



**Momanyi v Kenya National Chamber of Commerce and Industry (Cause 1272 of 2018) [2024] KEELRC 98 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 98 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1272 OF 2018  
J RIKA, J  
JANUARY 31, 2024**

**BETWEEN**

**SAMUEL MOMANYI ..... CLAIMANT**

**AND**

**KENYA NATIONAL CHAMBER OF COMMERCE AND  
INDUSTRY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 31<sup>st</sup> July 2018. The Statement does not bear the title ‘Statement of Claim.’ It bears the title ‘Introduction.’
2. He states that he was employed by the Respondent for 3 years, as its Information and Communication Technology Manager, commencing 19<sup>th</sup> February 2018. There was a probationary period of 3 months.
3. His salary was Kshs. 150,000 monthly.
4. He states that having reported on 19<sup>th</sup> February 2018, his probationary period ended on 19<sup>th</sup> May 2018. There was no extension of the probationary period. He was constructively confirmed, and entitled to all benefits under the contract, the Human Resource Manual, and the *Employment Act*.
5. On 8<sup>th</sup> March 2018, he was informed by the Respondent that there was suspicion he was involved in a conflict of interest leading to his appointment. He was suspended for 3 weeks to pave way for investigations.
6. He wrote back, successfully defending himself. The Respondent wrote to him on 23<sup>rd</sup> March 2018, rescinding suspension, and reinstated the Claimant forthwith, on 26<sup>th</sup> March 2018. It apologized to the Claimant.
7. However, on 22<sup>nd</sup> May 2018, the Respondent issued the Claimant a letter of summary dismissal, alleging that an issue of his integrity had arisen. No details were supplied.



8. He was not given reason to justify termination. He was not given notice. The Respondent rehashed the contents of the letter of suspension on dismissal. The issue raised on suspension, had been settled. There was no hearing. Termination was all along premeditated.
9. The Claimant states that termination was unfair and unlawful under the [Employment Act](#), the contract and the Human Resource Manual.
10. He prays for: -
  - a. Declaration that termination was unfair.
  - b. 36 months' salary for the remainder of the contract period at Kshs. 5,400,000.
  - c. Costs
  - d. Interest.
  - e. Any other suitable relief.
11. The Respondent filed a Statement of Response and Counterclaim, dated 28<sup>th</sup> August 2018. Its position is that the Claimant was appointed irregularly, by conniving with then Chief Executive Officer Angela Ndambuki. The position of Information and Communication Technology Manager was never advertised by the Respondent. The Respondent advertised for the position of Information and Communication Technology Consultant.
12. His contract of employment was illegal and void ab initio. It was not approved by the Respondent's Board. The Claimant completely failed to discharge the role he was assigned. This triggered investigations, which unearthed his irregular appointment.
13. The Respondent states that the Claimant was never its Employee. He is not entitled to any benefits. The Respondent concedes that it suspended the Claimant to pave way for investigations. The reasons for termination included gross misconduct, fraud, and breach of trust. The reasons were communicated to the Claimant.
14. It was reported by an Independent Investigator that the Claimant had connived with then CEO, who directed that the Claimant is not subjected to a written competency assessment test, interfering with the recruitment process. He was accorded an opportunity to defend himself. He admitted the allegations, and owned up to conflict of interest. He had previously worked with then CEO, a fact he did not disclose on recruitment.
15. He was dismissed fairly and lawfully. The Respondent urges the Court to dismiss the Claim with costs.
16. The Respondent counterclaims that the Claimant was fraudulently appointed as Information and Communication Technology Manager, through his connivance with then CEO. He did not disclose his association with the CEO. There was undisclosed conflict of interest. The Respondent suffered damages and counterclaims: -
  - a. General damages for fraud.
  - b. Costs of the Counterclaim.
  - c. Interest.
  - d. Any other suitable relief.



17. The Claimant filed Reply to the Statement of Response, and Reply to the Counterclaim, on 2<sup>nd</sup> July 2019. He reiterates that he was duly employed by the Respondent. He did not connive with the CEO. He was not aware of any conflict of interest. The possibility of conflict of interest was raised, the Claimant suspended and the issue investigated. He replied to the allegation, and was absolved. He was reinstated. The Respondent apologized to the Claimant for inconvenience caused. The Counterclaim has no merit. The Claimant urges the Court to uphold his Claim, and dismiss the Counterclaim with costs.
18. The Claimant gave evidence in the absence of the Respondent, and closed his case, on 29<sup>th</sup> July 2022. In a ruling dated 31<sup>st</sup> January 2023, the Court deferred its Judgment, to enable the Respondent clarify which Advocates, represented the Respondent. On 22<sup>nd</sup> March 2023, clarification on representation of the Respondent was made, and hearing reopened, to allow the Respondent call its evidence. Hearing was scheduled to 13<sup>th</sup> October 2023.
19. The Respondent however, was not ready to give evidence on 13<sup>th</sup> October 2023, citing internal reorganization of the Respondent. The Court declined further adjournment, reviewed and set aside the orders made on 22<sup>nd</sup> March 2023 reopening the hearing, and directing the Respondent to file and serve its closing submissions.
20. The Claimant relied on his witness statement and documents [1-16] on record, in his evidence-in-chief. He was employed by the Respondent as pleaded, between 19<sup>th</sup> February 2018 and 22<sup>nd</sup> May 2018. He was just called and told to pick his letter of termination. The letter recited the reasons given earlier by the Respondent on suspension. He was told procedure was flouted in his appointment. It was alleged that there was irregularity and undisclosed conflict of interest. The allegations were investigated. He was absolved He was advised to resume duty. The Claimant prays the Court to allow the Claim.
21. The issues are whether the Claimant's contract was terminated for valid reason; whether termination was fairly executed; whether the Counterclaim is merited; and whether remedies sought in either case, have been established. The applicable law governing these issue is contained in Sections 41, 43, 45, 47[5] and 49 of the [Employment Act](#), and Section 12 of the [Employment and Labour Relations Court Act](#).

**The Court Finds\*\* \_\_\_: -**

22. The Claimant was employed by the Respondent through a written contract, dated 19<sup>th</sup> February 2018. He was employed in the position of Information and Communication Technology Manager.
23. The contract was for a period of 3 years, with an initial probationary period of 3 months. The Claimant was entitled to a monthly salary of Kshs. 150,000 which was subject to statutory deductions.
24. The probationary period ended on 19<sup>th</sup> May 2018. There is no evidence that the period was extended. The Claimant was deemed to have been confirmed, after 19<sup>th</sup> May 2018.
25. He was suspended on 8<sup>th</sup> March 2018, for suspected conflict of interest. He was advised that suspension was to allow for investigations.
26. He responded at length, to the letter of suspension, on 14<sup>th</sup> March 2018, underscoring that his appointment was purely on merit and competence.
27. On 23<sup>rd</sup> March 2018, the CEO wrote to the Claimant advising that, "... the Executive Committee of the Board met on 23<sup>rd</sup> March 2018. The Executive Committee deliberated over the issue and arrived at a decision to rescind your suspension forthwith. You have now been requested to report back to duty



on Monday, 26<sup>th</sup> March 2018. We regret the inconvenience caused and look forward to re-energized engagement.”

28. The Claimant therefore resumed duty, and worked until 22<sup>nd</sup> May 2018, when he received a letter from the Respondent’s Chairman Kiprono Kittony, terminating his contract of employment.
29. There is no detailed reason for the decision, readable in the letter of termination. The letter simply cites an issue of integrity, without disclosing what the issue was.
30. The Claimant told the Court that the Respondent revisited the issue concerning undeclared conflict of interest, which had been resolved earlier after the Claimant was suspended.
31. There is no evidence that a new issue concerning integrity had arisen, justifying termination. The Respondent appears to have rehashed the same accusation on conflict of interest, which had been investigated earlier, and settled with a profuse apology tendered to the Claimant by the Respondent.
32. There was no valid reason, to justify termination on 22<sup>nd</sup> May 2018.
33. Procedure was manifestly deficient. The letter dated 22<sup>nd</sup> May 2018 was not preceded by a letter to show cause. The issues concerning integrity, were not clearly communicated to the Claimant, in form of detailed charges. Lack of integrity cannot be a charge standing on its own. There must be facts, disclosing lack of integrity, which were not communicated in a letter to show cause, or a letter inviting the Claimant for disciplinary hearing.
34. There is no record of disciplinary hearing. The letter dated 22<sup>nd</sup> May 2018 did not allude to a disciplinary hearing where the decision was arrived at. It is just a letter communicating termination at the will of Kiprono Kittony.
35. Termination was not based on a fair procedure, contemplated under Section 41 of the [Employment Act](#).
36. Termination was unfair, for want of valid reason, and fair procedure.
37. The Counterclaim is not supported by evidence. The Court bent backwards, reopened the hearing to allow the Respondent respond to the Claim and prosecute its Counterclaim. The Respondent did not present evidence.
38. The Counterclaim is based on the assertion that the Claimant was recruited irregularly, and that he was engaged in conflict of interest. These accusations as concluded above, were the subject matter of investigations upon the suspension of the Claimant, which culminated in his absolution. The Counterclaim is unfounded and is rejected.
39. The Claimant worked for 3 months. He was subjected to the same accusations twice. He was exonerated at the first instance. He was accused a second time over the same allegations. He was dismissed without the benefit of a hearing, and without notice. He did not cause, or contribute to the circumstances, leading to termination. He told the Court that he is an ICT consultant, the presumption being that he is earning an income through ICT consultancy. He mitigated loss of employment through continuing ICT consultancy. His contract was for a fixed term period of 3 years. He had worked for 3 months, and expected to complete the remaining 33 months.
40. The Court does not think he merits compensation based on an anticipated period of 36 months. The contract was not cast in bronze, and had provision for premature termination. Clause 5 states that the contract could be terminated due to discontinuance of the business. Clause 13 allowed the Parties to modify terms in writing. Clause 14 allowed the Parties to terminate the contract by giving written notice of 1 month, or payment of 1-month salary in lieu thereof. The clause also allowed



the Respondent to terminate the contract in event the Claimant violated his terms, without notice, but with compensation. The contract could also be terminated on death of the Claimant. Clause 15 regulated benefits that would be paid to his estate, in event of death. The contract was not therefore cast in bronze, justifying payment of anticipated salaries to the end of the contract, as pleaded by the Claimant.

41. The Claimant did not render any service over the anticipated period of 33 months. Employment remedies are not aimed at facilitating unjust enrichment as held in *D.K. Njagi Marete v. Teachers Service Commission*, Industrial Court Cause No. 379 of 2009, and Court of Appeal in *Elizabeth Wakanyi Kibe v. Telkom Kenya Limited* [2014] e-KLR.
42. The Court has taken into account the period served, the expected period of service, and that the Claimant did not cause, or contribute to, termination of his contract.
43. He is granted 3 months' salary in compensation for unfair termination and 1-month salary in lieu of notice, amounting to Kshs. 600,000.
44. Costs to the Claimant.
45. Interest allowed at court rate, from the date of Judgment till payment is made in full.
46. The Counterclaim is declined.

**In Sum, it is ordered: -**

47.
  - a. It is declared that termination was unfair.
  - b. The Respondent shall pay to the Claimant equivalent of 3 months' salary in compensation for unfair termination, and 1-month salary in lieu of notice, amounting to Kshs. 600,000.
  - c. Costs to the Claimant.
  - d. Interest allowed at court rate, from the date of Judgment till payment in full.
  - e. The Counterclaim is declined.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**JAMES RIKA**

**JUDGE**

