**Kangethe v Bic East Africa Limited (Cause 772 of 2019)**
**[2024] KEELRC 2106 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2106 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 772 OF 2019**

**NZIOKI WA MAKAU, J**

**JULY 30, 2024**

**BETWEEN**

**PETER NJAU KANGETHE ..... CLAIMANT**

**AND**

**BIC EAST AFRICA LIMITED ..... RESPONDENT**

## JUDGMENT

1. The Claimant filed this suit vide a Memorandum of Claim dated 14th November 2019. Through it, he claimed unfair and unlawful termination of his employment arising from contempt of court. He prays for judgment against the Respondent for:

    a. Maximum compensation of 12 months for wrongful and unfair termination.

    b. Payment of 36 months beyond the statutory 12 months for unlawful and unfair termination while in contempt of court.

    c. Unutilized leave 21 days – Kshs. 1,121,975.82

    d. 3 month's pay in lieu of notice.

    e. Outstanding compensation to the Claimant arising from miscalculation of the 20 days worked as a consultant - Kshs. 736,402.85

    f. Outstanding benefits due to the Claimant for the period 1st January to 31st August 2019 - Kshs. 187,860/-

    g. Employers portion of the Claimant's pension at the rate of 6.5% for the period 1st January to 31st August 2019 - Kshs. 574,166.67

    h. Pro rata Claimant's bonus for the year 2019 at the rate 20% gross annual salary - Kshs 1,766,666.67

i. Proper certificate of service.

j. Costs of this suit.

2. The Claimant's case was that he worked for the Respondent for eight (8) months as Manufacturing Director - Kenya since 1st January 2019, following a transition from Haco Industries Kenya where he had worked for 17½ years until 31st December 2018 and had risen to the position of Acting Managing Director/Managing Director. He stated that his role was to support in the integration process of the Respondent's manufacturing operations at the Haco Industries facility in Kasarani, which facility the Respondent had rented from Haco. He averred that he used his skills and experience to propose a robust structure for the Respondent's Manufacturing Operations as well as staff schedule and severally indicated to the Manufacturing Director that a drastic reduction in head count from 308 to 162 staff would not be achievable immediately for various reasons. He posited that ten (10) months after his consultancy stint with the said Manufacturing Director, he was accused of having flouted the Respondent's recruitment procedures, which he asserted were never availed to him in the first place.

3. The Claimant further averred that he was temporarily suspended on 19th July 2019, on the grounds that some complaints/allegations regarding his conduct and matters handled by him or under his supervision had been received but no particulars of the said allegations were provided to him. That on 25th July 2019, he was summoned by the Respondent's Advocates for an investigatory interview that took over two hours, from 6.00pm, on matters that had not been disclosed to him. He averred that the Management then extended his suspension by one more week and later by three days to 30th August 2019. That when he appeared at the disciplinary hearing on 27th August 2019, he reminded the Panel there was a Court Order in force that they had not complied with and that 50% of the documents he needed to prepare his defence had still not been availed to him. He contended that the Panel's Chair ignored his plea as well as the said Court Order and forced the disciplinary hearing to proceed. The Claimant asserted that his summary dismissal was communicated to him the following day on 28th August 2019 and that the Appeal Panel later upheld the decision of the Disciplinary Panel. He contended that the fact that his final dues were calculated on 31st August 2019, long before the Appeal and its outcome, confirms that the decision to dismiss him from employment had been premeditated. That following the unlawful, discriminatory and unfair termination of his employment, he has suffered loss, damages, prejudice, humiliation, and embarrassment for which he holds the Respondent responsible and claims against it.

4. In response, the Respondent filed a Statement of Response dated 13th December 2019 wherein it averred that the duties of the Claimant as stated in his Contract included, amongst others, to 'ensure there is a harmonious and disciplined workforce'. The Respondent's stance was that it received an anonymous whistle-blower email on 11th December 2018, outlining allegations that he had engaged in preferential treatment, harassment and intimidation of the Respondent's Production Co-ordinator-Moulding (PCM), one Ms. Mercy Gathoni Wandeto. That it then contracted an independent forensics investigation firm to investigate the allegations and suspended the Claimant on full salary. That after concluding the investigations and determining that the Claimant had a case to answer, it invited him for a disciplinary hearing that was deferred severally to accommodate issues the Claimant raised and to comply with a Court Order dated 15th August 2019. The Respondent averred that the Claimant's employment was in the end terminated vide a Dismissal Letter dated 28th August 2019, which was shared with him alongside his certificate of service. That the Claimant was informed of his rights to appeal, to be accompanied by a fellow employee to the appeal hearing and to his terminal dues and that the decision of the Appeal Panel was communicated to him in a letter dated 11th September 2019.

5. Claimant's Submissions

The Claimant submitted that his employment with the Respondent was unlawfully and unfairly terminated after the Respondent took him through an unfair and improper disciplinary proceedings. That section 41 of the *Employment Act* provides for certain procedural structures that must be complied with prior to terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity. In addition, section 45 of the Act requires the employer to prove that the employment was terminated in accordance with fair procedure. The Claimant relied on the case of National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR in which the Court of Appeal (referring to its previous decisions), said that in determining whether a decision by the employer to terminate is just and equitable, "the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee." It was the Claimant's submission that the Respondent did not comply with the mandatory provisions of sections 41 and 45 of the *Employment Act* as he was not accorded a fair hearing and it further did not comply with the Court Order. That he was not accompanied to the disciplinary proceedings by a fellow employee whereas the decision of the Court in Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR was that the right to be awarded a hearing and be accompanied by fellow employee or union representative during the hearing was sacrosanct.

6. The Claimant further submitted that the Respondent has not tabled any evidence to show that it had a valid ground to terminate his employment. That in the case of Mohamed Guyo Boru v Richard Mwilaria Aritho [2022] eKLR, the Court noted with approval that section 107 of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. That section 108 is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while section 109 states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The Claimant posited that the law is clear to the extent that he who alleges must prove, as provided under sections 107 and 109 of the *Evidence Act*. He argued that the *Employment Act* is specific that the reasons for terminating an employee must be fair reasons, which test the Respondent herein fails. In concluding, the Claimant submitted that the prayers sought in his Claim be granted as they are as the Respondent has frustrated and continues to frustrate him in gaining employment and effectively supporting himself. That the actions of the Respondent not only amounted to unfair and unlawful dismissal and termination, but equally amounted to violation of his constitutional protected rights to fair hearing, fair administrative action and to fair labour practices. He maintained that the Respondent subjected him to a hostile disciplinary procedure and work environment, harassment, humiliation and emotional distress.

7. Respondent's Submissions

According to the Respondent, the admission by the Claimant in his Written Submissions that he was exonerated of some of the allegations is a confirmation that the procedure the Respondent's representatives adopted during the investigation and disciplinary hearing was fair and impartial. Additionally, it proves that the Disciplinary Panel and Appeal Panel were impartial. The Respondent submitted that it had valid and genuine reasons to terminate the Claimant's employment, as unearthed by the extensive investigation undertaken by A&K Forensics LLP, the Disciplinary Hearing undertaken on 27th August 2019, the Appeal Hearing conducted on 5th September 2019 and the hearing before this Honourable Court. The Respondent submitted that section 43(2) of the *Employment Act* provides that for a termination of employment to be lawful, it must be based on a valid reason accompanied by a fair process. That in the case of Bakery Confectionery Food Manufacturing & Allied Workers Union v Wrigley Company (EA) Limited [2022] eKLR, the Court explained that

fair grounds for termination of employment exist when the employer genuinely believes that at the time of termination, the reasons for termination are matters that the employer genuinely believed to exist, and which caused the employer to terminate the services of the employee. Further in Lawrence Nyamichaba Ondari v National Hospital Insurance Fund [2018] eKLR, it was held that all the Court needs to ensure is that the reason put forward for dismissal or termination are reasons which the employer reasonably believed to exist and are reasons for which a reasonable employer would terminate the services of an employee. It was the Respondent's submission that in this case, it genuinely believed and found valid reasons to terminate the Claimant's employment.

8. In addition, the Respondent submitted that the Court of Appeal has ruled that the standard of proof an employer must meet to demonstrate genuine belief in a valid reason for termination is based on a balance of probabilities per the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR. Moreover, that it is trite that an employer has discretion on the appropriate sanction to impose in an employment matter involving a disciplinary hearing for an employee who has been found guilty, and that a court should therefore not lightly interfere with the sanction as held in the Court of Appeal decision in Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (K) [2017] eKLR, citing with approval the South African Case of Nampak Corrugated Wadeville v Khoza (JA 14/98) [1998] ZALAC 24). It was the Respondent's stance that therefore having found that significant allegations against the Claimant were substantiated and genuinely believing that they justified termination, this Court should not interfere with the Respondent's decision. It maintained that it had fair reasons to terminate the employment of the Claimant and went ahead to substantiate each of the reasons in its Submissions.

9. Regarding due process for termination, the Respondent cited section 41(2)(c) of the *Employment Act*, which stipulates that a termination may be considered unfair if it lacks fair procedure. It argued that the evidence demonstrates that the termination of the Claimant's employment was conducted procedurally and fairly. On the issue of suspension, the Respondent cited the case of Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR, in which the Court held that a suspension is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct. That further in the case of Donald C. Avude v Kenya Forest Service [2015] eKLR, the Court held that suspension is a preventive measure that can be taken when the interest of the employer's business requires it, even in the absence of an act made by the employee while working. The Respondent argued that given the seniority of the Claimant and upon reasonable belief that he could attempt to influence the investigations, there was a need to safeguard the integrity of the investigations and protect both the whistle-blower and the PCM by suspending the Claimant. That the Claimant was frequently updated on the status of the investigations and that the suspension was therefore both justified and within the threshold espoused in the aforementioned authorities. It further cited the case of Luka Korir v Moi Teaching and Referral Hospital [2022] eKLR wherein the Court held that the disciplinary hearing is a 'purely management function' guided by the employer's policy document. The Respondent submitted that considering the Claimant's senior position, it was not possible to have junior employees as part of the Disciplinary Panel and that the said panel was properly constituted. It maintained that it complied with the requirement of section 41 of the *Employment Act*, including availing all documentation the Claimant required to prepare his defence.

10. Further, the Respondent noted that despite the Claimant obtaining the Court Order on 15th August 2019, he failed to notify the Respondent of the existence of the Court Order and instead allowed the Disciplinary Panel to be assembled and for arrangements for the hearing to be made at the expense of the Respondent. That it was the Claimant who was thus in breach of the Court Order. The Respondent relied on the decision of the Court of Appeal in National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR endorsing this Court's position in Janet Nyandiko v Kenya Commercial Bank

Limited [2017] eKLR that a court has the power to scrutinize the procedure adopted by an employer in terminating the employment of an employee. The Court of Appeal equally stated that in doing so, the court ought not to overlook 'the conduct of the employee up to the date of termination'. It was the Respondent's submission that this Court should therefore consider the conduct of the Claimant as regards the allegation of non-compliance of the Court Order by the Respondent, as well as his conduct generally throughout the investigation and disciplinary proceedings. The Respondent further fronted that the issue of contempt of court can only be properly raised and prosecuted before the court that issued the said order and not in fresh proceedings. It cited the case of Matindi & 2 others v Independent Electoral and Boundaries Commission & 8 others; Commission on Administrative Justice & 4 others (Interested Parties) (Constitutional Petition E089 of 2022) [2022] KEHC 9763 (KLR)). That there are no contempt proceedings instituted by the Claimant against the Respondent or any of its officers in Petition 157 of 2019 for breach of the said Order and since the said Petition 157 of 2019 was pending and running concurrently with this suit, the Claimant has rightly admitted guilt on breaching the res sub judice rule.

11. The Respondent submitted that considering its foregoing submissions, the Claimant is not entitled to the reliefs sought. That it had further shown that the Claimant's employment was lawfully terminated and the procedure adopted was both lawfully and fair as per the *Employment Act* and its Human Resource Policy Manual. It thus urged this Court to dismiss the Claimant's claim with costs to the Respondent.

12. The Claimant was dismissed in what seemed to be a premeditated move. The Claimant's final dues were calculated on 31st August 2019, long before the appeal he made had been determined. This confirms that the decision to dismiss the Claimant from employment had been premeditated and the Respondent could not resist the concerted effort to have a manifestly unfair process in place. The Court takes judicial notice that the panel proceeded despite a Court order deferring the disciplinary hearing. It matters not what an employee is accused of. If the process is unfair, the dismissal will be deemed unfair and unlawful. See Walter Ogal Anuro v Teachers Service Commission [2013] eKLR. The Claimant seeks a slew of reliefs some of which are not capable of being granted. The Court notes the Claimant sought payment of pension contributions and the sum equivalent to 36 months for the gross mishandling of the discipline process. He is not entitled to claim pro rata bonus as it is not a sum he earned. Under the provisions of section 49 of the *Employment Act*, the court is hamstrung in the relief it can grant. The maximum compensation for the egregious dismissal would be 12 months which the Claimant is entitled to. He also is entitled to the 21 days of leave not utilized – Kshs. 1,121,975.82, an award of 3 month's pay in lieu of notice. He proved there was miscalculation of the days worked as a consultant meaning he will recover for the 20 days – Kshs. 736,402.85. He also had outstanding benefits due for the period 1st January to 31st August 2019 amounting to Kshs. 187,860/-. In the final analysis I enter judgment for the Claimant as against the Respondent for:-

    a. A declaration that the dismissal of the Claimant was unlawful.

    b. 12 month's salary as compensation.

    c. 21 days of leave not utilized

    d. 3 month's salary in lieu of notice

    e. Unpaid amounts for the 20 days worked as a consultant – Kshs. 736,402.85.

    f. Outstanding benefits due for the period 1st January to 31st August 2019 – Kshs. 187,860/-.

g. Interest at court rates on the sums in (b), (c), (d), (e) and (f) above from the date of judgment till payment in full.

h. A certificate of service strictly in terms of section 51 of the *Employment Act*.

i. Costs of the suit.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2024**

**NZIOKI WA MAKAU**

**JUDGE**