



**Chemoiwo v Bomas of Kenya Limited (Cause E314 of 2021)
[2024] KEELRC 415 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 415 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E314 OF 2021
NZIOKI WA MAKAU, J
FEBRUARY 29, 2024**

BETWEEN

LENA CHEMOIWO CLAIMANT

AND

BOMAS OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent through a Memorandum of Claim dated 15th April 2021. She averred that she was still in the employ of the Respondent as a Senior Personal Secretary pursuant to an Appointment Letter dated 16th September 2019. Further, she was entitled to a monthly salary in accordance with her contract and the Respondent’s Human Resource Manual. The Claimant’s case was that whereas her net monthly pay was Kshs 149,419/-, the salaries for the months of January, February and March of 2021 were not paid in violation of her right to remuneration. That as a result of the Respondent’s actions, she had been subjected to great prejudice and suffering and the Respondent had subsequently instituted irregular, unfair, and unprocedural disciplinary proceedings against her.
2. The Claimant averred that through a letter dated 26th January 2021, she was invited to an ad-hoc committee meeting to be held on 28th January 2021 for the purpose of investigating financial impropriety and gross misconduct by one Mr. David K. Rono. That she was further required to avail her letters of appointment and/or promotions but which documents bore no nexus to what she was allegedly being summoned to do. She again received communication from the Office of the General Manager on or about 12th March 2021 alleging that it had been established that her contractual engagement with the Respondent was irregularly conducted and violated the institutional procedures and policies on appointment. That the said letter of 12th March 2021 also required her to show cause in writing within four (4) days why disciplinary actions should not be taken against her and that considering the same was only availed to her via an email of 15th March 2021 at 16:34 hours, she only



had 26 minutes before close of business to respond. She nevertheless responded to the show cause in a letter dated 17th March 2021 wherein she raised the issue of the unpaid salary but the Respondent never responded to the same. Subsequently in a letter dated 19th March 2021, the Respondent's HR Manager summoned her to appear before the Disciplinary Committee on 23rd March 2021 but she fell ill prior to the said date. The Claimant further averred that the said invitation hearing did not accord her or inform her of her right to have an employee of her choice present at the hearing and that the aforementioned letters were made by people not mandated to make such communications. That it was from the foregoing that she opted to seek redress from this Honourable Court to safeguard her rights as the Respondent had by conduct, and in all manner, failed to follow the proper procedures as per the Manual, the relevant Employment laws and the Constitution of Kenya. She therefore prayed for Judgment against the Respondent for:

- a. An order for the payment, by the Respondent, the Claimant's withheld emoluments amounting to Kshs. 448,257/- for the months of January, February, and March 2021.
 - b. A declaration that the disciplinary proceedings commenced as against the Claimant are unfair, unprocedural, illegal and thus null and void and have no effect in law.
 - c. An order of permanent injunction restraining the Respondent either by themselves, employees, servants and/or agents from terminating employment of the Claimant based on the alleged disciplinary process.
 - d. Costs of this suit.
 - e. Interest on (a) and (d) above.
 - f. Any other relief this Court shall deem appropriate to grant.
3. In her Witness Statement made on 15th April 2021, the Claimant stated that in her role, she was entitled to a gross salary of Kshs. 126,104/- per month; house allowance of Kshs. 60,000/- per month; medical allowance of Kshs. 35,000/- annually; entertainment allowance of Kshs. 5,000/- per month; and commuter allowance of Kshs. 12,000/-. She further stated that the Respondent's letter of 12th March 2021 did not at any point disclose what provision of the HR Policy Manual she had contravened and was vague.

Respondent's Case

4. In its Statement of Defence dated 29th June 2022, the Respondent averred that on 1st October 2019, the Claimant irregularly violated the Respondent's Policy on appointment by awarding herself a renewal of contract for four (4) years with higher remuneration and without performance appraisal. That the Show Cause Letter dated 12th March 2021 instructed her to respond to the allegations of conniving with some employees to obtain a contract of employment with terms contrary to the HR Policy and which were providing benefits way above her cadre. It asserted that the Claimant used her position of working in the General Manager's office to prepare a document and send to the finance team to effect. That by the time she was awarding herself the said contract, the term of office of the then General Manager had come to an end and the Claimant then decided to enrich herself. It was the Respondent's averment that the Claimant's response inter alia narrated how she may have negotiated her terms with the personnel department and when she was called to appear before the disciplinary committee on 23rd March 2021, she opted for litigation.
5. The Respondent's case was that on 30th March 2021, the Claimant sent a letter to it claiming to be a medical report issued at Familia Bora Medical Centre, recommending for her rest from normal



duties. That later on after the expiry of the days recommended by the doctor, it again invited the Claimant to appear before the Committee but to no avail. This Court thereafter declined to grant the Claimant orders sought to stop the Respondent from proceeding with the disciplinary process against her and she was directed to appear for her disciplinary. The Respondent averred that after the Claimant appeared before the disciplinary committee, the staff disciplinary committee analysed the evidence and response from the Claimant, was satisfied that she had failed to exonerate herself from the allegations and recommended for her services to be dismissed.

Evidence

- 6 The Claimant testified that she could not appear before the disciplinary committee at first because of an inter-county lock-down and that she was later invited on 23rd April 2021 to attend a hearing. She stated that she received her Contract from the former General Manager and that she signed in acceptance when the said former General Manager was still in employment. Whereas she informed the Court that she received a letter of summary dismissal via registered mail on 2nd July 2021, she confirmed she was at that time still working for the Respondent. She further testified that she was never served with the Minutes of April 2021 to confirm the contents thereof. She prayed to be awarded the remaining prayers in the Claim with costs since her salaries had been paid, except for her allowances and the salary for April. Under cross-examination, the Claimant asserted that the Finance Manager appraised her but she had not produced the said appraisal in Court.
7. The Respondent's witness, Mr. Jimmy Okidiang'i (RW1), testified that the Claimant's dues were paid as directed by the Court and the Orders were adhered to until her Contract expired and that she was thus no longer an employee of the Respondent. Under cross-examination, RW1 stated that the Claimant was employed in 1986 or 1988 and served the Respondent before she signed the Contract that ended in 2018 and that the contractual period was three years and not four years. He admitted that they did not provide the Claimant with Minutes of the disciplinary hearing and that they had not produced in Court the summary dismissal dated 27th April 2021. RW1 asserted that they nevertheless reinstated the Claimant in compliance with Orders of the Court until her contract lapsed on 30th June 2023 and that she was yet to be paid her terminal dues and gratuity as she was yet to clear.

Claimant's Submissions

- 8 According to the Claimant, the following are the issues for determination by this Court:
 - a. Whether the Claimant's disciplinary process was already completed at the time this Court gave the interim injunctive Orders on 22nd April 2021.
 - b. Whether the disciplinary process was being conducted in a fair and just manner.
 - c. What remedies can this Court grant in the circumstances?
9. The Claimant submitted that in view of the evidence before Court, it was clear that the date of the summary dismissal letter dated 27th April 2021 was after this Court had issued Orders on 21st April that were duly served upon the Respondent, which indicated that the Claimant's employment was not to be compromised. She however noted that since the Respondent had introduced the said issue that she had been summarily dismissed yet the same was not in the instant substantive claim, the claim should be expunged for being misplaced.
10. It was the Claimant's submission that the disciplinary process was unfair and that this Honourable Court ought to interfere to prevent grave injustice befalling her as a result of the impugned process. In support of this argument, the Claimant relied on the cases of Fredrick Saundu Amolo v Principal



Namanga Mixed Day Secondary School & 2 others [2014] eKLR, Ann Wambui Kamuiru v Kenya Airways Limited [2016] eKLR and Mulwa Msanifu Kombo v Kenya Airways [2013] eKLR wherein Courts proceeded to interfere with an employer's internal disciplinary procedures for being marred with irregularities. That further in the case of MTM v KIE Limited & another [2020] eKLR, the Court found the process employed by the employer to be flawed and consequently declared the same null and void. The Claimant further submitted that the General Manager's letter of 12th March 2021 did not disclose any specific disciplinary offence as laid out in clause 10.13 of the Respondent's HR Policy Manual and that this irregularity was a contravention of clause 10.15.2 of the said Manual. That this was further because clause 10.15.2 of the HR Policy Manual accorded her a period of 14 days to respond to any charges laid against her yet she was required to respond within four (4) days. She thus urged this Court to find and hold that the disciplinary process was instituted by a person without authority and any action flowing from it is therefore null and void.

11. The Claimant submitted that the Court ought to consider the circumstances of this case, interfere with the flawed disciplinary process instituted against the Claimant and put it on the right cause. It was confirmed in evidence that the Claimant continued serving in her employment until her contract lapsed on account of effluxion of time on 30th June 2023. On the issue of costs, the Claimant submitted that this Court has unfettered discretion to award costs pursuant to section 12(4) of the ELRC Act and prayed for an award of costs since the filing of the suit had been occasioned by the Respondent's unjust actions against her. That she is also entitled to the award of interest and that as it was undisputed that her Contract of Employment has a provision for entertainment allowance which is due and outstanding, the same ought to be remitted with the salary.

Respondent's Submissions

12. The Respondent submitted that the Orders of this Court were to effect that the Claimant attends the disciplinary hearing but her employment should not be tampered with before the hearing and conclusion of the disciplinary process. It argued that the Court Orders did not restrict the Respondent from making its decision upon conclusion of the disciplinary process and that if that was the case, then the same would have been clearly expressed and or stated in the said Court Orders. That it nevertheless paid the fine after the Court held it in contempt and reinstated the Claimant back to employment until her contract ended in June 2023. It was the Respondent's submission that at the time of issue and service of the Court Orders dated 22nd April 2021, the disciplinary process had not commenced but later proceeded subject to the Court's directions and that the directions that the Claimant was to adhere to the disciplinary notice did not mean that the Respondent was stopped from rendering its decision. It maintained that it had not been served with any Court Orders when it made a determination on the disciplinary and issued the dismissal letter upon the Claimant vide her postal address.
13. The Respondent noted that the Claimant bases her argument for unfair process on the fact that the Show Cause letter was issued through the office of the General Manager, who is not mandated to write such communication. That however contrary to this assertion, the said letter was issued in line with clause 10.15.2(iv) of the Respondent's HR Policy Manual which states as follows:

In cases of serious misconduct where dismissal or termination of service is likely and where interdiction or suspension from duty is deemed necessary to facilitate full investigation into the case, the General Manager, shall issue a "show cause" letter to the employee through which the employee may be interdicted or suspended depending on the nature of the case.

14. Further, the Respondent submitted that paragraph 2 of the Show Cause Letter specifically indicated the Claimant's actions that amounted to gross misconduct, contrary to the allegation that it did



not disclose the disciplinary offence as laid out in the Respondent's HR Policy Manual. It was the Respondent's submission that it followed due process in that the Claimant was issued a show cause letter, was given several chances to attend the disciplinary hearing, she presented her case but failed to furnish her original documents for renewal of contract, and was issued with a letter of summary dismissal.

15. On the remedies sought, the Respondent submitted that prayer 1 is spent since the Claimant was paid her salary in full, that prayer 2 was effected by the orders of this Court and that prayer 3 is also spent because the Claimant was reinstated and served until lapse of her contract. It argued that the Claimant had received her recompense in full and it had shown that the disciplinary proceedings against her were lawful and fair. It submitted that the Claimant was not entitled to any further reliefs and that her case should be dismissed with costs.
16. The Claimant's contract with the Respondent was extended in a manner that caused pause. The Respondent was unable to verify its authenticity asserting the Claimant had obtained the extension irregularly. The contract gave the Claimant superior terms and this is perhaps what prompted the Respondent to doubt its veracity. The Respondent disowned the letter despite it bearing all the hallmarks of the contracts the Respondent issued from time to time. The contract subsequently ran its full course and the Claimant is only seeking the unpaid terminal benefits and gratuity.
17. The Claimant has not cleared with the Respondent which is the precursor to the payment she seeks. As such the Claimant must clear with the Respondent within the next 7 days and the Respondent must pay her terminal dues including her gratuity within 7 days of her clearing with it. As the Respondent was largely to blame for the extended litigation, it shall meet ½ of the costs of the suit.
- 18 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

