



**Kenga v Plan International Kenya (Cause 655 of 2019)  
[2024] KEELRC 1237 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1237 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 655 OF 2019**

**L NDOLO, J**

**MAY 23, 2024**

**BETWEEN**

**NICODEMUS KENGA ..... CLAIMANT**

**AND**

**PLAN INTERNATIONAL KENYA ..... RESPONDENT**

**JUDGMENT**

1. Nicodemus Kenga, the Claimant in this case, was a long serving employee of Plan International Kenya, having been employed in 2004 as an Internal Auditor and rising through the ranks to the position of Global Assurance Senior.
2. The Claimant worked for the Respondent until 17<sup>th</sup> May 2019, when his employment was terminated, on allegations of breach of the Respondent's Code of Conduct. The termination forms the subject matter of this dispute.
3. The Claimant states his case in a Memorandum of Claim dated 30<sup>th</sup> September 2019 and the Respondent states its defence in a Reply dated 10<sup>th</sup> March 2020. The Claimant responded to the Respondent's Reply on 4<sup>th</sup> August 2020.
4. At the trial, the Claimant testified on his own behalf and the Respondent called its Senior Human Resource Coordinator, Grace Lintari. The parties further filed written submissions.

**The Claimant's Case**

5. The Claimant states that he was employed as an Internal Auditor in 2004. He was promoted to the position of Global Assurance Associate from 2007 and subsequently to the position of Global Assurance Senior from 2009.



6. On 1<sup>st</sup> August 2015, the Claimant was issued with a three year fixed term contract and in June 2018, his contract term was extended to 30<sup>th</sup> June 2021.
7. On 26<sup>th</sup> February 2019, the Claimant was recalled from Egypt where he was on official duty. On 14<sup>th</sup> April 2019, he was issued with a notice to show cause, stating that the Respondent had conducted an investigation into a sexual harassment complaint made against him. The show cause letter also invited the Claimant to a disciplinary hearing.
8. The Claimant pleads that he was not furnished with full information to enable him adequately respond to the allegations levelled against him. By a letter dated 17<sup>th</sup> May 2019, the Claimant was informed that his employment had been terminated.
9. The Claimant's case is that the Respondent had no valid reason to terminate his employment as the Disciplinary Committee had made a finding that he was not guilty of gross misconduct.
10. The Claimant accuses the Respondent of breaching the provisions of the Employment Act, citing the following particulars of breach:
  - a. Failing to furnish the Claimant with the allegations made against him so as to enable him prepare a defence;
  - b. Failing to furnish the Claimant with a report on the investigations conducted and the findings made;
  - c. Failing to accord the Claimant a fair hearing;
  - d. Terminating the Claimant's employment on grounds where no complaint against him had been made;
  - e. Failing to take into consideration the Claimant's defence and submissions in reaching the final decision;
  - f. Failing to take into consideration the finding made by the Disciplinary Committee;
  - g. Terminating the Claimant's employment without a valid reason and in violation of due procedure.
11. The Claimant's claim is as follows:
  - a. A declaration that the termination of his employment was unlawful and unfair;
  - b. Kshs. 13,380,250 being payment for the remainder of the contract from 1<sup>st</sup> June 2019 up to 30<sup>th</sup> June 2021;
  - c. Kshs. 6,425,880 being 12 months' salary as damages for unfair termination;
  - d. Damages for mental anguish and torture;
  - e. Costs plus interest.

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

12. In its Reply dated 10<sup>th</sup> March 2020 and filed in court on 11<sup>th</sup> March 2020, the Respondent admits that it had engaged the Claimant in the position of Global Assurance Senior Officer-Nairobi Regional Office, with his last contract set to run until 30<sup>th</sup> June 2021.



13. The Respondent further admits that the Claimant was recalled to Kenya, while on official duty in Egypt. The Respondent states that the recall was as a result of reports made in Egypt regarding harassment of female employees by the Claimant. According to the Respondent, the Claimant was recalled for his own safety. The Respondent avers that the recall was with the Claimant's knowledge and consent.
14. The Respondent states that pursuant to formal complaints by two female staff members in the Egypt office, revolving around alleged breaches of the organisation's sexual harassment policy by the Claimant, it undertook investigations to verify the veracity of the complaints.
15. The Respondent claims to have been supplied with sufficient evidence of the Claimant's inappropriateness and lack of respect and dignity when dealing with female members of staff.
16. The Claimant was issued with a show cause notice to which he duly responded. He was further invited to a disciplinary hearing on 25<sup>th</sup> April 2019, which he attended in the company of his witness.
17. The Respondent asserts that the Claimant was afforded a fair chance to be heard and his submissions were duly recorded. At the conclusion of the disciplinary hearing, the Respondent arrived at the conclusion that the Claimant's conduct amounted to a breach of the organisation's sexual harassment policy and the Claimant's employment was therefore terminated. The Claimant was informed of his right of appeal, which he chose not to exercise.
18. The Respondent's case is that the termination of the Claimant's employment was in compliance with the law and the organisation's Human Resource Policy and Procedure Manual. The Respondent states that the Claimant was paid all his terminal dues.

### **Findings and Determination**

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

### **The Termination**

20. The Claimant's employment was terminated by letter dated 17<sup>th</sup> May 2019 stating as follows:

“Dear Nicodemus

RE: Termination Of Employment

We refer to the incidences that occurred on the 24<sup>th</sup> to 26<sup>th</sup> February 2019, in Egypt, the show cause letter dated 15<sup>th</sup> April 2019, your response to the show cause letter dated 17<sup>th</sup> April 2019 and the disciplinary hearing held on 25<sup>th</sup> April 2019, whose proceedings were comprehensively documented, and confirmed as a true record of the discussions that took place by all present, including yourself.

Based on the outcome of the said disciplinary hearing, it was clear that you breached the Code of Conduct (CoC) of Plan International Inc (PII) contrary to the following sections:

- i. Section 1. B of the CoC “I will; Always act fairly and honestly and will treat people with dignity and respect”



- ii. Section 1. C of the CoC 'I will; maintain PII's professional reputation, upholding and complying with PII and Global policies and standards
- iii. Section 3. D of the CoC 'I will; Adhere to any professional code of conduct applicable to my role and profession.'

Your behavior, which included; unwanted physical contact (touching), insinuations about a person's private life and comments about someone's physical appearance, was offensive to the recipients.

According to Plan International Human Resources Policies and Procedures Manual, Chapter 11, Section 11.5.4, Offensive behaviour is a gross misconduct and constitutes summary dismissal.

Your actions amounted to a misconduct which warrants dismissal, however in your submissions during the hearing, you indicated that you had no intentions to offend. Because of your lapse of judgement in your intentions, this is what caused the misconduct, therefore we are reducing your sanctions from dismissal to termination with notice.

This letter therefore serves as a notice of termination from Plan International Kenya employment with effect from 16<sup>th</sup> June 2019. You will be paid salary in lieu of notice.

Your final dues will be paid as follows:

1. One month salary in lieu of notice
2. Salary for the days worked up to and including 16<sup>th</sup> June 2019
3. 13<sup>th</sup> month salary, prorated to up to and including 16<sup>th</sup> June 2019
4. Accrued annual leave days as at 16<sup>th</sup> June 2019

Your final dues will be paid subject to proper handover to your supervisor/designate any Plan property under your possession. In addition, you will be awarded a certificate of service.

Please note that you have the right to appeal within three (3) working days, as per the provision of Plan International Kenya Human Resources Policies and Procedures Manual.

Yours faithfully,

(signed)

Catherine Maina-Vorley

### **Country Director**

21. This letter accuses the Claimant of breaching several provisions of the Respondent's Code of Conduct. In particular, the Claimant is said to have breached the following provisions of the Code:
  - a. Section 1. B which required him to act fairly and honestly and to treat people with dignity and respect;
  - b. Section 1. C which instructed him to maintain the Respondent's professional reputation, while upholding and complying with its Global policies and standards;
  - c. Section 3. D which obligated him to adhere to any professional code of conduct applicable to his role and profession.



22. Prior to the termination letter, the Claimant had received a show cause letter, which also served as an invitation for a disciplinary hearing. The first letter dated 14<sup>th</sup> April 2019, made reference to a sexual harassment case against the Claimant. The letter states in part:

“The allegations made against you constitute breach of Plan International Code of Conduct for staff, Harassment, Bullying and Discrimination policy and the 2015 Plan International Kenya Human Resources Policies and Procedures Manual.

The above falls under Acts of Gross Misconduct according to the following provisions:

- a. 11.5.4 acts of gross misconduct of Plan International Kenya Human Resources Policies and procedures manual in regards to sexual or racial harassment.
- b. Harassment, Bullying and Discrimination policies, and
- c. Clauses 1, 3(e) of Plan International Code of Conduct for staff.”

23. Significantly, the charges presented to the Claimant by the show cause letter appear to have mutated in the course of the disciplinary process. This may explain the final finding, as communicated in the termination letter, that the Claimant was not in fact guilty of gross misconduct and was therefore not liable to summary dismissal but rather to termination with notice.

24. As held in *Thomas Joseph O. Onyango v State & another* [2014] eKLR variation of charges in the course of a disciplinary process amounts to violation of the right to due process. The reason for this is that the disciplinary process must be viewed as indivisible where the employee is taken through several steps before a final decision is made either holding them culpable or absolving them. This cannot be achieved where the charges keep mutating.

25. In his final submissions dated 29<sup>th</sup> February 2024, the Claimant referred to the decision in *Zephania O. Nyambane & another v Nakuru Water & Sanitation Services Company Limited* [2013] eKLR where Ongaya J stated as follows:

“...the court holds that where the particulars of the alleged misconduct keep varying during the employer’s administrative disciplinary process, the employee is thereby disadvantaged from preparing for his or her effective defence towards self exculpation. In such cases, it is the view of the court that the employer fails to demonstrate good faith in invoking the disciplinary procedure and it is justified for the employee to infer bad faith calculated to lead to imposition of a punishment including dismissal at all costs and means. The court holds such to be unfair disciplinary process falling short of due process of justice. Further, where the reasons alleged in the notice to show-cause letter are substantially at variance with the reasons for termination...the court holds that the reasons for the termination must be found to have been invalid and the termination therefore unfair.”

26. Regarding the right of an employee to defend themselves, this Court, in its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture & Technology* [2014] eKLR stated 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.”

27. This is the essence of Section 41 of the *Employment Act*, which provides as follows:
- (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.
28. There is evidence on record that the Claimant asked to be supplied with details of the charges levelled against him. In particular, he sought documentary evidence, including statements by the complainants, none of which was supplied. The Claimant referred the Court to the decision in *David Wanjau Muhoro v Ol Pajeta Ranching Limited* [2014] eKLR where Rika J held that the principle of fair hearing entails; the right to sufficient time to prepare, the right to fully understand the charges and the right to documentation.
29. The Claimant further complained about the haste with which his case was handled. In this regard, he fingered the manner in which he was whisked away from Egypt, the scene of the alleged infractions. What is more, the Claimant was never allowed a chance to meet his accusers.
30. My reading of the record of the proceedings of the disciplinary hearing conducted on 25<sup>th</sup> April 2015, reveals that the Claimant was questioned about some comments made by him to some members of staff, touching on the shoulder and what was referred to as ‘warm handshaking’.
31. What the Respondent should have done was to place these actions in context, by facilitating an encounter between the Claimant and his accusers. The Claimant himself told the Disciplinary Committee that one of the complainants had invited him to dinner, which he declined. To my mind, this was a significant piece of information which ought to have been interrogated, by summoning the complainant to testify in the presence of the Claimant.
32. The record of the disciplinary proceedings states inter alia:
- “On being asked for her comment, Rose, Nicodemus witness said that the investigating team seemed more pro Sussanna and that she felt that some of the things Nicodemus was purported to have said to Sussanna may have come up as he was given space to do so.”
33. The Disciplinary Panel appears to have dismissed the concerns raised by the Claimant and his witness and proceeded to conclude the hearing without availing an opportunity to the Claimant to cross examine his accusers.
34. In his witness statement dated 30<sup>th</sup> September 2019, the Claimant states that from the month of March 2019 to May 2019, all the assignments that he was supposed to undertake were withdrawn from his portfolio, ostensibly because he was under investigation. The Claimant rightly took this as a strong indication that there was a pre-determined decision against him.



35. The only conclusion to make in the circumstances of this case, is that the disciplinary process initiated and concluded by the Respondent did not meet the threshold set by Section 41 of the Employment Act. Further, the charges levelled against the Claimant, which kept mutating, were not proved at the shop floor as required under Section 43 of the Act.
36. I therefore find and hold that the termination of the Claimant's employment was substantively and procedurally unfair.

### **Remedies**

37. Flowing from the foregoing, I award the Claimant twelve (12) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this award, I have considered the Claimant's long service and the slim chances of him getting a similar employment in the foreseeable future. I have further taken into account the Respondent's violation of the Claimant's right to fair hearing.
38. No basis was established for the claims for payment for the remainder of the contract and damages for mental anguish and torture, which therefore fail and are disallowed.
39. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 6,425,880 being 12 months' salary in compensation for unlawful and unfair termination of his employment.
40. This amount will attract interest at court rates from the date of judgment until payment in full.
41. The Claimant will have the costs of the case.
42. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Anzala for the Claimant

Ms. Wamuyu for the Respondent

