



**Chege v I-Engineering (K) Limited (Cause E929 of 2022)
[2024] KEELRC 2079 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2079 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E929 OF 2022
NZIOKI WA MAKAU, J
AUGUST 2, 2024**

BETWEEN

ALICE WANGARI CHEGE CLAIMANT

AND

I-ENGINEERING (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent through a Memorandum of Claim dated December 6, 2022, seeking that judgment be entered in her favour for:
 - a. A declaration that the Respondent breached the principles of natural justice in the process of summarily dismissing the Claimant from her employment.
 - b. Payment being remedy for wrongful dismissal and unfair termination as follows:-
 - 2021 Bonus Kshs. 187,882/-
 - 2021 Leave days (12.5 days) Kshs. 116,229/-
 - 2022 Leave days (15.75 days) Kshs. 146,449/-
 2. months' salary in lieu of notice Kshs. 390,530/-
 - Compensation for unfair termination Kshs. 2,087,580/-
 - Total Kshs. 2,928,670/-
 - c. Exemplary damages.
 - d. Damages for Constitutional violations.
 - e. Interest on (a) to (d) above at court rates from the date of determination until payment in full.



- f. Costs of the suit.
 - g. Any other relief this Honourable Court may deem fit to grant in the circumstances.
2. The Claimant averred that she was engaged by the Respondent on or about 23rd January 2019 as a Human Resource (HR) Manager on permanent basis. That she was subject to a three (3) months' probationary period after which she was duly confirmed and pursuant to the Appointment Letter, she was to earn a basic monthly salary of Kshs. 173,965/-. She was further entitled to monthly communication, transport allowances, medical insurance and annual bonus based on personal and company's performance. The Claimant noted that as per her Job Description, she was further assigned more responsibilities to manage Ericsson Kenya Resource Management Project effective 1st April 2022, the said company being a client of the Respondent. It was also the Claimant's stance that because of her stellar performance over the years, she particularly earned a Bonus of Kshs. 187,882/- in 2021.
 3. The Claimant's case is that on or about July 2022, the Company's internal auditors conducted audit for the year 2021 and she was interviewed on matters concerning her Department. She contended that contrary to 2019 when a draft audit report was sent to all concerned heads of department for review prior to generation of the final report, she was not furnished with the draft internal audit for 2021. That she later learnt that the Final Internal Audit Report had been prepared and released without her being given an opportunity to address and work on the recommended improvement actions therein and despite her persistent request for the same. The Claimant averred that she continued rendering her services to the Respondent until 8th September 2022 when she was issued with a letter titled, "Invitation – Formal Disciplinary Hearing". That the said letter did not have any particular agenda/ facts for the disciplinary hearing save for consideration of arising performance concerns with her role and reference to the findings of the Final Internal Audit. She noted that the letter required her to attend the hearing on 9th September 2022 to show cause why her employment should not be terminated for her breach of employment terms. She further contended that prior to being issued with the Invitation Letter for disciplinary hearing, the Respondent had already commenced the recruitment process to fill her position within the organization, meaning the Respondent had already made a determination to terminate her services.
 4. The Claimant further averred that although she attended the disciplinary hearing as scheduled, she did not have the opportunity to adequately prepare her defence. Further, that the Respondent failed, refused and/or neglected to share with her a copy of the Minutes of the disciplinary hearing and the Final Report of the Committee as promised to her at the hearing. The Claimant stated that the Respondent, through an email by its Vice President on 22nd September 2022, alluded to have arrived at the decision to terminate her employment for repeated violation of the company policy and process effective 30th September 2022. She contended that the Respondent subjected her to untold emotional stress and humiliation for the two weeks between 8th and 22nd September 2022 that she continued rendering service to the Respondent without knowing the status of her employment. It was the Claimant's averment that the Respondent sent her an official Termination Letter on 26th September 2022 citing underperformance, incompatibility and/or lack of capacity to hold the office of HR Manager. That she however has never paid her terminal dues and has been frustrated in trying to complete the handover process. In the end, the Claimant maintains that she is entitled to exemplary and malicious damages from the Respondent to be assessed by the Court. Moreover, that she is entitled to an order for compensation as the Respondent failed to uphold and protect her right to fair labour practices, and to maximum compensation for unfair termination of her employment.
 5. In reply, the Respondent filed a Memorandum of Response dated 8th March 2023, wherein it averred that since an audit process touches on all departments including those with sensitive information,



it was prudent to adhere to confidentiality standards by only revealing the sections of the Report relevant to the affected employee(s), as per the Non-Disclosure Agreements applicable to all employees. It denied that the Claimant's performance was at all times diligent, asserting that she was issued with several warning letters. The Respondent further averred that contrary to assertions, the intended recruitment was that of a "Human Resource Manager" whilst the Claimant's position at that time was "Head of Human Resource", which are two different job designations. It contended that it is the Claimant who had already anticipated separation by deliberately demanding disposition in related to queries raised and/or clarifications sought by the Respondent's top management.

6. It was the Respondent's averment that the Claimant was informed during the disciplinary hearing that non-conformity to HR Standards, as particularised in the Letter of Invitation for disciplinary hearing, had exposed the Respondent to financial risk that needed ascertainment and quantification prior to payment of her terminal dues. It stated that it nevertheless bona fide paid the Claimant her September 2022 salary and that when the reconciliation exercise was concluding mid-February 2023, the Claimant had already filed the instant suit. The Respondent averred that arising from the said reconciliation exercise that revealed the Claimant's omissions and commissions, it was forced to shoulder third party claims amounting Kshs. 436,573.44, which is a lawful deduction from the Claimant's terminal dues. According to the Respondent, it had valid grounds to terminate the Claimant's employment and made efforts to accommodate her demands in compliance with procedural requirements of the law. It therefore denied liability in the manner averred by the Claimant.
7. The Claimant's Reply to Memorandum of Response is dated 15th June 2023 was that there is no differentiation between Human Resources Manager and Head of Human Resource. She argued that terminal dues are not subject to unfair, irregular and unlawful deductions as the Respondent has purported to do and that the deduction made from her dues to cover imaginary third party claims is geared towards causing her more financial embarrassment, anguish and psychological torture. The Claimant maintained that she is entitled to the reliefs sought in the Claim and prays that the Respondent's Defence be dismissed with costs to the Claimant and judgment entered in her favour.

8. Claimant's Submissions

The Claimant submitted that it is key to note that the Respondent's witness confirmed in testimony that she was not served with a show cause letter prior to being invited for disciplinary hearing, and that the hearing notice was insufficient as it was barely 24 hours. That she persistently requested to be furnished with a copy of the 2021 Audit Report in vain and was only served excerpts of the same on 15th September 2022, which was 6 days after the disciplinary hearing. She posited that section 41 of the *Employment Act* provides for what constitutes procedural fairness prior to termination of employment and section 45 of the Act provides what amounts to unfair termination of employment. That when the Respondent's witness testified before Court, it was clear the Respondent was not sure of the grounds and/or reasons for terminating her services, pursuant to the threshold set out in section 43 of the Act. She cited the case of *Walter Anuro v Teachers Service Commission [2013] eKLR* in submitting that her termination of employment failed the fairness test, was illegal and wrongful.

9. It was submitted by the Claimant that she had demonstrated unfair termination of her employment warranting an award of the remedy under section 49(1)(c) of the *Employment Act*, that is, compensation per the decision by Supreme Court of Kenya in *Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR*. She submitted that she is also entitled to costs which follow the event.

10. Respondent's Submissions

The Respondent submitted that pursuant to section 43(2) of the *Employment Act*, it had demonstrated to this Court that the Claimant negligently performed her tasks as HR Manager, which was sufficient



justification for her termination from employment. It relied on the case of Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others [2019] eKLR, wherein the Court of Appeal opined that the standard of proof is on a balance of probability 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.

11. It was the Respondent's submission that there is no prescribed format for a show cause letter and that it is sufficient if details of the allegations the employee ought to respond to are set out in the notice with a request to the employee to respond. In this regard, it referred to the dicta of the Court in Hosea Akunga Ombwori v Bidco Oil Refineries Limited [2017] eKLR that a show cause notice/letter should outline the allegations or charges against the employee and request the employee to respond within a reasonable time. The Respondent fronted that the evidence before this Court also demonstrates that it complied with the procedural requirements during the Claimant's disciplinary process.
12. As regards the reliefs sought, the Respondent submitted that its witness testified that the Claimant had been paid a sum of Kshs. 148,875/- on 19th April 2023 as the undisputed difference between her rightful terminal dues and the deductible provision. It maintained it had grounds to make deductions against the Claimant's dues in relation to potential third-party claims. The Respondent maintained that the Claimant's dues were one month's notice pay, bonus, and unused leave less the prepayment made on 19th April 2023, totalling to Kshs. 492,300.75. It asserted that the instant case is a proper and fit situation where the Court is invited to look at the conduct of the parties both prior and during the proceedings and in the circumstances, an order of each party bearing their own costs is most commendable herein.
13. The Claimant's services were terminated for the alleged repeated violation of the company policy and process. The termination was effective 30th September 2022. In order to prove the alleged violation of company policy and processes, the Respondent was supposed to demonstrate with evidence, that the Claimant did not deliver as expected. Attempting to hide behind the alleged confidentiality advanced as a reason of denying the Claimant access to the audit report, it revealed the Respondent's duplicity in as far as the Claimant's role was. It alleged it was recruiting for a different role before the termination of the Claimant yet all the title was was a mere play on words. "Human Resource Manager" and "Head of Human Resource" are mere semantics and I see through the lies of the Respondent in this regard. The Respondent then went ahead and deducted a sum of Kshs. 436,573.44 for potential third-party claims. The key word is potential. The sum must be refunded as there was no basis for the deduction. Having subjected the Claimant to a process that was fait accompli the Respondent failed to accord the Claimant fairness. The determination was subjective hence unfair and unlawful. The Claimant therefore will recover 4 months salary as compensation for the egregious manner of termination. In the final analysis, I enter judgment for the Claimant against the Respondent for:-
 - a. Kshs. 436,573.44 being the sum unlawfully deducted.
 - b. 4 month's salary – Kshs. 695,860/-
 - c. Costs of the suit.
 - d. Interest at court rates on the sum in (a) and (b) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST 2024

NZIOKI WA MAKAU

JUDGE



