



**Kiugo v Dig Deep Africa (Cause 1731 of 2017)
[2024] KEELRC 677 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 677 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1731 OF 2017
SC RUTTO, J
MARCH 20, 2024**

BETWEEN

CAROLINE NJERI KIUGO CLAIMANT

AND

DIG DEEP AFRICA RESPONDENT

JUDGMENT

1. It is common ground that the Claimant was employed by the Respondent as a Country Manager with effect from October 2014. It is the Claimant’s case that during the entire period of employment, she faithfully and diligently fulfilled her role. From the record, the Claimant’s employment was terminated through a letter dated 6th June 2017. It is that termination that has triggered the instant dispute. The Claimant contends that the Respondent failed to terminate her employment in accordance with a lawful and fair procedure. Her claim against the Respondent is for the sum of Kshs 3,999,000/= being compensatory damages for unfair and wrongful termination.
2. Opposing the Claim, the Respondent filed a Response dated 9th November 2017, through which it avers that towards the end of the Claimant’s employment, she conducted herself contrary to the employment contract and in a dishonest manner as a result of which her employment was terminated. In the Respondent’s view, the Claimant’s termination from employment was based on sound reason and she was afforded a fair chance to be heard and all necessary legal steps were strictly adhered to. As such, the Respondent has asked the Court to dismiss the Claimant’s Claim with costs.
3. During the hearing which proceeded on diverse dates, both parties called oral evidence.

Claimant’s Case

4. The Claimant testified in support of her case and to start with, she adopted her witness statement and further witness statement to constitute her evidence in chief. She proceeded to produce the list and bundle of documents filed on her behalf as exhibits before Court.



5. It was the Claimant's evidence that on 15th May 2017, she was summoned to the office of the Line Manager who informed her that she was subject to investigation on the misuse of computer and internet in the office.
6. She averred that the Respondent through her Line Manager, immediately subjected her to an investigation hearing which she was ill-prepared for, and thereafter suspended her.
7. In the investigation hearing, she explained that she had accessed the alleged sites on 8th May 2017 in the belief that on that date, it was on Tuesday as opposed to Monday.
8. She further explained that she had accessed the sites during the week but could not remember the exact day and time the sites were accessed apart from Global Careers Fair which she had accessed on 9th May 2017 and 11th May 2017.
9. On the 17th of May, the Respondent called her to the office to unlock her work phone. She was also invited to resign on grounds that the trust between her and her employer was irreparable. She opted to undergo the disciplinary process in a bid to clear her name as she had not done anything wrong.
10. In an email dated 18th May 2017, the Respondent informed her that the disciplinary hearing would be held on 25th May 2017. She was requested through the said email, to give an explanation on specific issues.
11. According to the Claimant, the Respondent lacked impartiality as it allowed its Line Manager to not only conduct investigations into her alleged misconduct but also solely subject her to an investigation hearing.
12. She further averred that she was witch-hunted by the Respondent in maliciously failing to inform and provide her with warnings of alleged misconduct which does not warrant summary dismissal as provided for in Section 11.6.i of the Respondent's Staff Handbook. The malice of her employer is further corroborated by the fact that on the aforesaid date, all the employees had been informed not to report to work.
13. The Claimant further stated that she offered her explanation during the disciplinary hearing. She contended that during the aforesaid hearing, the Respondent breached her rights by inter alia placing heavy reliance on the evidence adduced during the investigation hearing when she had been denied the right to a fair hearing.
14. She was dissatisfied with the manner in which the disciplinary hearing was conducted, hence appealed against the said decision. The appellate tribunal in upholding the decision of the disciplinary hearing failed to consider all the representations she had made.
15. She further averred that the Respondent in furtherance to the illegality terminated the services of its employee Rose Kendagor, who had testified in her favour during the investigation witness notes and disciplinary hearing.
16. In her further witness statement, the Claimant stated that her suspension was pre-meditated.
17. She further averred that on the same day she was suspended, RW1 invited her to settle since "she was not the trustees' (board in the UK) cup of tea at the moment" as he said. She was shocked beyond words since it was unethical and unfair to be told these words even before she defended myself.
18. She further averred that the Respondent had hired a committee externally, which had not been done before, to carry out her disciplinary hearing which shows that it was a sham.



19. She questioned why it was only her router that was investigated but her questions were ignored.
20. According to the conclusion of investigations, she was accused of misuse of 40% of the internet but when she asked how the Respondent got to 40% whereas she had completed all her responsibilities without fail, she never got an answer.
21. After the disciplinary hearing, the tables turned and she was now being accused of dishonesty and hence summarily dismissed based on the said accusation.

Respondent's Case

22. On its part, the Respondent called oral evidence through Mr. James Michael Haughton who testified as RW1. He stated that at all material times, he was the Respondent's Country Director in Kenya hence he is fully conversant with the circumstances of this case. Similarly, he adopted his witness statement and further witness statement to constitute his evidence in chief. He further produced the initial list and bundle of documents as well as the supplementary list and bundle documents filed on behalf of the Respondent as exhibits before Court.
23. RW1 stated that under the terms and conditions of employment, excessive personal use of work computers and work internet was prohibited. That the Respondent was entitled to monitor the use of its systems by the staff to ensure compliance. Any breaches would be sanctioned by disciplinary action. The Claimant was fully aware of all this.
24. In the month of May 2017, it was suspected that the Claimant had excessive personal use of her computer and internet, the properties of the Respondent. The suspicion arose in the course of investigations of another employee.
25. Based on the suspicion, he (RW1) was tasked with the responsibility of investigating the matter and in particular, to establish if there was excessive use of the Respondent's systems during working hours together with the extent to which such use may have demonstrated a willful dereliction of duty and professionalism by the Claimant. He was also tasked to investigate any other related misconduct.
26. He duly communicated the above to the Claimant and also requested her to proceed on paid leave. He reminded her that the suspension was not a disciplinary penalty and that the investigation was not a disciplinary hearing but rather a fact-finding mission. The Claimant was reminded of her rights to a hearing in the event a disciplinary hearing was necessary. According to him, the process was in accordance with the Respondent's Human Resource Policy.
27. He commenced the inquiry which included interviewing the Claimant, interviewing other employees, going through the system activity log and manual examination of the Claimant's computer.
28. During the investigations, he discovered that the Claimant had been seeking employment elsewhere during working hours and using the company resources. Based on this, he suggested mutual separation to her. This was in line with her desire to leave the organization. He contended that the proposal was on a without prejudice basis and was made in good faith. He reminded the Claimant of her rights if she did not wish to take up that proposal.
29. After the inquiry, he compiled a report which he forwarded to the Executive Director of the Respondent. Upon review, it was decided that the report revealed misconduct on the part of the Claimant. This necessitated disciplinary action against her.
30. The Claimant was thus invited for a disciplinary hearing on 25th May 2017 and was advised to bring along an advisor or representative of her choice. She attended the hearing accompanied by one John



- Huss. The hearing was conducted by the Respondent's Human Resource Advisors in his (RW1) presence. The Claimant responded to queries asked and also asked questions. Minutes were taken and signed by all parties in attendance.
31. The Report of the disciplinary hearing and the materials provided in evidence were reviewed by the directors of the Respondent who concluded that the Claimant was dishonest during the investigative interview. The Claimant's position required a high level of integrity.
 32. RW1 further stated that the Claimant's dishonesty in both the investigative interview and the disciplinary hearing left the organization with the conclusion that she could no longer be trusted. The Claimant's actions amounted to gross misconduct for which she was dismissed.
 33. She appealed against the decision and the same was considered by a different person, David Fitzsimmons. After consideration, the appeal was found to be unmeritorious and was thus dismissed.
 34. RW1 further stated that the Respondent did not breach the provisions of Section 41 of the [Employment Act](#) since an investigative hearing or inquiry is not a disciplinary step but rather a fact-finding mission.
 35. At the time of carrying out the investigative hearing, the Respondent was not considering termination of the Claimant. The investigations were not a one-time event.
 36. He contended that the investigative hearing was therefore not one of those circumstances contemplated in Section 41 of the [Employment Act](#). In his view, the Claimant's complaints about the investigations after the termination cannot be anything but an afterthought.
 37. RW1 stated that every issue raised was addressed individually and the Claimant's responses were considered. Some of the allegations against her were dismissed and in others, she was to be warned. However, the issue of dishonesty was found to be inexcusable and constituted gross misconduct. In his view, the reason for the Claimant's termination was therefore valid and justified.
 38. In his further witness statement, RW1 stated that there was only one shared router in the building. This is the router that was reviewed.
 39. He further averred that he did not utter such words that "she (the Claimant" was not the trustees' cup of tea at the moment". He termed it a creation of the Claimant.
 40. RW2 further averred that all the other staff members in Kenya were subordinates of the Claimant and the consultants were requested to assist in conducting the disciplinary hearing. Their role was simply to chair and take minutes. They were not involved in decision making. Their inclusion was communicated in the invitation to the Claimant to attend the disciplinary hearing. The Claimant raised no objection before, during the hearing and in the appeal.
 41. Had the Respondent had any ill motives against the Claimant, she would neither have been employed by the Respondent nor gotten salary increments. That further, in March 2017, when the Claimant wanted to seek a pay rise he (RW1) guided her on how best to make the request. He would not have done so if he harboured any ill motives against her.

Submissions

42. It was Claimant's submission that the Respondent acted maliciously in failing to inform and provide her with warnings of the alleged misconduct which does not warrant summary dismissal as provided for in the Staff Handbook.



43. Placing reliance on the cases of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and *Nicholus Muasya Kyula v FarmChem Limited Industrial Cause Number 1992 of 2011*; (2012) LLR 235 (ICK), the Claimant submitted that her termination was unlawful. She contended that the Respondent had no valid reason for termination and therefore a clear absence of a substantive justification for the said termination.
44. It was the Claimant's position that the Respondent has been unable to demonstrate and/or explain how the IT system was excessive with around 40% of active computer use.
45. On the other hand, the Respondent submitted that the Claimant carried the senior most position in the organization in Kenya as the Country Manager. The Respondent posited that the said position therefore required utmost integrity and honesty. That honesty was a key factor and dishonesty was thus listed as gross misconduct, both in the Claimant's employment letter and in the Staff Handbook.
46. The Respondent stated in further submission that the Claimant was given a chance to present her case during the disciplinary hearing but even then, persisted with the lies. According to the Respondent, the lies were meant to cover up her misdeeds.
47. The Respondent maintained that there was a valid and fair reason for termination of the Claimant and it has proved beyond reasonable doubt as to how the decision of the Claimant being dishonest was arrived at.
48. Referencing the decision of *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR, the Respondent submitted that the disciplinary process was conducted in accordance with the law.

Analysis and Determination

49. Having considered the pleadings, the evidentiary material before Court and the rival submissions, the issues falling for determination can be condensed as follows: -
 - a. Whether the Respondent has proved that it had a valid and fair reason to terminate the Claimant's employment;
 - b. Whether the Respondent accorded the Claimant procedural fairness prior to termination;
 - c. Is the Claimant entitled to the reliefs sought?

Fair and valid reason?

50. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. Further to the foregoing, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
51. As can be discerned from the record, the Claimant was terminated from employment on grounds of dishonesty. In this regard, the Ruling on the disciplinary hearing indicates that the testimony given by the Claimant during the investigation hearing was dishonest and misleading.
52. It was further noted in the aforementioned Ruling that the Claimant's initial statement made during the investigation hearing was that the Global Careers Fair was accessed for business-related reasons but the Claimant later asserted in the disciplinary hearing that the activity was related to searching for JDs and salary scales as a result of a request by her line manager. The Respondent wondered why this defence was not made from the onset.



53. The Ruling further observed that the initial statement made by the Claimant during the investigation hearing that she did not apply for any jobs through Global Careers Fair or did not apply for any jobs during working hours was misleading and dishonest. With respect to this, it was noted that the Claimant in explaining her side of the story during the disciplinary hearing, acknowledged having applied for two jobs.
54. In considering whether the Claimant was terminated on valid and fair grounds, it is critical to consider the context in which the investigation hearing was undertaken. In this regard, it is evident from the record that the Claimant was invited at 9:10 am for a meeting with RW1. As it turned out, that was the commencement of the investigation process. Questions were put to the Claimant and she was required to respond to the same. At 10:00 am, she was handed the letter suspending her from employment.
55. Taking into account the manner in which the Respondent commenced the investigations against the Claimant, I cannot help but conclude that she was ambushed.
56. It was therefore not surprising that the Claimant could not recall certain aspects of the subject of the investigation hearing. Case in point, she admitted looking at the Global Careers Fair site, on Tuesday or Thursday but clarified that she could not remember exactly when this was.
57. Further, the investigation report states as follows: “For the sake of clarity, I invited Caroline to indicate on the list which sites she thinks she accessed during the working week and which she did not. Upon discussion, it was decided not to do this as Caroline was struggling to remember.”
58. The foregoing statement is a confirmation that the Claimant’s memory was not quite clear with regards to some of the issues put across to her and to which her response was required during the investigation hearing.
59. Bearing in mind that the Claimant was not informed beforehand of the investigation and hence had no time to prepare, it is quite understandable that some of her responses were not accurate.
60. It is also notable that during the disciplinary hearing, the Claimant stated a number of times that she was confusing the dates of 8th and 9th May as to which was Monday or Tuesday.
61. Indeed, one wonders why the Respondent failed to conduct comprehensive investigations and gather sufficient evidence prior to asking the Claimant to give her responses on issues she was not very clear about at that point in time.
62. As a matter of fact, the Respondent admitted in the Ruling of the disciplinary hearing that the evidence presented to the Claimant during the investigations was incomplete as the investigations had not begun.
 63. Applying the reasonableness test and the standard established under Section 43(2) of the Act, the question is whether a reasonable employer would terminate the employment of an employee if faced with the same set of circumstances as in the case herein. Admittedly, this is quite a subjective test.
64. As to the reasonableness of an employer’s conduct, the Halsbury’s Laws of England, 4th Edition, Vol. 16(1B) para 642, states thus: -
 - “...In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach



(the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

65. Considering the totality of the circumstances at hand and specifically noting the context in which the Claimant was required to give her statement during the investigation hearing, it is my considered view that no reasonable employer would terminate an employee on grounds of dishonesty.
66. In total sum, the Court is unable to find that the Respondent has proved that it had a valid and fair reason to terminate the Claimant's employment on grounds of dishonesty. To this end, the Court finds that the Claimant's termination was without a valid and fair reason in terms of Section 45(2) (a) and (b) of the Act.

Procedural fairness?

67. Beyond proving that there was a valid and fair reason to terminate the employment of an employee, an employer is required under the *Employment Act* to further prove that it accorded such an employee procedural fairness prior to terminating his or her employment.
68. This position is aptly captured under Section 45(2) (c) of the Act which stipulates that for termination to be fair, it ought to be in line with fair procedure. With respect to this, Section 41(1) enumerates what constitutes fair procedure. This entails the employer notifying an employee of the allegations for which it is considering termination of the employment contract and according the employee a hearing prior to termination. Worthy to note is that the employee is entitled to have another employee or a shop floor union representative of his choice present during such explanation.
69. In the case herein, the Claimant was suspended from employment on 15th May 2017. She was subsequently invited for a disciplinary hearing via email on 18th May 2017. Through the said email, she was informed of the allegations she was to respond to and asked to bring an advisor or a witness to the hearing. She was further advised of the identity of the panelists.
70. From the record, the hearing was conducted on 25th May 2017. The Claimant was present and she was accompanied by an advisor during the hearing.
71. The minutes of the disciplinary hearing reveal that the Claimant was given an opportunity to articulate her case.
72. In light of the foregoing, I am persuaded that the procedure applied by the Respondent prior to terminating the Claimant's employment met the minimum requirements of a fair hearing as envisaged under Section 41 of the Act.
73. The total sum of my consideration is that in as much as the Respondent has proved to the requisite standard that it observed the basic requirements of a fair hearing within the meaning of Section 41 of the Act, it failed the test in substantive fairness hence ultimately, the Claimant's termination from employment was unfair.



Reliefs?

74. As the Court has found that the Claimant's termination from employment although procedural, was without a valid and fair reason, the Court awards her compensatory damages equivalent to five (5) months of her gross salary. This award has further taken into account alongside other factors, the length of the employment relationship.

Orders

75. In the final analysis, I enter Judgment in favour of the Claimant against the Respondent in the following manner: -

- a. A declaration that the Claimant's termination from employment was unfair.
- b. The Claimant is awarded compensatory damages in the sum of Kshs 999,750.00 being equivalent to five (5) months of her gross salary.
- c. Interest on the amount in (b) at court rates from the date of Judgment until payment in full.

76. The Claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Gathaara

For the Respondent Ms. Muya instructed by Mr. Kingati

Court Assistant Millicent Kibet

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

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