



**Koskei v Bomas of Kenya Limited (Cause E500 of 2021)  
[2024] KEELRC 256 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 256 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E500 OF 2021  
L NDOLO, J  
FEBRUARY 15, 2024**

**BETWEEN**

**RONO DAVID KOSKEI ..... CLAIMANT**

**AND**

**BOMAS OF KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claim before me seeks relief for wrongful dismissal and payment of terminal dues. The claim is documented by a Memorandum of Claim dated 22<sup>nd</sup> June 2021 and filed in court on 23<sup>rd</sup> June 2021. The Respondent’s response is contained in a Statement of Defence dated 15<sup>th</sup> May 2022.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Jimmy Okidiang’i. The parties also filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as an Accounts Clerk, on 18<sup>th</sup> March 1997. He rose through the ranks to the position of Finance and Administration Manager as at 12<sup>th</sup> March 2021, when he was dismissed. He claims to have acted in the position of General Manager in June 2016 and from September to November 2019.
4. By letter dated 2<sup>nd</sup> November 2020, the Claimant was interdicted on allegations of presiding over improprieties and irregularities as established by the Auditor General in a qualified opinion on the Respondent’s Accounts and Financial Statements for 2018/2019. The Claimant was further accused of giving misleading financial data to the Board. The letter also served as a show cause notice to which the Claimant was required to respond within 14 days.



5. The Claimant responded by his letter dated 10<sup>th</sup> November 2020, denying the allegations and pointing out that he had not seen the audited report from the Auditor General. The Claimant also stated that there was no exit meeting between the external Auditors and the Respondent's staff to resolve any outstanding issues.
6. The Claimant complains that his request for better particulars on the accusations raised against him did not elicit any response. He avers that the nature of the offence he was accused of required forensic audit of the Respondent's data.
7. By a letter dated 26<sup>th</sup> January 2021, the Claimant was invited to a session with the Respondent's Investigating Committee, on 28<sup>th</sup> January 2021. The Claimant accuses the Respondent of contravening the law by inviting him to a disciplinary hearing disguised as a session. He adds that his response to the show cause letter was not considered.
8. The Claimant claims to have been confronted with new allegations that were not contained in the show cause letter. He further questions the composition of the disciplinary panel which was made up of Board members.
9. According to the Claimant, his dismissal was actuated by malice and witch-hunt. He now claims the following:
  - a. A declaration that the termination of his employment was unlawful, null and void;
  - b. Reinstatement with all entitlements payable in full;
  - c. In the alternative damages for unlawful termination in the following terms:
    - i. 12 months' salary in compensation.....Kshs. 2,170,308
    - ii. 3 months' salary in compensation.....542,577
    - iii. Unpaid but earned leave allowance.....180,859
    - iv. Half salary during interdiction.....633,003
    - v. Gratuity for 23 years of service
    - vi. Unremitted PAYE, NSSF and Pension dues
    - vii. Damages for unlawful termination
    - viii. Certificate of Service
    - ix. Costs plus interest

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

10. In its Statement of Defence dated 15<sup>th</sup> May 2022, the Respondent admits having employed the Claimant as a Clerk from 18<sup>th</sup> March 1997. The Respondent concedes that the Claimant rose through the ranks to the position of Finance and Administration Manager.
11. The Respondent states that the Auditor General's report for 2018/2019 had flagged Kshs. 10,821,823 raised from cash sales that could not be accounted for.
12. According to the Respondent, the Claimant's duties as Finance and Administration Manager, included supervising all financial functions within the Institution.



13. Pursuant to the 214<sup>th</sup> Board meeting, it was resolved that the Claimant be interdicted and an ad hoc Committee be established to investigate his conduct, alongside other implicated officers. The Claimant was therefore issued with an interdiction letter dated 2<sup>nd</sup> November 2020.
14. In his response, which was received on 13<sup>th</sup> November 2020, the Claimant submitted that he was not aware of any misleading data that he had given to the Board.
15. The Claimant appeared before the ad hoc Committee on 28<sup>th</sup> January 2021. The Respondent asserts that the Claimant was subjected to a disciplinary hearing but was unable to exonerate himself, leading to his summary dismissal.

### **Findings and Determination**

16. There are two (2) issues for determination in this case:
  - a. Whether the Claimant's dismissal was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

17. On 2<sup>nd</sup> November 2020, the Claimant was issued with an interdiction letter on allegations of gross misconduct particulars being that:
  - a. He presided over financial improprieties and illegalities as was established by the Auditor-General in his Qualified Opinion regarding the Respondent's Accounts and Financial Statements for 2018/2019 FY; and
  - b. He gave non-factual and/or misleading financial data and information to the Board contrary to Part III Section 19 of the *Public Officer Ethics Act*.
18. The interdiction letter also served as a notice to show cause to which the Claimant was required to respond within 14 days.
19. In his response dated 10<sup>th</sup> November 2020, the Claimant stated that he had not seen the final audited report from the Auditor General, noting that he had only seen management responses made by the Acting Chief Accountant. The Claimant added that the Respondent had never had an unqualified opinion due to historical outstanding issues.
20. The Claimant further stated that he was not aware of any false, non-factual and/or misleading financial data given by him to the Board. He concluded by asking for actual facts and data on the accusations plus a forum to state his case.
21. Subsequent to this, the Claimant was, by letter dated 26<sup>th</sup> January 2021, invited to appear before an ad hoc Investigating Committee appointed by the Respondent.
22. The letter of 26<sup>th</sup> January 2021 states in part:

“Further to your interdiction on 2<sup>nd</sup> November 2020 over presiding over financial improprieties and illegalities as was established by the Auditor-General in his Qualified Opinion regarding BOK's Accounts and Financial Statements for 2018/2019 FY; and giving false, non-factual and/or misleading financial data and information to the Board, which is contrary to Part III Section 19 of the *Public Officer Ethics Act*, a committee that was established to investigate the matter seeks to have a session with you on Thursday, 28<sup>th</sup>



January 2021 at exactly 10:30 am so that you can assist it in reaching an informed decision regarding the matter.”

23. Finally, the Claimant was dismissed by letter dated 12<sup>th</sup> March 2021 stating as follows:

“Dear Mr. Koskei,

#### Summary Dismissal

Following your interdiction on 2<sup>nd</sup> November 2020, the allegations leveled against you were as follows:-

As Finance and Administration Manager, you presided over financial improprieties and illegalities, as was established by the Auditor-General in his Qualified Opinion regarding BOK’s Accounts and Financial Statements for 2018/2019 FY; and You gave to the Board false, non-factual and/or misleading financial data and information, which is contrary to Part III Section 19 of the *Public Officer Ethics Act*.

You appeared before the Ad-Hoc Committee of the Board of Directors, which was constituted as the Disciplinary Committee on 28<sup>th</sup> January 2021, for hearing and interrogation on the charges leveled against you, as was brought to your attention through the interdiction letter.

In view of the seriousness of the matter, a decision by the Board of Directors has been made to terminate your employment with Bomas of Kenya Ltd due to gross misconduct in line with Bomas of Kenya Human Resources Policies and Regulations Manual and the *Employment Act* (2007).

The reason for this decision to Summarily Dismiss you is that during the hearing process, it was found that your repudiation was unsatisfactory in the following respect:-

1. You failed to justify how receipt books, with the same receipt numbers, having money received from different individuals was captured in daily summary of gate collections, that created room for embezzlement of BOK’s funds.
2. You failed to account for the loss of Kshs. 10,821,823.00 property of Bomas of Kenya that was raised through the Auditor-General in his Qualified Opinion concerning BOK’s Accounts and Financial Statement for 2018/2019 FY.
3. You admitted the loss of Kshs. 2,080,000.00 of which you failed to provide evidence justifying this loss despite reminders.
4. Your account of issues was unreliable and, in many instances, misleading to the Board. It was established that you gave to the Board false, non-factual, and/or misleading financial data and information during its meetings, a case in point during the 80<sup>th</sup> Finance and Human Resources Committee Meeting, in which you indicated that Kshs. 50 million was available at the beginning of the Little Theatre Project, which in essence had not been factual.



The foregoing concerns are very serious issues for a Public Servant whose relationship with the organisation he/she serves, is to ensure they support and assist it to realize its mandate.

The summary dismissal arrangements are as follows;

Your summary dismissal is effective immediately, and your final day of employment with Bomas of Kenya Ltd. is on 11<sup>th</sup> March 2021; You must clear with Company by filling a clearance form obtainable from Human Resource Office.

For any clarifications, please do not hesitate to contact the undersigned. Any appeal regarding this decision should be made to the Chairman of the Board of Directors of Bomas of Kenya.

Yours Sincerely,

(signed)

Peter Gitaa

AG. General Manager/Chief Executive Officer”

24. This letter reiterates the two counts levelled against the Claimant in the interdiction/show cause letter and in the letter inviting him to appear before the Investigating Committee, being:
  - a. Presiding over financial improprieties and illegalities; and
  - b. Giving non-factual and/or misleading financial data and information to the Board.
25. The dismissal letter went further to set out details of the charges, including an alleged admission by the Claimant of loss of Kshs. 2,080,000. Significantly, these details were not part of the two previous letters and the Claimant denied ever admitting any part of the charges levelled against him.
26. For a termination of employment to pass the lawful and fairness test, there must be both substantive justification, meaning that a valid reason for the termination has been established and procedural fairness, meaning that the employee has been subjected to due process. (see *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR).
27. The requirement for substantive justification is codified by Section 43 of the [Employment Act](#) as follows:
  43.
    - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
    - (2) The reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
28. The procedural fairness requirements are set by Section 41 of the Act as follows:
  41.
    - (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 the 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.

29. In his final submissions dated 22<sup>nd</sup> November 2023, the Claimant cited the Court of Appeal decision in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where it was held that:

“The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

30. The Claimant complains that he was not given an opportunity to respond to the allegations levelled against him. The Respondent’s response to this complaint is that the Claimant was not only given an opportunity to respond to a show cause letter but also appeared before an Investigating Committee appointed by the Respondent.

31. The letter of 26<sup>th</sup> January 2021, did not in any way disclose that the session the Claimant was invited to attend on 28<sup>th</sup> January 2021 was a disciplinary meeting. Further, the Respondent did not avail the record of these proceedings to the Court and the Claimant himself testified that he had no seen any such record. There was therefore no way the Court could tell the nature of the session the Claimant had with the Respondent’s Investigating Committee.

32. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR this Court held as follows:

“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”

33. From the evidence on record, the session between the Claimant and the Investigating Committee cannot pass for a disciplinary hearing as contemplated by Section 41 of the *Employment Act*. First, the Claimant did not have prior notice of what he was going to face; second, he was not notified of his right to be accompanied at the meeting; third, he was not given details of the charges prior to the meeting; and fourth, there was no evidence that he was allowed to make any representations in his defence.

34. What is more, the dismissal letter as crafted, introduced new charges under the guise of details, that were not put to the Claimant either in the show cause letter or during his encounter with the Investigating Committee.

35. In the final analysis, it emerges that the Respondent adopted a disciplinary procedure that is not known in law or in its own Human Resources and Regulations Manual. The only conclusion to make therefore is that the Claimant’s dismissal was substantively and procedurally unfair.



## Remedies

36. The Claimant seeks reinstatement as a primary remedy. However, in view of the time lapse after dismissal this would not be an appropriate remedy. Instead, I award the Claimant twelve (12) months' salary in compensation. In making this award, I have considered the Claimant's long service and the Respondent's unlawful conduct in executing the dismissal.
37. I further award the Claimant one (1) month's salary in lieu of notice plus the salary withheld during interdiction.
38. The claims for leave allowance, gratuity, unremitted statutory dues and damages were not proved and are disallowed.
39. Finally, I enter judgment in favour of the Claimant as follows:
- a. 12 months' salary in compensation.....Kshs. 2,170,308
  - b. 1 month's salary in lieu of notice.....180,859
  - c. Salary withheld during interdiction.....633,003
- Total.....2,984,170
40. This amount will attract interest at court rates from the date of judgment until payment in full.
41. The Claimant is also entitled to a certificate of service plus costs of the case.
42. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Ms. Tusiime for the Claimant

Mr. Njiru for the Respondent

