

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO 1644 OF 2017**

ROSE KENDAGOR.....CLAIMANT

VS

DIG DEEP (AFRICA).....RESPONDENT

**J U D G M E N T**

**Introduction**

1. Rose Kendagor, the Claimant in this case, was an employee of the Respondent, Dig Deep (Africa). Kendagor brought this claim alleging unlawful and unfair termination of employment.
2. The claim is contained in a Memorandum of Claim dated 22<sup>nd</sup> August 2017. The Respondent filed a Response dated 9<sup>th</sup> November 2017. At the trial, the Claimant testified on her own behalf and the Respondent called Caleb Muiga. The parties subsequently filed written submissions.

**The Claimant's Case**

3. The Claimant was employed by the Respondent in the position of Project Officer. She worked as such until 21<sup>st</sup> June 2017, when her employment was terminated.
4. The termination of the Claimant's employment was preceded by an accusation of a disciplinary offence relating to a former employee of the Respondent, by the name Caroline Kiugo. The Claimant was accused of communicating with Kiugo who had live investigations against her.

5. On 7<sup>th</sup> June 2017, the Claimant was invited to attend a disciplinary hearing scheduled for 13<sup>th</sup> June 2017 at 11.30 am. The Claimant attended the hearing in the company of her Advocate.
6. The Claimant however complains that the disciplinary hearing was marred with patent unfairness and procedural injustice. She cites the following particulars in this regard:
  - a) The disciplinary interviewers were outsiders hired on an *ad hoc* basis and not people engaged in the company, on a day to day basis;
  - b) In order to understand the manner in which the Claimant worked and for a fair appreciation of the issues raised, it would have been fair to have the interview conducted by persons who are engaged in the day to day running of the company or are employees or directors or trustees;
  - c) The decision was made by persons who did not sit in the said proceedings and thus did not have the benefit of first hand response and explanation, which may not have been adequately captured in words;
  - d) If the session was handled by persons working on a day to day basis with the company, they would have been fair and in a better position to understand the Claimant, based on the practices of the company.

7. The Claimant claims that the evidence used by the Respondent was procured illegally and in breach of her fundamental constitutional rights.

The Claimant lists the following particulars on this account:

- a) The Respondent accessed the Claimant's private email without her permission or consent, and consequently acted in breach of her constitutional rights to privacy and communication;
- b) Communication related to the Claimant's work ought to be done on official channels, thus clause 30.21 of the employment contract relates to work communication but is not about sending or forwarding emails to oneself;
- c) The Claimant was communicating with herself and not with an outsider and that is within the scope of incidental personal use under clauses 30.14 and 30.19 of employment contract;
- d) Most of the evidence relied on by the Respondent was procured illegally, without the Claimant's permission, expressly written or otherwise;
- e) The Respondent's action of barring the Claimant from communicating with Caroline Kiugo was in blatant disregard of her fundamental freedom of association.

8. By its letter dated 21<sup>st</sup> June 2017, the Respondent returned its verdict on the disciplinary hearing, being that the Claimant's employment had been terminated.

9. The Claimant appealed against the termination vide her letter dated 28<sup>th</sup> June 2017 but the termination was upheld by the Respondent's letter dated 12<sup>th</sup> July 2017.

10. The Claimant terms the termination of her employment as a harsh and extreme measure, pointing to her clean employment record. She therefore pursues the following remedies:

- a) *A declaration that the termination of her employment was unlawful and unfair;*
- b) *A declaration that the Respondent breached the Claimant's fundamental right to privacy and freedom of association;*
- c) *Kshs. 2,457,000 being 12 months' salary in compensation;*
- d) *General damages for unlawful termination of employment;*
- e) *General damages for breach of the Claimant's right to privacy;*
- f) *Costs plus interest.*

### **The Respondent's Case**

11. In its Response dated 9<sup>th</sup> November 2017, the Respondent admits having employed the Claimant, but defends the decision to terminate the employment relationship.

12. The Respondent states that the Claimant was part of the team charged with the responsibility of investigating Caroline Kiugo. The Respondent adds that

the Claimant had therefore been instructed not to communicate with Kiugo during the period of investigation.

13.The Respondent disputes that the disciplinary hearing was conducted unfairly and traverses all the particulars of unfairness and procedural injustice listed by the Claimant.

14.The Respondent asserts that the disciplinary hearing was conducted in accordance with fair practice, by persons who were most objective. According to the Respondent, this was necessitated by claims of bias raised by the Claimant.

15.The Respondent avers that the final decision to terminate the Claimant's employment was made by the Board, on recommendation by the team that conducted the hearing, and after evaluation of all factors, including the response by the Claimant.

16.The Respondent denies the Claimant's allegation that the evidence relied on was procured illegally or in breach of her constitutional rights. The Respondent further denies all the particulars of illegality and breach of constitutional rights pleaded by the Claimant.

17.The Respondent avers that investigations were conducted on the Claimant's office computer, which was the property of the Respondent, and related to use of internet connection belonging to the Respondent. The Respondent maintains that this was in accordance with the terms and conditions of employment, of which the Claimant was aware; specifically, that personal

use of the Respondent's systems could be monitored and where breaches occurred, disciplinary action would be taken.

18.The Respondent asserts that the investigation conducted was within the agreed terms, as it was purely for establishing whether the Claimant was conducting herself in accordance with specific instructions given to her.

19.The Respondent stresses that it had a right to temporarily bar the Claimant from communicating with Caroline Kiugo during the investigation period, as such communication would have the potential of interfering with or compromising the investigations.

20.The Respondent adds that as an employee, the Claimant had a duty to follow lawful and reasonable instructions, failing which the Respondent had the right to take disciplinary action against her.

21.The Respondent avers that it conducted itself objectively and fairly during the entire process and the Claimant was afforded a fair chance to defend herself. The process is said to have been conducted in accordance with the normal practice of the Respondent, to ensure objectivity and fairness.

22.Finally, the Respondent states that the Claimant was paid all her terminal dues and was issued with a certificate of service.

### **Findings and Determination**

23.There are two (2) issues for determination in this case:

- a) *Whether the termination of the Claimant's employment was lawful and fair;*

b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

24. On 21<sup>st</sup> June 2017, the Respondent wrote to the Claimant as follows:

*“Dear Rose*

**RE: HEARING DECISION LETTER**

*In accordance with the Employment Act, you are receiving this notification of the outcome of your disciplinary hearing held on 13<sup>th</sup> June 2017.*

*As a result of your hearing, the company has decided to terminate your contract.*

*The details of this decision are contained in your letter on ruling on disciplinary investigation undertaken by a subcommittee of Trustees/Directors.*

*Regards,*

*(signed)*

*Caleb Muiga*

**HUMAN RESOURCE CONSULTANT”**

25. The reasons for the foregoing decision are contained in a letter to the Claimant dated 19<sup>th</sup> June 2017. This letter drew the following findings and conclusions:

- *Allegation that you acted insubordinately through contravening a direct instruction to not contact Caroline while the disciplinary investigation was on-going.*
- *We find that the instruction was made as acknowledged by you during the Disciplinary Hearing.*
- *This was an appropriate and lawful instruction given to protect the integrity of the investigation.*
- *You denied sending Caroline any “work-related emails when the investigation was going on.”*
- *The evidence presented in Document 16 is reasonably indicative that you sent several emails between the 17<sup>th</sup> and 19<sup>th</sup> May 2017.*
- *As such it is our opinion that you acted insubordinately in direct contravention of a proper instruction.*
- *Allegation that you attempted to interfere with the disciplinary investigation and to erase the evidence of the evidence of this interference.*
- *We find that slides 16-19 in ‘Document 16’ demonstrates you deleting emails from sent messages that you had sent to your Gmail and forwarded to Caroline. This occurred on the 22<sup>nd</sup> May at your computer. There is no evidence to suggest that anyone else made these actions.*
- *During the disciplinary hearing you refer to the removal of your historic emails, which occurred on the 26<sup>th</sup> May 2017 and do not provide any evidence that offers a defence for slides 16-19.*
- *It is our determination that you attempted to interfere with the disciplinary investigation and to erase the evidence of your interference.*

26. The parties appear to be in consonance regarding the facts of this case. What is in contest is the import of these facts. In its final submissions dated 24<sup>th</sup> July 2025, the Respondent referred to the decision in ***Bamburi Cement Limited v William Kilonzi [2016] eKLR*** where the Court of Appeal affirmed that the burden of proving that a termination is unlawful rests on the employee, while the burden of justifying the grounds of termination rests on the employer.

27. In reaching its decision, the Court of Appeal relied on the following holding by the Canadian Supreme Court in ***Mckinley v B.C. Tel (2001) 2 S.C.R. 161***:

***“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent in the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”***

28. It is incontrovertible that on 16<sup>th</sup> May 2017, the Claimant was expressly instructed not to communicate with Caroline Kiugo, who was under investigation. The context to this instruction is that the Claimant was directly involved in the investigations against Kiugo.

29. According to evidence adduced by the Respondent, the Claimant did, subsequent to this instruction, forward to Kiugo several emails, extracted from the Claimant's official email account through her Gmail account. The Respondent further adduced evidence, in the form of screenshots, exhibiting attempts made by the Claimant to delete the email trail.

30. But the Claimant complains that the instruction issued to her not to communicate with Kiugo was a violation of her freedom of association, guaranteed by Article 38 of the Constitution.

31. In response, the Respondent submits that the right secured by Article 38 is not absolute. In this regard, the Respondent cites the limitation parameters provided under Article 24(1) (d) and (e) as follows:

***(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***

***(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

32. The Respondent defends its instruction to the Claimant, asserting that it was meant to preserve its managerial prerogative. In its decision in ***SBI International Ag (Kenya) v Amos Hadar [2015] KEELRC 1073 (KLR)*** this Court stated the following:

***"In the normal course of employment, the employee will get to learn their employer's confidential information and as long as the information is proprietary in nature and is revealed in confidence, then the employee has a common law duty not to***

***reveal the information. This duty applies irrespective of whether there exists a confidentiality agreement or clause in the employee's employment contract and generally extends beyond the life of the employment relationship."***

33. In the present case, the Claimant was a crucial part of live investigations against a fellow employee and she was under express instructions not to communicate to that employee, during the pendency of the investigations.

34. It seems to me that this was a reasonable and necessary limitation and the Claimant was duty bound to comply. The complaint on violation of the Claimant's freedom of association is therefore without basis and is rejected.

35. The Claimant further complains that the evidence relied on to nail her was obtained illegally. In this regard, she avers that the Respondent violated her right to privacy, by accessing her personal emails.

36. In its defence, the Respondent states that the Claimant was aware that her personal use of the Respondent's electronic communications systems and equipment could be monitored. The Respondent refers to clauses 30.16 and 30.18 of the Staff Handbook which provide thus:

***" 30.16 Staff should be aware that personal use of our systems may be monitored and, where breaches are found, action may be taken under the disciplinary procedure.***

***30.18 We reserve the right to retrieve the contents of messages***

***or check such as which have been made on the Internet for the following purposes:***

**(a) to monitor whether the use of the e-mail system or the Internet is legitimate;**

**(b)...**

**(c) to assist in the investigation of wrongful acts; “**

37. There is a body of jurisprudence from this Court (variously constituted) to the effect that electronic communications systems and equipment issued at the workplace, remain the property of the employer who retains the right to track the use of these facilities.

38. In *Peter Apollo Ochieng v Instarect Ltd [2017] eKLR Mbaru J* stated as follows:

**“Access to workplace emails and communication is a prerogative of the employer. Where an employee uses workplace tools, time, resources to send communication, such time tools and resources are the property of the employer.”**

39. In *Musa & another v Makini Schools Limited [2025] KEELRC 17 (KLR) Abuodha J* held that an employer who accesses information processed through an office laptop cannot be accused of violating the right to privacy of the employee to whom the laptop was issued.

40. This case is on all fours with the foregoing authorities, which I fully adopt. The argument that the Claimant's right to privacy therefore dissipates.

41. The Claimant also takes issue with the composition of the disciplinary panel on the ground that it was composed of external persons. The minimum

standard as to what constitutes a fair disciplinary procedure is to be found in Section 41 of the Employment Act, which provides as follows:

**(1) “Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”**

42. In its decision in *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR the Court of Appeal distilled the following four elements for a termination to pass muster:

- a) An explanation of the grounds of termination in a language understood by the employee;**
- b) The reason for which the employer is considering termination;**

- c) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;*
- d) Hearing and considering any representations made by the employee and the person chosen by the employee.*

43. This Court finds nothing in the law or the Respondent's internal disciplinary rules to suggest that a disciplinary panel cannot be made up of external persons appointed by the Respondent.

44. The question to ask is whether the Claimant was availed a fair opportunity to defend herself. There is evidence that she was informed of the allegations levelled against her and was given adequate opportunity to respond, which she did. This dispenses with the issue taken by the Claimant that the decision to terminate her employment was made by a person who was not at the disciplinary hearing.

45. Overall, I find and hold that the termination of the Claimant's employment was substantively and procedurally fair.

46. The result is that her entire claim fails and is dismissed with costs to the Respondent.

47. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF OCTOBER 2025**

**LINNET NDOLO**

**JUDGE**

Appearance:

Ms. Nyagah h/b Mr. Okatch for the Claimant

Mr. Kiingati for the Respondent

ORIGINAL