



**Warui v Transparency International (Cause 549 of 2017)
[2024] KEELRC 1227 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1227 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 549 OF 2017
NZIOKI WA MAKAU, J
MAY 23, 2024**

BETWEEN

MIRIAM NJOKI WARUI CLAIMANT

AND

TRANSPARENCY INTERNATIONAL RESPONDENT

JUDGMENT

1. In the Memorandum of Claim dated March 6, 2017, the Claimant prays for judgment against the Respondent for:
 - a. A declaration and finding that the Claimant was wrongfully and unfairly dismissed.
 - b. An order that the Respondent do unconditionally reinstate the Claimant to her employment.
 - c. In the alternative and without prejudice to the foregoing, an order directing the Respondent to pay the Claimant all outstanding dues as pleaded in paragraph 46 of the Memorandum of Claim.
 - d. The Claimant be paid general damages for defamation, injured feelings and loss of reputation.
 - e. Costs and interest at court rates from the date of filing this claim until payment is fully made.
 - f. Any other further relief that this Honourable Court may deem fit.

2. The Claimant averred that she was an employee of the Respondent since February 15, 2016 appointed to the position of Programme Coordinator, Humanitarian Aid Integrity Programme on a 1½ year renewable Contract of Employment dated January 19, 2016. According to the Contract, she was to be on probation for a period of three (3) months after which she would be confirmed as a full employer of the Respondent. She contended that her probation period was extended unprocedurally by another three (3) months before confirmation of her appointment and that there was no prior communication



or reasons for delay in confirmation or otherwise. It was the Claimant's averment that an appraisal was duly done to confirm or deny her suitability for the job and that her supervisor did recommend that she be confirmed at the end of the probation period of three (3) months. That however, the Respondent Executive Director did not write to either confirm her employment or extend the probation and further failed to consult the Senior Management Team on the issue, as per clauses 3.7, 3.8 and 3.9 of the Respondent's HR Policies Manual. She further contended that she was only confirmed to employment upon her persistent inquiries to the Respondent's Director through the HR and that the HR/Admin verbally informed her that the letter of confirmation took long to be released due to alleged pending disciplinary issues.

3. The Claimant's case was that on July 13, 2016, she received a warning letter from the Executive Director for alleged misconduct of having taken some 15 minutes health break before crossing the ferry in Mombasa. That the said letter erroneously claimed that she had held the team for 45 minutes and that her response vide an email dated July 15, 2016 indicated the reasons she was late to board the ferry. She averred that on July 20, 2016, the HR Manager called her in for a meeting that turned out to be a disciplinary meeting/hearing by the HR Manager and Executive Director, on her attending a social event on the gala event night. That however in the discussion held on July 20, 2016, she was not accused of leading a walkout, as the conversation was on why she left the gala event and who had led the walkout. The Executive Director subsequently asked her on 21st July to write an email before end of the following day, showing cause why disciplinary action should not be taken against her for leaving a gala event to attend a parallel event before the gala was over. She asserted that in an email of 22nd July at 4.25pm, she explained the circumstances for her and her colleagues leaving the venue and that the Executive Director's response was that the said email had arrived later than expected with a promise to revert. She further averred that when she asked the HR Manager for feedback almost two months later, she received a second warning letter dated September 16, 2016, for alleged misconduct of leading members of staff on a walkout of an official function to a parallel one. That she then wrote an email on November 4, 2016 requesting for notes taken during the disciplinary hearing that resulted to the second warning letter but the Executive Director responded that no notes were taken. According to the Claimant, the said warning letters were unwarranted because none of her said actions amounted to misconduct as per clause 8.5 of the Respondent's HR Policies Manual. Furthermore, while she was the only one given a warning letter, other 10 members of staff had also left the venue of the gala event at about 11pm, way past official time and after all the planned events were over. That it was therefore evident that the Respondent's Executive Director specifically targeted her. She also submitted that regarding the first warning letter, a colleague named Sharon Mwangi went late to the bus after holding the team for 27 minutes but no similar action was taken against her.
4. The Claimant's averment was that on November 17, 2016, the HR Manager handed her a letter of suspension from duty until 8th December 2016. That the suspension followed EACC's investigations on an employment fraud by Mr. Abdullahi Ollow, who was supervised by her supervisee, Mr. Caleb Mbalukha and that it was made known to her that she was not under any investigation. That she nevertheless received an email from the Executive Director on December 11, 2016 at 19.32pm inviting her for a disciplinary hearing scheduled for December 13, 2016, seeking to know what information she had regarding the said employment fraud. She argued that the said process ought to have been done before she had been issued with the suspension letter. The Claimant further averred that on December 16, 2016, she again received an invitation letter to a hearing set for 9.00am on 19th December, for her to show cause why she should not be disciplined, as management was considering summarily dismissing her for not disclosing to it the employment fraud. That the Respondent substantially accused her of failing to inform the management that Mr. Abdullahi Ollow was employed by the Wajir County Government while serving as an employee of the Respondent. She contended that she had severally



sought to inform the Respondent's HR Manager about Mr. Ollow's employment status even before the said accusations were made to her. That she had initiated appropriate investigations, personally and through her assistant – Mr. Caleb Mbalukha, through a joint appraisal of the concerned individual. That she had even visited Wajir County and documented a formal engagement of the Steering Committee that was carrying out investigations on the issue and that her immediate supervisor, Mr. Nicolas Seris, was well informed of the matter and the steps taken. The Claimant's stance was that in order not to have parallel investigations, she let the HR Manager continue carrying out investigations on the employment fraud issue.

5. Further, the Claimant averred that on December 19, 2016, she responded to the Show Cause Letter and at 5.20pm on December 20, 2016, was invited to appear for a show cause hearing at noon the following day. She asserted that she had raised issues regarding the composition of the Disciplinary Panel for the disciplinary hearing of December 13, 2016 and contended that she was not accorded an investigative review hearing before the disciplinary hearing. That the Respondent conducted the said hearing before also considering a pending grievance she had raised at the board level regarding the unfair treatment of staff at the Respondent. It was the Claimant's averment that the Respondent proceeded to terminate her employment by a letter dated December 20, 2016 and that it generally failed to follow the disciplinary procedures set out in its HR Policies Manual. She further averred that the real reasons for the warning letters issued to her and her subsequent suspension and dismissal from employment was the stance she had taken in regard to certain issues that the Respondent's Executive Director was not comfortable with. The Claimant averred that she was neither accorded a chance to defend herself adequately as per policy nor informed or given a chance to appeal against the decision. That at the time of termination of her employment, she was earning a gross salary of Kshs. 250,000/- and that the Respondent declined to pay her terminal dues and benefits because she failed to inform the management of the employment fraud. That the Respondent's Executive Director also indicated to staff and third parties that she had issues of money and employment fraud thereby injured her reputation. The Claimant's claims against the Respondent are two (2) months' salary in lieu of notice, unlawfully withheld provident fund contributions for three (3) months, 12 months' salary for unfair termination of employment, and salary due to the end of the contract period.

Respondent's Case

6. The Respondent averred in its Memorandum of Defence and Counterclaim dated April 26, 2017 that the Claimant was summarily dismissed on grounds of gross misconduct as communicated to her in a notice to show cause and not because of her previous warnings. It argued that the grounds giving rise to the Claimant's dismissal were genuine, warranted and justified in the circumstances and that it in fact seeks a refund from the Claimant for the losses arising from her failure to report information that caused the Respondent loss and damage. The Respondent holds the Claimant liable for the loss of Kshs. 94,966.60 paid to Mr. Ollow as his monthly salary from August 2016 to September 2016, which amount it therefore claims from the Claimant. It noted that it is donor-funded and accountable to its donors with respect to its expenses.
7. The Respondent's case was that the Claimant was employed pursuant to a 1½-year non-renewable fixed-term contract effective from February 15, 2016. That the Claimant's contract was scheduled to end on 21st August 2017 unless otherwise extended by the Respondent as provided under clauses 6 and 3.7 of the Respondent's HR Policies Manual. It averred that whereas the Claimant's Line Supervisor conducted the Claimant's appraisal on June 22, 2016 and subsequently prepared a report outlining her progress and indicating that she required further partnership engagements, the said Line Manager did not recommend her confirmation. It confirmed that the Claimant's confirmation was further delayed because of disciplinary matters well within the Claimant's knowledge, in respect of her actions



during the Respondent's annual strategy review and planning retreat. In effect, that the Claimant absented herself from the Respondent's team on July 10, 2016 without notice to the said team and prior notification thereby holding up the team's progress for at least 45 minutes. Secondly, on or about 19th July the Claimant led some members of staff away to another Bar and Restaurant from an official gala dinner it had organized, before the close of the ceremony and without communicating to and/or seeking authorization from the Respondent's management. That the Claimant was the most senior member of staff who participated in the walkout and her disregard for the Respondent's Management and colleagues who had organised the event undermined the Organisation's efforts at team building. It was the Respondent's averment that the Claimant was issued with a second warning letter after she failed to provide satisfactory responses to the show cause why disciplinary action should not be taken against her. It argued that it was justified and acted procedurally in issuing the warning letters as the Claimant's behaviour and actions contravened its laid down rules and regulations. That the matters relating to the Claimant and her misconduct were not personal as alleged or at all and that she received her full pay during her suspension.

8. The Respondent averred that the Claimant's probation period was completed in September 2016 after its extension on the recommendation of her Line Supervisor and further deliberations by the management and that she was issued with a Confirmation Letter on September 5, 2016. Without prejudice to the foregoing, it maintained that Claimant was summarily dismissed based on information regarding one of her supervisees, Mr. Ollow, who had been working for the Respondent as well as the County Government of Wajir at the same time. That the Claimant had been informed of the said allegation by Mr. Ollow's immediate supervisor and whereas she had a duty to immediately notify the Organisation's management for appropriate action to be taken, she failed to do so. That it was not until the HR Manager called her to discuss the matter on November 3, 2016 that the Claimant then disclosed her knowledge of the issue. The Respondent averred that it subsequently wrote to the Wajir County Government inquiring on the status of Mr. Ollow's employment, whereupon it was confirmed that the County Government of Wajir appointed Mr. Ollow on January 22, 2016.
9. The Respondent further averred that the Claimant did not attend the disciplinary hearing scheduled for December 19, 2016 despite having received an invitation for the same on December 16, 2016 and a further invitation via email on December 20, 2016. That instead, the Claimant submitted a Grievance Submission to the Respondent's Board and Secretariat against the management, contrary to the Grievance Policy Guidelines at clause 8.6.4 of the HR Policies Manual. It asserted that on December 21, 2016, the management resolved to summarily dismiss the Claimant based on the investigations carried out, the disciplinary meeting and her written responses thereto and that her terminal dues were computed and paid accordingly. The Respondent submitted that whereas the Claimant had a right to appeal against the decision within five (5) working days from the date of the decision as provided under the HR Policies Manual, she failed to do so. It denied that the Claimant was subjected to discrimination and unfair treatment as alleged and contended that by her actions, it lost trust and confidence in her and that the relationship between them has irretrievably broken down. That the Claimant is thus neither entitled to reinstatement nor the other orders sought and that her case should be dismissed with costs to the Respondent and judgment entered for the Respondent against the Claimant for an Order that she pays it Kshs. 94,966.60 together with interest and cost.
10. The Claimant's reply to the Defence and Counterclaim dated June 8, 2017 was that she joined the Respondent Organisation in February 2016, long after Mr. Ollow had joined and that she neither recruited the said individual nor participated in his recruitment. She maintained that there is no proof that her supervisor or the Senior Management Team extended her probation period. She questioned why the Respondent waited almost two (2) months to conclude her responses concerning the accusation of leading staff out of an official function. The Claimant denied that she had based her



claim for wrongful and unfair dismissal on the warning letters and asserted that she had discussed the warning letters to demonstrate the Respondent's unfair treatment towards her prior to dismissal. She further denied that areas of improvement were brought to her attention, and maintained that she was not informed of the reason(s) of the suspension prior to receiving the letter of suspension. It was the Claimant's averment that she sought clarification as to whether the hearing of December 19, 2016 was a second disciplinary hearing and had also requested for a proper reconstitution of the Panel and evidence of the charges against her. She noted that both the Respondent's HR Policies Manual and the Letter of Dismissal did not state to whom an aggrieved employee may appeal. She denied the Counterclaim as pleaded, reiterating that she did disclose to the HR Manager the allegations Mr. Ollow's employment status at the earliest time. She thus prays that the Respondent's Counterclaim be dismissed with costs and judgment entered in her favour as per the Memorandum of Claim.

Claimant's Submissions

11. The Claimant submitted that she was denied a hearing and an opportunity to present her case in writing, as provided for under clause 8.2 of the Respondent's HR Policies Manual. That the responsibility for staff discipline is the primary responsibility of the Line Supervisor in consultation with the HR & Administration, in accordance with clauses 8.3.2 and 8.3.3 Respondent's HR Policies Manual. She noted that in this case, the Respondent's Executive Director sidestepped her Line Supervisor and the HR and Admin and proceeded to violate the Organisation's guidelines by disciplining the Claimant and singularly taking up the roles of accuser, prosecutor and judge. Furthermore, that the Disciplinary Committee consisted of the Executive Director and the HR Manager, contrary to clause 8.4 of the Respondent's HR Policies and Manual that provides for five (5) members. The Claimant cited the case of *Josbua Rodney Marimba v Kenya Revenue Authority* [2019] eKLR wherein the Court held that there cannot be a fair hearing where the committee sitting to hear the case is improperly constituted, biased, hostile to the accused employee, and denies such employee the right to face their accusers as provided under the contract of service.
12. The Claimant submitted that her dismissal from the Respondent's employ fell short of the threshold provided for in section 45 of the *Employment Act* of 2007 on fair termination of employment. That section 43 of the *Act* requires an employer to prove the reason or reasons for the termination, failure to which the termination shall be deemed to have been unfair within the meaning of section 45. The Claimant further submitted that an employee is entitled to adequate notice to respond to a show cause letter and to attend a disciplinary hearing/meeting and that an invitation letter must always inform an employee of their right under section 41 of the *Employment Act*. She argued that in this case, there was no sufficient time as she was only given a weekend to respond, and the meeting was then adjourned for one day. That the Respondent further failed to produce minutes of the disciplinary committee meeting in which the decision to terminate her services was made and in essence, the termination was a unilateral decision of the Executive Director. The Claimant cited the case of *APC Daniel Namunyu Obingo v National Police Service Commission* [2021] eKLR in which the Court observed that any disciplinary process, that does not give sufficient notice of the hearing and provide the charges and supporting evidence before hand in order for the intended respondent to prepare his defence, does not pass the test of fairness. It was the Claimant's submission that since the Respondent did not prove the reason for the termination of her employment, the dismissal was substantively unfair.
13. It was the Claimant's submission that section 49 of the *Employment Act* guides the courts in the remedies that can be awarded for unfair termination. That section 49(1)(c) provides that the employee may be paid, "the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal." That one of the factors the Court may consider include those under section 49(4)(f) and (g) on the reasonable



expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; and the opportunities available to the employee for securing comparable or suitable employment with another employer. The Claimant relied on the case of *D.K Njagi Marete v Teachers Service Commission* [2011] eKLR in which Rika J. awarded the claimant the equivalent of 12 months' salary in compensation for the unlawful and unfair termination of his employment. She argued that the Respondent in the instant case is thus obliged to compensate her to a maximum 12 months' salary, for the wrongful dismissal of her employment contract. That the Court should note that she did not contribute in any way to the termination and that her job is specialized and not easy to find. The Claimant further invoked the provisions of section 49(1)(c) of the *Employment Act* in regard to the prayer for general damages for discrimination and unfair treatment, and asked the Court to grant all the prayers sought in the Memorandum of Claim.

Respondent's Submissions

14. The Respondent submitted that parties to the instant suit agreed that they would address, by way of written submissions, the issue of whether the Claimant's Transcript of alleged recording of conversations is admissible. The Respondent's stance was that the Claimant's transcript of alleged recording of conversations is not admissible in evidence as stipulated under sections 78A, 106A and 106B of the *Evidence Act*. That the importance of a certificate of production of electronic evidence was underscored in *MNN v ENK* [2017] eKLR where the Court stated that the recording must be accompanied by a certificate by a person who occupied a responsible position in relation to the operation of the recording device or the management surrounding the recording and transcription thereof. It was the Respondent's submission that since the Claimant herein did not produce any certificate of production of electronic evidence in accordance with section 106B of the *Evidence Act* thereby rendering the Transcript in court is inadmissible, the Court ought to disregard the said transcript completely. The Respondent further submitted that the Claimant has infringed on the Respondent's Line Supervisor's right to privacy guaranteed under Article 31(d) of the *Constitution* of Kenya, by recording their telephone conversations without consent. That since the said audio recording amounts to illegally obtained evidence, it is not admissible before this Honourable Court as it only arose as a fishing expedition following termination of the Claimant's employment.
15. The Respondent submitted that the Claimant's failure to report a conflict of interest within her knowledge warranted the termination of her contract of employment, considering she had a duty to comply with clause 8(g) of the Respondent's Policies Manual. It noted that a court of law cannot rewrite a contract between parties who are bound by the terms of their contract per the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR. The Respondent further submitted that pursuant to section 47(5) of the *Employment Act*, it had proved that the summary dismissal of the Claimant on grounds of gross misconduct was lawful, justified and warranted and that due process was followed during the disciplinary process. That on the other hand, the Claimant had failed to prove to the required standard that her termination was unfair and unlawful and thus failed to establish a *prima facie case* that would shift the burden of proof to the employer – Respondent. It was the Respondent's submission that it had also complied with section 45(2)(a) of the *Employment Act* as it has provided the valid reasons that led to the Claimant's termination, and has also proved and justified the reasons for termination as required under section 43(1) of the *Act*. That it had also shown that the Claimant's disciplinary process was lawful in the circumstances and had been done in accordance with sections 41, 44 and 45(1)(c) of the *Employment Act*. It was the Respondent's submission that having found that the Claimant's summary dismissal was lawful, justified and followed due process, the Claimant is therefore not entitled to the reliefs sought. As regards the prayer for reinstatement, the Respondent asserted that the Court in the case of *Alexander Kiberenge Aderi v Devkan Enterprises Limited* [2018] eKLR declined the prayer for reinstatement because under section



12 of the *Employment and Labour Relations Court Act*, reinstatement cannot be ordered after the lapse of three (3) years from the date of dismissal. The Respondent further submitted that this Court lacks jurisdiction to award general damages for defamation, injured feelings and loss of reputation. It argued that jurisdiction flows from the *Constitution*, Statute or both and a Court cannot give itself that which is not given by law. Lastly, the Respondent submitted that the loss of Kshs. 94,966.60 was a direct consequence of the Claimant's breach of clause 8(g) of the Contract of Employment. It opined that the said loss would have not been incurred had the Claimant abided by her contractual obligations and reported the said conflict as the Respondent would have stopped its losses at that point. That the Court should consider that the Organisation is donor-funded and its donors shall hold it to account for the losses incurred as a direct consequence of the Claimant's actions and consequent breach of her contract. The Respondent thus sought costs of the suit because costs follow the event.

16. The Claimant was terminated for her alleged gross misconduct. The Court has disregarded evidence of recordings between the Claimant and her colleagues. The Respondent had employed the Claimant as a Programme Coordinator, Humanitarian Aid Integrity Programme. The matters leading to her termination were petty. The Respondent's position was that the Claimant walked out of a gala dinner held in Mombasa, the venue to which she had been accused of causing a 15 minute delay in crossing the ferry as she had gone for a health break at the Nakumatt situated near Likoni ferry. The attendance of gala dinners is not compulsory neither is an employee expected to attend the entire event if the employee is playing no meaningful role other than being an attendee. To expect an employee to sit through boring speeches in the cold ostensibly because it is a gala dinner would be a stretch and could amount to servitude and degrading and inhuman treatment. The Claimant was therefore not bound to sit through the entire event as she played no significant role. As such, being hauled before a disciplinary that did not accord with the provisions of the HR Manual of the Respondent in terms of composition exacerbated the poor judgment of the Respondent in handling the matter. The Executive Director and the HR Manager presided over an unlawfully constituted disciplinary committee as the quorum required for a disciplinary hearing in terms of the HR Manual of the Respondent was lacking. Returning to the alleged gross misconduct, the walkout from the gala dinner, if one can call an employee leaving a function that has overextended their hours such, would at most have only attracted a verbal warning, not even a written one nor a dismissal. As such, the court finds the Respondent did not have a valid reason for dismissal as required of an employer under section 43 of the *Employment Act*.
17. On the Respondent's counterclaim, the Respondent employed a Mr. Abdullahi Ollow who was found to have been serving the County Government of Wajir. The amount paid to him in salary was Kshs. 94,966.60 and it is this sum the Respondent seeks from the Claimant. The sum can be sought from Mr. Abdullahi Ollow and the HR Department of the Respondent as the Claimant did not play any role in the recruitment of the Respondent's employee. The Respondent's Officials were responsible for the hire and it is their failure to act on time to the information that led to the loss. In any event, the person who benefited from the salary is known. In my finding, the counterclaim is unmerited and is accordingly dismissed albeit with no order as to costs.
18. The Claimant sought a raft of reliefs in her claim. She asserts that she works in a rarefied field and therefore unable to secure alternative employ. The Claimant was terminated more than 3 years ago and is not a suitable candidate for reinstatement. She is equally not so advanced in age as to be unemployable and as such the most the Court can do is award her compensation in terms of section 49(4) of the *Employment Act*. She cited the case of *D.K. Njagi Marete v Teachers Service Commission* (*supra*) with which I am inclined to agree with. She would be entitled to 12 months' salary as compensation but just like in the foregoing case, she will not be entitled to payment of salary to the end of her contract. She did not prove defamation and injured feelings and therefore will not recover any damages in that regard. She could at least have called some evidence to demonstrate how her reputation suffered as a



result of the actions of the Respondent. Having neither particularised the damage to her reputation nor led any evidence to that end, the claim on that score is disallowed. She will have costs of the suit limited to her claim as the counterclaim was dismissed with no order as to costs.

19. In the final analysis I enter judgment for the Claimant against the Respondent for:
- a. A declaration and finding that the Claimant was wrongfully and unfairly dismissed.
 - b. Compensation equivalent to 12 months' salary – Kshs. 3,000,000/-
 - c. One month's salary as notice – Kshs. 250,000/-
 - d. Costs of the suit.
 - e. Interest on the sums in b) and c) above at court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2024

NZIOKI WA MAKAU

JUDGE

