



**Owuor v Practical Action (Cause E824 of 2022)
[2024] KEELRC 1647 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1647 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E824 OF 2022
NZIOKI WA MAKAU, J
JUNE 25, 2024**

BETWEEN

GEORGE GODFREY OPIYO OWUOR CLAIMANT

AND

PRACTICAL ACTION RESPONDENT

JUDGMENT

1. The Claimant filed his Memorandum of Claim dated 11th November 2022. In it, the Claimant raises issues of wrongful and unfair termination of his services and failure by the Respondent to pay terminal benefits to him. The Claimant avers that he is a former employee of the Respondent, which is a non-governmental organization duly registered under Kenyan laws. He averred that the Respondent employed him as a Project Officer – Gender and Advocacy through a written two-year contract from 18th November 2019 and on a monthly salary of Kshs. 164,431/-. That he diligently served the Respondent until 26th October 2020 when it unlawfully and wrongfully summarily dismissed his services.
2. The Claimant’s case was that on 13th July 2020, the Respondent put him on compulsory leave from a duty for a period of two (2) months pending investigations on complaints and allegations made against him. He averred that he received a letter from the Respondent on 1st September 2020 inviting him for a disciplinary hearing on 7th September 2020, after he was found guilty of the allegations of sexual assault and breach of terms of administration leave by contacting other persons involved in the investigations. He avers that he attended the disciplinary hearing as scheduled and on 11th September 2020, received a letter confirming that the committee had found him guilty of the aforementioned two allegations and had thus summarily dismissed him from employment on grounds of gross misconduct. The Claimant further averred that he wrote an Appeal that was allowed vide a letter dated 16th October 2020, in which the Respondent’s CEO stated that the Claimant be furnished with the written summary of the information and be allowed to present a witness as the Committee had failed to grant him these



requests. On 26th October 2020, the Claimant received a letter communicating the outcome of the fresh disciplinary hearing held on 23rd October 2020, to effect that his employment was terminated on grounds of gross misconduct effectively from 26th October 2020. The Claimant contended that the termination was malicious, unlawful and unfair because the outcome of the two disciplinary hearings was predetermined.

3. The Claimant therefore prays for judgment against the Respondent for:
 - a. A declaration that the termination of the Claimant's services by the Respondent was unlawful and unfair.
 - b. An order to have the Respondent expunge all records of sexual assault, defamation and all other allegations.
 - c. The sum of Kshs. 1,973,172/- being salary for the remainder of the contract.
 - d. Cost of this suit.
 - e. General damages.
 - f. Spent.
 - g. Any other or further remedy this Court deems just and expedient to grant.
4. The Claimant further asserted in his Supplementary Witness Statement dated 5th May 2023 that the letter sending him on compulsory leave did not reveal the nature of the complaints against him and he was not aware of the misconduct. The Claimant averred that it happened that the HR Managers and Regional Director who issued the said letter to him had called him to the Kisumu Region Office at about 1800hrs, past working hours and without any explanations. That his journey was not facilitated as is the norm and considering the location was remote, he needed accommodation that was facilitated by one Ms. Farida Bulhan, who sent him the funds directly from her Mpesa account and which was not the norm. That moreover, they did not explain to him the reasons for the administrative leave, on which period he in fact continued working. The Claimant noted that third allegation levelled against him was that of collaborating with another staff member in an attempt to misrepresent the complaints procedure and influence the reporting of a complaints.

Respondent's Case

5. The Respondent averred in its Memorandum of Response dated 7th December 2022 and the Witness Statement made by Mr. Richard Powell on 25th February 2024, that the Claimant's Claim as filed is frivolous, vexatious, incompetent, fatally defective ab initio; incurable and the same should be struck out. It averred that the Claimant was dismissed from employment after being found culpable of engaging in acts of sexual assault against his colleague, an act that constituted gross misconduct warranting his dismissal.
6. The Respondent argued that prior to the dismissal, it accorded and or subjected the Claimant to a due and fair process by placing him on administrative leave with pay so as to pave way for investigations, invited him to appear before an independent investigator and summoned him to a disciplinary hearing. Furthermore, the Claimant's Appeal was allowed and he was reinstated with several recommendations made to ensure he was accorded a fair hearing during the fresh disciplinary hearing. That the Notice for the fresh disciplinary hearing was served upon the Claimant accompanied with an Investigation Report dated 20th August 2020 and he was allowed to tender in his defence and call a witness in support of his defence. In further response thereto, the Respondent averred that upon the Claimant's dismissal



from employment, he was duly paid his outstanding pay/salary up to and including his last day of employment and also issued with a Certificate of Service. It was the Respondent's averment that based on the gross misconduct committed by the Claimant, there existed valid and sufficient grounds to take disciplinary action against the him. That consequently, the Claimant is not entitled to payment of damages of unfair and or unlawful dismissal and that his suit should be dismissed with costs.

7. Evidence

The Claimant confirmed in cross-examination that he was issued with a Certificate of Service of 11th November 2020 and that he was paid. He asserted in re-examination that he never received a notice to show cause. On the other hand, the Respondent's witness, Mr. Richard Powell (RW1) stated that being an independent consultant on sexual abuse cases in the development sector, he advised the local advisors appointed by the Respondent and they undertook investigations in line with fairness. He confirmed that the allegations against the Claimant included that he sexually harassed and attacked a female member of staff at a training event. Whereas RW1 asserted in cross-examination that a report was lodged with the police on the sexual assault, he confirmed that they had not furnished such report and OB to the Court.

8. Claimant's Submissions

The Claimant's submissions were premised on two issues:

- a. whether the procedure to release the Claimant was adhered to and
- b. whether there were substantive grounds for termination.

9. On the issue of procedure, the Claimant submitted that the Respondent has not proved that he was accorded due process in the termination of his employment. He relied on the case of *Galgalo Jarso lillo v Agricultural Finance Corporation [2021] eKLR (Cause 13 of 2019)* wherein the Court declared the termination of the claimant's contract of service unfair only to the extent of the Respondent's failure to prove that it afforded the claimant procedural fairness in processing his release. He also cited *Freddy Kipkorir Lang'at v Co-operative University of Kenya [2021] eKLR (Cause 148 of 2020)* in which the Court quoted the case of *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR* and awarded the claimant therein 5 month's salary as compensation together with costs and interest. The Claimant in the instant suit urged this Court to find that the Respondent failed to justify the termination by failing to show whether they afforded him due process.

10. As to whether there were substantive grounds for termination, the Claimant submitted that further to there being no mention of the police report or OB number in the Investigation Report, no explanation was given as to why the Respondent did not consider the available evidence of a CCTV footage or the testimony of the hotel manager who was with the Claimant at the night of the alleged offence. He noted that the Respondent did not also explain whether the room the Claimant was in was corroborated in the complainant's witness statement.

11. The Claimant cited section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required 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. That further under section 47(5), the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. The Claimant urged this Court to thus find that the Respondent did not discharge its burden in proving that there was a valid reason for termination of his employment. He relied on the case of *Riley Falcon Security Services Limited v Bosire (Appeal E015 of 2023)* [2024] KEELRC 259



(KLR) wherein Baari J. cited the decision of the Court in *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR that in other words, the respondent bears the evidential burden of rebuttal and if the employer is unable to rebut the evidence by the claimant, the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities. In concluding, the Claimant maintained that he should be granted Kshs. 1,973,172/- being salary for the remainder of the contract, as compensation for unfair termination together with costs and interest.

Respondent's Submissions

12. According to the Respondent, the following issues emerge for determination:
 - a. Whether the Claimant committed acts of misconduct that warranted him to be subjected to a disciplinary process;
 - b. Whether the Claimant was subjected to a disciplinary hearing that was done in accordance to the law; and
 - c. Whether the Claimant is entitled to the reliefs sought in the Statement of Claim.
13. It was the Respondent's submission that section 43(2) of the *Employment Act* defines the reason for dismissal as, '...the matters that the employer at the time of termination of contract genuinely believed to exist, and which caused the employer to terminate the services of the employee'. On this submission, the Respondent relied on the analysis of the Court in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR and by the Court of Appeal in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR. The Respondent maintained that it did satisfy the limb of substantive fairness; having demonstrated that there existed reason(s) that made the Claimant be subjected to a disciplinary process; and the reason(s) were valid and fair as they related to the Claimant's conduct, capacity and compatibility with regards to his work.
14. As regards the standard of proof, the Respondent submitted that it is trite that employment claims are civil in nature and the standard of proof is thus on balance of probabilities. That equally, the test of reasonableness also applies as envisaged under section 45(4)(b) of the *Employment Act*, to the extent that the dismissal will be unfair if, '(b) it is found out that in all the circumstances of the case, the Respondent did not act in accordance with justice and equity in dismissing the Claimant from employment'. The Respondent argued that therefore in dealing with an employment misconduct touching sexual misconduct, the Respondent's Disciplinary Committee was not sitting as a criminal court so as to require the OB number and or/investigation report from the police to enable it apply the standard of beyond reasonable doubt. That the absence of the OB number or police investigation report did not and/or cannot diminish the fact that the Claimant committed a sexual misconduct that is an employment misconduct as per the Respondent's Code of Conduct. It further argued that firstly, a criminal trial or proceedings and internal disciplinary proceedings at the work place are two distinct processes with different procedural and standard of proof requirements or thresholds; and secondly, while the Respondent may choose to rely on reports made or lodged with the police to make its decision on an employee's misconduct, failure to produce the OB or police investigation report do not, by itself, render the Respondent's decision to dismiss the Claimant wrongful or unfair. The Respondent cited the decision of the Court in the case of *Nelson Mwangi Kibe v Attorney General* [2003] eKLR (Civil Appeal No. 164 of 2000), as approved by Waki JA in the case of *Hon. The Attorney General & another v Maina Githinji & another* Nyeri Court of Appeal No. 21 of 2015 (UR), that:

“acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two



distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.”

15. On the allegation that the Respondent failed to consider the CCTV footage or the testimony of the Hotel Manager, the Respondent submitted that if the Claimant felt that the CCTV footage would have exonerated him from the allegations of sexual misconduct, nothing prevented him from sourcing the said footage from the hotel and tendering it as part of his defence. It relied on the case *Patrick Abuya v Institute of Certified Accountants of Kenya (ICPAK) & another* [2015] eKLR wherein the Court found that unless circumstances warranted, an employer was not expected to hold a mini-court in the name of disciplinary hearing and that an employee desirous of making reference to documents or records by an employer has to make that request at the first instance. It was submitted by the Respondent that it adhered to section 41 of the *Employment Act* before dismissing the Claimant, as demonstrated in its pleadings. It cited the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR wherein the Court held at paras 64 to 66 that:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

16. The Respondent submitted that given the Claimant's dismissal was premised on gross misconduct, he is not entitled to payment of damages of unfair and or unlawful dismissal. It urged this Court to therefore dismiss the Claimant's Claim in its entirety with costs.
17. This case hinges in large part, on the construction of sections 43, 45 and 47 of the *Employment Act*. The Respondent asserts it had the benefit of section 43(2) which provides that it suffices for an employer to demonstrate that it had in place the matters that the employer at the time of termination of contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. The Respondent seems to have genuinely believed some information availed to it by the complainant but failed to demonstrate why it chose to believe the version availed by the complainant and disregard the testimony of 5 others. The Claimant was accused of sexual assault and there is opaqueness in relation to the same. The Claimant was only furnished with a summarized account of what was said by 5 of the 9 witnesses. It is unclear whether the statements of the 4 exonerated the Claimant and whether the statements/information excluded in the summarized account exonerated the Claimant or not. Since the Claimant knew the identity of the complainant, there was no need to cover the entire matter in a shroud of secrecy. Whereas the Court will not indicate the identity of the complainant, it is clear from proceedings before the disciplinary committee that the Claimant was aware who had made the allegation. The 4 supporting witnesses are not identified and even if their evidence was availed with names redacted, it would have been adequate to show whether the Claimant was culpable or not. In the defence placed before the disciplinary panel, the Claimant poked sufficient holes in the 'evidence'



by the complainant as the reports that were alleged to have been delivered in his hotel room on 24th June 2020 were actually meant to be information only available at the end of the training on 27th June 2020. That in fact, the complainant sent these on 29th June 2020 via email thus displacing the notion that the Claimant had sought delivery of the information in his hotel room a few days before. The evidence the Respondent had in its possession was unable to clearly connect the Claimant to the allegations of misconduct and in my considered view did not warrant a dismissal.

18. Section 43(1) of the Employment Act provides that in any claim arising out of termination of a contract, the employer is required 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. That means the reason has to be proved. Making the allegations as was done was sufficient to trigger investigations. It however falls short of proving the allegation where the employer declines to avail evidence of the misdeed the employee is accused of especially when the misconduct alleged is so grave as to tank a career or end in termination of services. Even where the employer genuinely believes certain facts to exist, some degree of proof is required. While it is appreciated that the elements of a trial are not necessary in an employment situation, there must be cogent proof that the employer relies on, not mere allegations. If that standard was lowered to allow allegations to stand as proved with nothing more, there would be catastrophe at the work place. It is apparent that under section 47(5) of the Employment Act, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee. In this case it is clear the Claimant has discharged this and the Respondent failed to discharge its burden under section 47(5) of justifying the grounds for the termination of employment. Having failed to do so, what is the remedy the Claimant is entitled to? The Claimant received his terminal dues and even received the Certificate of Service during the pendency of this case. He is not entitled to any payment for the balance of his contract as he is not rendering any service to the Respondent. Additionally, the contract he had did not provide for continued salary payments regardless of the termination of the contract. It is trite that employees do not obtain payment of the sums due on the balance of the contract automatically. Exceptions are there but there must be sufficient basis for such an award and there is none in the case before me. That means that the only issue that remains would be compensation for the unlawful dismissal. Section 49 of the Employment Act provides the parameters to guide a court on the award of damages for unlawful dismissal. Having taken into consideration the efforts the Respondent made to ensure a fair hearing, despite the manifest failure to avail adequate proof, an award of 3 months salary as compensation would suffice. The Claimant shall be entitled to costs of the suit limited to this amount. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. Kshs. 493,293/-.
- b. Costs of the suit based on the sum above.
- c. Interest at court rates on the sum in (a) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

