nothing in the section affects the right of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination. The Court therefore considers that even where the employee has acknowledged receipt of terminal dues with a discharge of the employer, such discharge cannot extinguish the employees' inherent right to allege and pursue a claim of unlawfulness of the termination.

19. The 5<sup>th</sup> issue is on remedies and the Court returns as follows:

- a. The evidence is that parties agreed on a consolidated salary described as gross monthly pay and which was within section 31 of *the Act* on reasonable provision for house rent in the gross payment. Parties agreed on the remuneration and there is no basis shown to justify the claim on house allowance now declined.
- b. There was no unfair termination and the claim for compensation will collapse.
- c. The claimant has exhibited a receipt for Kshs 11, 950.00 by which he paid to secure a work VISA to South Africa and the same was not refunded. The respondent appear not to dispute the claim and it is allowed. In that consideration, each party to bear own costs considering the margins of success.

In conclusion, judgment is hereby entered for parties with orders:

- a. The respondent to pay the claimant the sum of Kshs 11, 950.00 by 01.08.2024 failing interest to be payable thereon at Court rates from the date of filing the suit until full payment.
- b. Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 26<sup>TH</sup> JULY 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

