



Simiyu v CBRE Corporate Outsourcing [PTY] Limited (Cause E390 of 2021) [2024] KEELRC 92 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 92 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E390 OF 2021
J RIKA, J
JANUARY 31, 2024**

BETWEEN

ELIZABETH AYOTI SIMIYU CLAIMANT

AND

CBRE CORPORATE OUTSOURCING [PTY] LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim dated 3rd December 2019.
2. She avers that she was employed by the Respondent, on permanent and pensionable terms, as a Facilities Manager for 3 years, and posted to British American Tobacco-Kenya [BAT], in Nairobi.
3. Her salary was Kshs. 357,638 monthly, by the time she left employment.
4. Her contract was terminated by the Respondent, on 20th September 2019. The Respondent alleged that the Claimant breached the Respondent's procurement policy, by applying funds belonging to the Respondent for unauthorized payments. She was alleged to have received money on her M-pesa account in the month of July, for goods /services rendered on behalf of the Respondent, without any documentation showing the money was used for intended purpose.
5. She was suspended without pay on 3rd July 2019. Suspension was based on what she was advised, was "the outcome of an ongoing investigation on procurement practices on the BAT Account."
6. She replied to the letter of suspension and made her demands before initiation of the Claim, through a letter issued by her Advocates, dated 8th July 2019.
7. Through an e-mail dated 3rd July 2019, the Respondent reinstated the Claimant's salary, pending disciplinary hearing.
8. On 27th August 2019, she received 3 charges, detailed as follows:



- i. Misconduct, in that you applied or attempted to apply funds, assets or property belonging to the company or client for wrongful use, or for unauthorized purpose. On or about the month of July, you received cash payment into M-pesa banking account for goods/services rendered on behalf of CBRE, with no supporting invoices, receipts or client agreements. Without supporting documentation, there is no record that the funds have been used for their intended purpose or value.
 - ii. As such you have failed to adhere to company procurement policies and procedures.
 - iii. This is in direct breach of the CBRE's Code of Conduct and has brought our company into disrepute with the client [BAT].
9. The charges served as notice to attend disciplinary hearing, scheduled for 11th September 2019. She wrote back on the same date, 27th August 2019 stating that the e-mail did not contain the charges; and the charges were not specific. She asked for further details to enable her respond.
 10. She was supplied the annexure containing charges, witness interview records, and a report prepared by Timothy Lukorito.
 11. She gave a comprehensive reply on 2nd September 2019, detailed at paragraph 14 and 15 of her Statement of Claim.
 12. She was heard on 11th September 2019. The disciplinary committee found her guilty. She was issued the letter of termination dated 20th September 2019. She appealed to the Managing Director on 24th September 2019. The Appeal was dismissed through a letter addressed to her from the Human Resource Director, dated 15th October 2019.
 13. She avers that termination was not justified, and was not executed fairly. She prays for the following: -
 - a. Declaration that termination was unfair and unlawful.
 - b. 1-month salary in lieu of notice at Kshs. 357,638.
 - c. Equivalent of 12 months' in compensation for unfair termination at Kshs. 4,291,656.
 - d. Certificate of Service to issue.
 - e. Costs.
 - f. Any other suitable relief.
 14. The Respondent concedes it employed the Claimant, through a contract dated 29th August 2016. It is conceded that the Respondent terminated the Claimant's contract. Termination was based on valid reason, and fairly executed. The Claimant misappropriated funds belonging to the Respondent's client, BAT, in breach of procurement guidelines. It is conceded that the Respondent suspended the Claimant without pay, but reversed the decision immediately the Claimant wrote complaining about the decision. She was restored to full salary pending disciplinary hearing. The Respondent issued her a clear statement of charges. She was advised on all her procedural rights.
 15. She attended the disciplinary hearing. She admitted that she received money through her M-pesa account, in violation of procurement policy. She conceded that she handled some supplies personally, alleging the supplies were sensitive. She handled the supplies without authority. She influenced the price of items, predetermining what a supplier would quote, normally higher than the market rates. The Claimant did not perform her duties diligently.



16. The outcome of the disciplinary hearing was not predetermined. The Claimant did not challenge the impartiality of the chair. She was accorded a fair hearing. The Respondent prays that the Claim is dismissed with costs.
17. The Claimant and her 2 witnesses, Engineer Edwin Ndirangu and Engineer Odhiambo Wabwire, gave evidence on 3rd February 2023, when the Claimant closed her case. Respondent's Human Resource Director, Gerhard Johannes Saaiman, gave evidence for the Respondent on 13th July 2023, closing the hearing. The Claim was last mentioned on 26th September 2023, when the Parties confirmed filing and exchange of their Submissions.
18. The Claimant told the Court that she is herself, an Engineer. She relied on her witness statement, and documents [exhibits 1-28]. She restated the contents of her Statement of Claim, as summarized above.
19. Cross-examined, she stated that she was an Employee of the Respondent, stationed at BAT, Nairobi. She confirmed that 3 charges were presented to her by the Respondent.
20. She bought goods from a supermarket, and paid through M-pesa. The money was remitted by a supplier. She submitted the receipt to her Manager. The same amount was paid back to her. On investigation, the Claimant said she billed the supplier, and the supplier billed the Respondent, at 15% added cost. This was a common practice. It was not a collusion, but a practice.
21. The Claimant received the letter of suspension and the invitation to disciplinary hearing. She did not agree that she went against the code of conduct. She did not send Meshack a request with a purchase order. On investigation it was conceded that she made a request with the purchase order. The Claimant was advised on her procedural rights, leading to the disciplinary hearing. She was heard. The panel was chaired by an independent person. She was given a chance to respond. A decision was made to dismiss her. The decision was communicated to her. She was given a chance to appeal. She appealed. She received the Respondent's decision on appeal. Dismissal was upheld.
22. Redirected, the Claimant told the Court that the Respondent had urgent accounts. There was a meeting at the Respondent's client, where the convenors needed chocolates and other snacks. There was no time for procurement. The Claimant used her own money at the supermarket, which was to be reimbursed through a supplier. It was a standard practice at the Respondent. The Claimant did not like the practice, and had proposed the use of credit cards instead. The Respondent did not have procurement rules.
23. Engineer Ndirangu relied on his witness statement, corroborating the evidence of the Claimant. Cross-examined, he told the Court that he ceased working for the Respondent, in 2017. He found greener pastures. He worked for the Respondent for about 2 years. At the time he joined in 2015, the Respondent was known as Johnson Control Limited. He did not know when the Respondent changed to CBRE.
24. Engineer Odhiambo adopted his witness statement on record. He told the Court that he worked as the Engineering Manager, BAT. He was not an Employee of the Respondent. He was the Contract Manager. He confirmed that BAT had contracted the Respondent for supply of facilities management.
25. Human Resource Director Gerhard Johannes Saaiman, adopted his witness statement and documents filed by the Respondent, in his evidence-in-chief.
26. Cross-examined, he told the Court that the Respondent carried out internal investigations on procurement. A report was generated. It is not exhibited before the Court by the Respondent. Malpractices took place at the Respondent's client, BAT. There is no witness called by the Respondent,



from BAT. The Respondent's procurement policy, referred to in the witness statement of Saaiman, was not exhibited before the Court. The Claimant worked in Kenya and her supervisor was in Kenya. There is no witness statement taken from her supervisor. The Respondent supplies facility management services. It has suppliers, who provide various services to its clients. There is an on-boarding process for suppliers. A supplier has to be on-boarded before rendering services. Saaiman did not recall if any supplier rendered service without on-boarding. Redirected, Saaiman told the Court that the Claimant exhibited the report by Lukorito. BAT had procurement procedures, which the Respondent implemented.

27. The issues are whether termination of the Claimant's contract was executed fairly in accordance with section 41 of the *Employment Act*; whether it was based on valid reason[s] under section 43 of the *Employment Act*; and whether the Claimant merits the prayers sought.

The Court Finds: -

28. The Claimant was employed by the Respondent, a corporate outsourcing business, as a Facilities Manager. She was employed under a written contract, exhibited by the Parties.
29. Employment commenced on 12th September 2016. She was stationed at the Respondent's client, cigarette-maker BAT- Kenya. Her salary under the contract was Kshs. 300,000 monthly.

Procedure.

30. She was suspended on 2nd July 2019. She was advised suspension was to remain in place, until the disciplinary hearing. The hearing was on a date to be advised. Suspension was necessitated by the outcome of "an ongoing investigation in the procurement practices on the BAT account."
31. She was suspended without pay. She wrote to the Respondent on 3rd July 2019, complaining about suspension without pay, and her salary was restored through an e-mail communication from the Respondent, dated 8th July 2019. She was served with a statement of charges dated 27th August 2019. There were 3 charges, captured at paragraph 8 of this Judgment.
32. The Claimant wrote to the Respondent on the same date seeking additional information on the charges. The Respondent supplied the information, through its e-mail to the Claimant dated 29th August 2019. She was supplied the Respondent's witness interview records; and a report prepared by Timothy Lukorito, a former Facilities Manager with the BAT, between 2018 and 2019.
33. The Claimant gave a comprehensive response to the charges in her letter dated 2nd September 2019.
34. She was given a personal hearing on 11th September 2019. There is nothing on record to show that the Claimant challenged the composition of the disciplinary committee, which comprised: Dave Gericke – Independent Chairperson; Tegwhen Kort- Regional Supply Chain Manager Middle East, North Africa, Turkey and Pakistan; and, Done Close- Acting Regional People Manager, Human Resources.
35. The Claimant told the Court in her evidence on cross-examination that, "Invitation to disciplinary hearing is dated 27th August 2019. I was to appear on 11th September 2019. I was told to reply to allegations. I was advised on my rights at the hearing. I appeared. The panel was chaired by an independent person. I was given a chance to respond. A decision was made to dismiss me. The decision was communicated to me. I was given the chance to appeal. I appealed. I did not appear. I was just sent a decision. Initial decision was upheld."
36. The Court does not find fault with the procedure adopted by the Respondent. There were investigations into the allegations made against the Claimant. She was suspended without salary. The



Respondent quickly corrected the decision to suspend her without salary, restored her salary and quickly convened a disciplinary hearing. Preceding the hearing, the Claimant was presented with clearly worded charges, the witness interviews and investigation report by Timothy Lukorito. She concedes that she was advised on her right of appeal. She appealed. She did not tell the Court what clause in her contract or the Respondent's disciplinary procedure, entitled her to a personal hearing on appeal. The decision on appeal was communicated to her.

37. The Court is satisfied that procedure leading to termination was fair.

Reasons.

38. There were damning findings against the Claimant, in the report prepared by Timothy Lukorito, himself a former Facilities Manager. In her evidence on cross-examination, the Claimant appears to have given weight, to the report made by Lukorito. It is noteworthy that the report was availed to the Claimant before the disciplinary hearing upon her request, and although she alleges that Lukorito was not called as a witness, she is not recorded as having made a request before the disciplinary committee, to have Lukorito called as a witness. She did not request the disciplinary committee to call any of the persons mentioned in the witness interviews. She did not ask the committee, to call any of the suppliers she was alleged to have transacted irregularly with. She had a record of the interviews. She did not herself call any supplier, to deny any of the findings made by Lukorito. She made no attempt to put questions to Lukorito, or any of the interviewees.
39. She admitted that in the CBRE GWS Compliance Investigation Question and Answers Report, at page 143 of her documents, she billed the supplier and the supplier billed the Respondent at 15% added cost. The Claimant conceded that money was paid directly to her M-pesa account by a supplier. The Respondent would then be billed at an additional 15% of the actual cost of the goods purchased.
40. It was reported by Lukorito that the Claimant used to direct requests to suppliers to pay directly to her phone. She would advise suppliers to quote higher amounts than the actual amounts expended. Suppliers were only asked to settle what the Claimant told them to settle. They were not able to support supply by documentation.
41. They requested to submit quotes on predetermined amounts. Gopro cameras were procured at Kshs. 38,000, a piece, but the price was exaggerated at Kshs. 66,000 a piece on submission of quotes. There was double costing on supply of tint under CBRE LPO 6208103058 which was also included in LPO 62081031157. Some suppliers complained that they provided quotations and were never awarded tender. They were contacted later and requested to revise the quotation upwards. They were instructed to pay the higher amount to the Claimant or her contacts.
42. At the disciplinary hearing, as recorded in the chairman's findings, exhibited by the Claimant, it was shown that the Claimant instructed suppliers to send money to her M-pesa account, and reminded suppliers to quote for supplies that had already been paid. Documentary evidence was led, by Regional Supplies Chain Manager Tegwhen Kort, supporting these irregularities.
43. The Claimant's response to these accusations was that she did not deny requesting payments to be made to her M-pesa account. She stated that this was not uncommon. She incurred personal costs for the Managing Director's condiments. She would receive reimbursement from suppliers on demand. She carried out transactions this way, because the Respondent's credit card system was cancelled. She fought tooth and nail to have the credit card system restored. She explained that variation in camera prices, was because there were different types of cameras, with different specifications. Different Employees handled the cameras and could give evidence on the transaction. On supply of tint, the Claimant stated that she did not understand what the breach was. On suppliers who were never



awarded tenders, only to be contacted by the Claimant, and advised to give a higher quotation, the Claimant demanded that the said suppliers provide affidavits.

44. The Court has considered the allegations made against the Claimant, and her responses. The Court is of the view that the Respondent had valid reason or reasons, to justify termination under Section 43 of the Employment. The Respondent's procurement system had loopholes, which the Claimant and her colleagues exploited in carrying out questionable transactions. Why would goods be procured at a standard market price, without any accounting documentation, and charged on the Respondent / client at an additional 15% of the market price?
45. The reason or reasons for termination, under section 43 of the *Employment Act*, are matters that the Employer at the time of termination, of the contract, genuinely believed to exist, and which cause the Employer to terminate the services of the Employee.
46. The Claimant's contract, under clause 5.5. bound the Claimant to comply with company standards in regard to her conduct and performance of her work. She was required to ensure that all instructions were complied with, in accordance with the Respondent's international standards and internal guidelines.
47. The Respondent's Standards of Business Conduct, exhibited by the Claimant, bound each person at the Respondent to do the right thing, when acting on behalf of the Respondent. Before acting, the Claimant/ staff was required under this policy to ask: -Is it legal? Does it follow company policy? Is it the right thing to do? How would it be perceived by our clients, the media or our communities?

Did the Claimant ask herself these questions when she transacted official business through her M-pesa account, and had procured goods charged on her Employer' / client, at 15% over the market price?
48. She suggested that Lukorito who made the damning report against her, and the colleagues who were involved in procurement of the cameras, could give evidence, but did not demand that they are called to give evidence, at the disciplinary hearing. She did not herself call the 2 Engineers who gave evidence on her behalf in these proceedings, at the disciplinary hearing. The evidence of the 2 Engineers before this Court was not helpful, in addressing the allegations made against the Claimant, leading to termination.
49. The Respondent was not required to prove its allegations against the Claimant, beyond reasonable doubt, but only in accordance with the standard of proof, prescribed under section 43 of the *Employment Act*. There was evidence that the Claimant received cash payments through M-pesa, without accounting documentation. The client, BAT, would no doubt question the probity of the Respondent. The Claimant appears not to have followed procurement policy and standards of business conduct. The Court finds resonance in the disciplinary committee's chairman's findings, that the Claimant was not entitled to create her own scheme of procurement practice, no matter how virtuous her intention was.
50. Termination was based on matters that the Respondent genuinely believed to exist, and was substantively fair, under section 43 of the *Employment Act*.
51. The Claim has no merit.

It is ordered: -
 - a. The Claim is declined.
 - b. No order on the costs.



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

James Rika

Judge

