



**Mwanji v Kenya Revenue Authority (Cause E610 of 2020)
[2024] KEELRC 1469 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1469 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E610 OF 2020
NZIOKI WA MAKAU, J
JUNE 13, 2024**

BETWEEN

MAJ (RTD) NICHOLAS MAYENZE MWANJI CLAIMANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated 1st October 2020, the Claimant filed this suit against the Respondent Authority for the wrongful, unlawful, unfair and unconstitutional termination of his contract of employment. He averred that he was an employee of the Respondent having joined the institution on 17th July 2007 as a Principal Security Officer and expert on security issues. That in August 2015 while serving as a Supervisor, he was transferred to the Headquarters at Times Tower to serve as the Head of the Security and Safety Operations Unit of the Security Division that covered all security operations countrywide. On 22nd November 2016, he was promoted due to exemplary performance and that at the time of termination of his employment on 24th May 2019, he was the Manager In-Charge of Security Operations at the Respondent earning a gross salary of Kshs. 340,000/- plus a monthly telephone airtime of Kshs. 5,000/-.
2. The Claimant's case was that while he was on leave in December 2017, the Respondent arbitrarily transferred him from the docket of Manager Security Operations countrywide to Manager Corporate Business Center, Upper Hill. He stated that the transfer was effected without notice to him and was calculated at demoralizing as well as frustrating his employment performance since it did not conform to the KRA HR Policy of one remaining in a station for at least three (3) years before being transferred. He contended that in October 2018, he faced harassment from his superiors at the Authority in form of internal investigations into the duties he carried out as a security manager at the Authority. The Claimant averred that through a letter dated 5th February 2019, he was again unceremoniously transferred from the Respondent's Headquarters through Corporate Business Center at Upper Hill



Branch to an inferior docket of the KRA Sub-Office Branch at Sameer Business Park along Mombasa Road. That the said transfer being the second within a period of one year was contrary to the Respondent's guidelines on transfers and was further constructively a demotion from the position of Manager In-charge of Security Operations to Supervisor In-charge of Security in the said Sub-Office. It was the Claimant's averment that after he questioned whether the transfer was a demotion, he was served a Letter on 7th March 2019 requiring him to show cause why he should not be dismissed from employment for gross misconduct for actions he allegedly carried out in 2017.

3. The Claimant further averred that on 14th March 2019, the Respondent sent him on compulsory leave allegedly to allow for investigations into a case of gross misconduct he was accused of that is, criminal activities and embezzlement of funds allocated to the security department during Kenya's General Election in 2017. He responded to the said allegations through a letter dated 21st March 2019 detailing the operations and how the funds in question were spent. The Claimant stated that on 29th March 2019, he received formal communication to appear before the Disciplinary Panel and on 4th April 2019, he attended the hearing of his case. That notably, an officer of a junior rank on the said Panel was one of the witnesses in the matter before the Panel and that when he raised concern about the irregular presence of the junior officer in both the Panel and as a witness, his complaint was dismissed and the hearing proceeded. He contended that he was not informed of his right to call a witness in his defence and that his request to call the police commander that distributed the subject funds to the various police officers in the regions was dismissed by the Panel Chair. The Claimant stated that subsequently vide a letter dated 24th May 2019, the Respondent terminated his services and that while seeking to appeal against the said decision, his requests to be furnished with minutes of the disciplinary committee were denied. That his Appeal was also thereafter dismissed without him being accorded a chance to prosecute it and no committee was constituted to hear his Appeal contrary to clause 11.3 of the Respondent's Code of Conduct.
4. According to the Claimant, the termination of his services was unlawful since he was unfairly accused of forgery, fraud and embezzlement of funds from the Respondent yet he was never investigated or charged of any criminal offence, from the said allegations, before a court of law. He contended that save for the said termination, he would have worked until his retirement age of 60 years based on his exemplary performance over the years. He averred that the Respondent unlawfully surcharged him and deducted Kshs. 398,000/- from his dues and particularised the unfairness and malice he asserts against the Respondent Authority. The Claimant thus seeks unconditional reinstatement to his workplace without loss of salaries, allowances and benefits or seniority. In the alternative, he seeks that the Respondent pays him his accrued and terminal dues, general damages for pecuniary loss suffered, compensatory damages plus anticipated salary up to retirement age, aggravated or punitive damages for harm to reputation, gratuity pay, service, 12 months' salary compensation for the unfair dismissal, and refund of the amount surcharged. Furthermore, the Claimant prays for declaratory orders against the Respondent, as set out in the Statement of Claim and that the Respondent pays him the unpaid leave allowance for the unutilized days.
5. In his Witness Statement, the Claimant further asserted that neither was he accorded an opportunity to call a document examiner nor was his handwriting analysed against the questioned documents and that the finding of forgery made against him was biased and unlawful. He stated that he was due for promotion to the next higher rank but did not get the chance to due to the aforementioned harassment by his supervisors and the eventual termination of his services. The Claimant also filed a Further Witness Statement wherein he gave an account involving the subject funds he is said to have embezzled.
6. Respondent's Case



The Respondent averred in the Statement of Response dated 19th November 2020 that the Claimant was employed on probationary terms with effect from October 2007 and that his appointment was confirmed to permanent and pensionable terms of service on 1st April 2008. It stated that it conducted an investigation into alleged misappropriation of the Authority's funds by the Claimant, whose findings were released vide an Investigation Report Ref: KRA/IAD/RPTSA/OL.X/2B/226 dated 29th January 2019. That the said Investigation Report established that he embezzled or misappropriated the Authority's contingency funds amounting to Kshs. 398,000/- meant for outsourcing of armed security personnel to beef up security during the 8th August 2017 General Elections.

7. The Respondent's stance was that following the disciplinary proceedings held on 4th April 2019, the Claimant was found culpable for the offenses he had been charged with and his services were then terminated on account of gross misconduct. It acknowledged having received an Appeal Letter dated 20th June 2019 against the termination of the Claimant's employment and making a determination on the Appeal vide a letter dated 26th August 2019, declining the same on the ground that no new evidence was adduced to warrant a review of its earlier decision to terminate his services. The Respondent also noted that the Claimant had since cleared with the Authority and that it had fully settled his dues in October 2019 as evidenced by the Payment Schedule dated 23rd October 2019.
8. On the allegation that the Claimant was denied his request to call the Police Commander who distributed the subject funds, the Respondent averred that there was no evidence showing the stated request was made, which in any event would be contrary to the provisions of Part 11.1.4 of the KRA Code of Conduct. As regards the allegation that it refused to avail the Claimant with Minutes of the Disciplinary Committee, it asserted that it invoked the provisions of section 6(5) of *Fair Administrative Action Act*, 2015. The Respondent posited that it explained to the Claimant the reasons for terminating his services and that the same was communicated to him in his Letter of Termination. Further, that the Disciplinary Panel was properly constituted and it adhered to the dictates of a fair procedure in according the Claimant a fair hearing. It further averred that it no longer required the services of the Claimant as his employment was terminated in line with the law and his Contract of Employment. That it indeed deducted Kshs. 398,000/- from the Claimant's final dues being the loss he occasioned to the Authority and that there was no guarantee that the Claimant would have continued in employment till the retirement age of 60 years to warrant the award of compensatory damages as pleaded. The Respondent prayed that the Claim herein be dismissed with costs.
9. The Claimant's rejoinder in his Reply to the Statement of Response dated 14th December 2019 was that the alleged investigation was full of witch-hunt and stage managed to vindicate and victimize him, thus culminating to unjustified and unreasonable findings. He asserted that he had not been paid all his dues in full hence the instant Claim. He argued that the decision not to give him Minutes of the Disciplinary violated his constitutional rights of access to information and the right to fair administrative action and that the Respondent is estopped from relying on section 6(5) of *Fair Administrative Action Act*, 2015. The Claimant prays that the Respondent's Statement of Response be struck out with costs and judgment entered for the Claimant against the Respondent as prayed in the Claim.

10. Claimant's Submissions

The Claimant submitted that the issues arise for determination before this Honourable Court are whether or not the Claimant was unfairly terminated from employment and whether or not the Claimant is entitled to the prayers sought. It was the Claimant's submission that he stated in his evidence that he presented payment schedules to the Finance Department and was cleared and that he accounted for the imprest money received in the payment schedules. Further, he stated that the



Investigating Officer did not bother to get any statement from each of the officers listed on the alleged suspect payment schedules or at least a majority of them, to ascertain the veracity of the claims that they were not paid. He stated that he did not forge any document presented to the Respondent and that he was cleared by Finance having followed the procedure and having submitted the payment schedules not questioned at the time. That he was never accorded an opportunity to call a document examiner and neither was his handwriting analysed against the questioned documents, meaning the finding against him on forgery was biased and unlawful.

11. The Claimant cited section 43 of the [Employment Act](#) on proof of the reasons for termination by employment and section 45(1) of the Act, which provides that no employer shall terminate the employment of an employee unfairly. He relied on the case of [Elizabeth Kioko v Beyene Haire Warde & another](#) [2018] eKLR where, in support of her case, the claimant employed the provisions of section 45 of the [Employment Act](#). The Claimant further cited the authority of [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR where the Court observed that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. He posited that since the Respondent did not show any evidence that proves these allegations against him and failed to prove the reason for dismissing his employment, the termination was unfair and unlawful. As regards fair procedure, the Claimant submitted that by the time he was being sent on compulsory leave to allow investigations to be carried out, the investigations had already been done and concluded. That he was not given notice for the intention to terminate his services and his supervisors perpetually harassed him and that he was never heard on his appeal and was not afforded a report of the disciplinary proceedings. That evidently, the Respondent failed to provide reasonable and procedurally fair administrative action as provided for in Article 47(1) and (2) of the [Constitution](#) of Kenya. That the Respondent also contravened his right to fair labour practices, fair remuneration and reasonable working conditions as provided for in Articles 41(1), (2)(a) and (b) of the [Constitution](#).
12. The Claimant submitted that having asserted that his employment was unlawfully terminated due to failure by the Respondent to comply with both procedural fairness and substantive justice, this Court should find that he is entitled to the prayers sought in the Statement of Claim. That the Respondent had failed to demonstrate the requirements of sections 45(2) and 47(5) of the [Employment Act](#), which affirm that the burden of justifying the grounds for termination of employment or wrongful dismissal lies with the employer. He asked the Court to reinstate him to his job given his exemplary service during his term of employment and reiterated his entitlement to the other claims as sought. The Claimant urged the Court to consider the harsh economic times, inflation and his suffering as a result of the Respondent's actions and to award Kshs. 47,260,000/- as general damages plus salary that he would have earned for 11 years and seven months up to retirement of 60 years at the rate of Kshs. 340,000/- per month. That he is also entitled to 12 months' salary or wages for the unfair termination as under section 49 of the [Employment Act](#) and that having explained how the surcharged amount of Kshs. 398,000/- was spent and cleared by Finance, he is entitled to a refund of the same. He further submitted that he is entitled to his unutilised leave days as provided under section 28(1)(b) of the [Employment Act](#) and to costs of the Cause because costs follow the event.
13. Respondent's Submissions
It was the Respondent's submission that in line with section 41(1) and (2) of the [Employment Act](#), 2007, the Claimant made his oral representation at a disciplinary meeting following an invitation letter. That part 11.1.4 of the KRA Code of Conduct provides that an employee with a disciplinary case shall be entitled to have another employee of his choice present during the explanation. That the Court ought to note that, the said Police Commander was not an employee of the Authority to accompany the Claimant as a witness to his disciplinary hearing. Moreover, it should be noted that the said issue was



not raised in the Claimant's response to the Show Cause Letter issued to him. The Respondent further submitted that the reasons for terminating the Claimant's services were meritoriously communicated to him in the Termination Letter dated 24th May 2019, in line with the provisions of Article 47(2) of the Constitution of Kenya, 2010. On the issue that the Claimant's Appeal was dismissed without him being accorded a hearing, the Respondent reiterated that the said Appeal did not adduce any new grounds or evidence to warrant for appeal hearing, as per clause 9.1.6 of the KRA Code of Conduct, and which was communicated to the Claimant vide the letter by the Commissioner General dated 26th August 2019. It relied on the case of Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR wherein the Court of Appeal found that the fairness of a hearing is not determined solely by its oral nature and may be conducted through an exchange of letters.

14. Additionally, the Respondent submitted that the Claimant was lawfully terminated from employment pursuant to section 44(4)(c) and (g) of the Employment Act, 2007 as well as clauses 5.6.5, 6.1.2.2.1, 6.1.2.2.13 and 6.1.2.6.12 of the Respondent's Code of Conduct. That the said termination of employment was based on both reasonable and valid grounds and that clearance by the Finance Department does not absolve the Claimant from the charges, considering the Report of the document examiner was released way after the surrender had been approved. The Respondent submitted that the issue of re-deployment or transfers was not arbitrary but in exercise of the managerial prerogative of the Respondent and that the Claimant never lodged any grievance of harassment to the Human Resources Department, as enshrined in clause 12.1 of the Code of Conduct. The Respondent submitted that under Part 3.1.1, 3.1.2 and 3.1.5 of the Transfer Policy, the transfer/deployment/redeployment exercise shall be guided by the staffing needs based on workload analysis, established skills requirements and focus on critical service delivery points. The Respondent thus concluded that considering its submissions, the instant Claim lacks in merit and ought to be dismissed with costs.
15. The Court has considered the testimony adduced, the pleadings of parties as well as the submissions made and case law in coming to this decision. It is common ground that the Claimant was dismissed as a consequence of surrender of imprest. As indicated in proceedings before the Court, there was money issued to the Claimant for distribution to various personnel some of whom were colleagues and others who were working externally. It was for covert and overt operations and after the exercise the money disbursed was to be accounted for through the surrender process in place. The Claimant is alleged to have misappropriated a portion of the funds and failed to properly account for it.
16. The Respondent is said to have failed to accord the Claimant a fair hearing. It is trite that no employer shall terminate the employment of an employee unfairly. As such, the process undertaken to the discipline of an employee must be in accordance with the provisions of the law. In particular section 41 provides the safeguards an employee enjoys. The Claimant was entitled to be heard. In the evidence adduced before the Court, the Claimant was issued a show cause notice and heard on the matter. He was given the safeguards in section 41 and in accord with the rules of natural justice. He was not condemned unheard. The Claimant was allowed to be accompanied by an employee of his choice and he did not call one. Neither did he indicate the manner the Respondent denied him such opportunity if indeed he was not permitted to do so. As held in the case of Kenya Revenue Authority v Menginya Salim Murgani (*supra*), a hearing can be on correspondence. In my considered view, a hearing that is both in person and a mix of the hybrid we have come to be familiar with post Covid – online, as well as by correspondence would in keeping with the rules of fairness suffice. In this case, the appeal the Claimant lodged was not heard in person. That of itself is not grounds for the assertion that there was unfairness. On the second issue for determination being the substantive fairness, the Claimant faults the Respondent for not calling the Police Commander who it is asserted was responsible for part of the funds issued to the Claimant. The Claimant had the burden of proving his innocence and it was not the responsibility of the Respondent to call witnesses to exonerate the Claimant. The Claimant



conflates his dismissal with the criminal process asserting that since he was not charged in a court of law for the alleged offences of stealing or theft by servant, he was not guilty of any of the matters the Respondent accused him of. In a disciplinary matter in the realm of section 44 of the Employment Act, a proceeding in respect of any of the offences listed there does not morph into a criminal process. In my considered view, any idea that the disciplinary process or investigations undertaken in an enterprise must result in criminal process is fallacious. An employer can even opt in instances where the offences such as the ones the Claimant was charged with have been revealed, only proceed to dismissal and forego criminal charges. It does not detract from the severity of the charges where the employer opts not to have the employee prosecuted. These two processes are separate and distinct. In the case before me, there is evidence that the Claimant presented documentation for surrender which was flawed. Whereas he asserts he did not make the documents in question, the fact that he was the one responsible for the accounting for the funds, he had a duty of care to ensure the lists he received as well as the sums disbursed tallied. Having failed to dislodge the Respondent's assertions that he was complicit in the loss and therefore amenable to dismissal for misconduct, the Claimant has no remedy available to him in this case. The Claimant has faulted the Respondent for the frequent transfers and whereas there is no rationale for the frequency in transfers, the Claimant never raised the issue in any forum and only awaited the dismissal to assert he was harassed in the manner of transfer. He should have protested the transfers if he felt he was demoted or underserving of the frequent shifts. In the final premises I find the suit unmerited and accordingly dismiss it albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

