



**Kibore v National Oil Corporation of Kenya (Cause 1993 of 2017)
[2024] KEELRC 2021 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2021 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1993 OF 2017
NZIOKI WA MAKAU, J
JULY 29, 2024**

BETWEEN

MABEL KIBORE CLAIMANT

AND

NATIONAL OIL CORPORATION OF KENYA RESPONDENT

JUDGMENT

1. In the Memorandum of Claim dated October 5, 2017, the Claimant prays for judgment against the Respondent for:
 - a. A declaration that the Respondent's action of terminating the Claimant's employment on 3rd August 2017 was null and void.
 - b. A permanent injunction to restrain the Respondent, its agents, and/or servants from terminating the services of the Claimant.
 - c. A declaration that the disciplinary process against the Claimant was irregular, unlawful and a nullity.
 - d. An order lifting the termination of the Claimant and a mandatory injunction directed at the Respondent to reinstate the Claimant to employment.
 - e. An order directing the Respondent to stop the recruitment process of the Claimant's successor or any other person to replace the Claimant.
 - f. In the alternative and without prejudice to the foregoing, an order that the Respondent compensates the Claimant for wrongful/unlawful/unfair termination in the equivalent of the remainder of her working years until she attains retirement age and to recall the termination letter dated 3rd August 2017, and 3 months' salary in lieu of notice.



- g. Any further or other relief that this Honourable Court may deem fit and just to grant.
 - h. Costs of this suit.
 - i. Interest on all monetary awards at court rates from 3rd August 2017 until payment in full.
2. The Claimant averred that she had been an employee of the Respondent from 18th May 2015 as Head of Human Resource and Administration and was reporting to the General Manager – Finance and Administration. That she later reported to the Acting General Manager and finally to the Acting Chief Executive Officer (hereinafter "the Ag. CEO"). The Claimant's case is that between February 2017 and May 2017, she received several Internal Memos from the Ag. CEO requiring her to give explanations on various issues. That later on 3rd July 2017, she was served with a Disciplinary Hearing Notice to appear before the Human Resource Board Committee on 3rd August 2017 to respond to the said matters. She asserted that despite responding to the said notice, the Ag. CEO continued issuing other memos to her between 3rd May and 3rd August 2017 in clear demonstration of bad faith and ill motive. The Claimant noted that all the functions she performed and for which she received the said internal memos, were required to be performed in conjunction with personnel from other departments and ultimately to be approved by the Ag. CEO. That the Ag. CEO started undermining her by by-passing her and giving instructions directly to the Claimant's juniors and then requiring her explanation when the tasks were poorly performed or delayed by the said junior staff. She contended that the numerous memos and warnings issued to her were a scheme by the Ag. CEO to portray her to the Board as incompetent and incapable of performing her professional tasks and have her dismissed by the Board of Directors. That therefore on or about 28th July 2017, she filed a Grievance to the Human Resource Board Committee detailing the frustrations and harassment she had been put through by the Ag. CEO.
3. It was the Claimant's averment that she attended the Disciplinary Hearing on 2nd August 2017, with the Ag. CEO present, and that she responded to the allegations set out in the Internal Memos cited in the aforementioned Disciplinary Hearing invitation letter dated 3rd July 2017. That she however noticed that her grievance was never mentioned and upon inquiry, she was informed that the Grievance could not be attended to because of the approaching General Elections scheduled for 8th August 2017. The Claimant further averred that the Respondent's Human Resource Board Committee circulated the minutes of their Meeting of 2nd August 2017 recommending her dismissal to the full Board, contrary to practice and clear directions of the Head of Civil Service in the Mwongozo Guidelines. That on 3rd August 2017, the Board through the CEO communicated the Respondent's decision to dismiss her from its employ.
4. The Claimant's stance is that she was never given any warnings whether verbal, written, first, severe and/or final, or notice to show cause but was rather served with routine workplace memos. She asserted that on 11th August 2017, she appealed the decision to dismiss her to the full Board of Directors of the Respondent but the said Appeal was dismissed on 25th August 2017. She contended that she was treated badly and inhumanely and that her responses to the various memos were ignored by the Ag. CEO, the HR Committee of the Board and the full Board of Directors. That her grievance and appeal were also ignored and that among other reasons, her dismissal was a ploy to create a vacancy for a compliant person in exchange for the said Ag. CEO being confirmed to the position of CEO. The Claimant thus believes that this is a clear case that merits intervention of this Court through issuance of a conservatory order to lift the termination and that unless a mandatory injunction is also issued, she shall suffer irreparable loss and damage.
5. Respondent's Case



The Respondent averred in its Memorandum of Response dated 10th September 2021 that through the Letter of Appointment dated 14th April 2015, the Claimant was under Job Group 3 (Senior Manager) and was to be reporting to the General Manager, Finance & Administration of the Respondent Company. It asserted that part of the Claimant's responsibilities under her Contract as well as the Respondent's HR Policy Manual was to ensure that each employee at the Respondent Corporation has a valid job description. That the Office of the Head of HR & Administration is critical to the Respondent's operations as it deals with issues related to inter alia recruitment, compensation, performance management, organizational development, safety, benefits and employee trainings.

6. The Respondent's case is that by an Internal Memo dated 6th March 2017, the Claimant admitted that the HR Department, which she was the overall head, had failed to ensure that all the Respondent's employees had a valid job description and which omission she did not rectify more than two (2) years as the head of the said department. That furthermore, the Claimant had on various instances failed and/or blatantly neglected to perform her duties and obligations in accordance with her Contract of Employment and the Respondent's HR Policy Manual. It asserted that the Claimant's disciplinary hearing was conducted pursuant to the provisions of the law and in accordance with policy and that it resolved to terminate her employment on account of gross misconduct under section 44(3) as read with 44(4)(c) of the *Employment Act*. That it thereafter considered the Claimant's Appeal before upholding the Board's decision to terminate her employment. According to the Respondent, the Claimant was thus accorded her right to fair hearing and appeal. It averred that it hired a new Head of Human Resource and Administration on 7th November 2017 and prays that the Claimant's Claim is dismissed with costs.
7. The Claimant's Reply to the Memorandum of Response dated 1st October 2021 was that she never admitted to the Respondent's HR Department having failed in its mandate and that ensuring that all Respondent's employees had valid job descriptions did not fall within her docket. The Claimant contended that the Respondent conducted a sham disciplinary process against her and that the meeting of 2nd August 2017 was not properly constituted in line with the HR Policies and Procedures Manual for the Public Service. She averred that the advertisement for her position was malicious and vindictive and that filling of the said position having been stopped by a Court Order given on 8th November 2017, the filling of the vacancy was null and void.
8. Claimant's Submissions
The Claimant submitted that clause 3.5.8 (on Job Description) of the Respondent's HR Manual states that, "A job description will be prepared for each position within the organization structure. The new staff will be issued a job description within the first two weeks of employment which he/she will acknowledge in writing". That clause 12.4 of the HR Manual lays down the procedure to be followed in disciplinary action, which procedure RW1 admitted was not followed. She further submitted that none of the offences she is alleged to have committed as set out in the Disciplinary Hearing letter dated 3rd July 2017 constitutes a minor or a major offence in terms of clauses 12.4.2 and 12.4.3 of the HR Manual. Furthermore, as required under clause 12.5 of the HR Manual, her Appeal was not heard within 7 working days from the date it was received and there is no evidence that the full Board sat to hear the same. The Claimant further submitted that the Respondent failed also to satisfy the provisions of clause 13.4.4 of the HR Manual on summary dismissal as she was not accused of any of the offences stipulated thereunder. That in the end, she was not accorded her right to be heard and her rights to equality and freedom from discrimination as were violated.
9. It was submitted by the Claimant that the Guiding Principles of the Disciplinary Manual for the Public Service are governed by the rules of natural justice, fair administrative action which is expeditious,



efficient, lawful, reasonable and procedurally fair. She argued that none of the offences for which she was twice dismissed meets the criteria as set out under clause 4.6 of the said Guiding Principles Manual and that the punishment meted on her was not commensurate to the alleged offences. That in any event, the Respondent did not inform the State Corporations Advisory Committee and no investigations were carried out against her to warrant the action taken against her as would have been required under clause 4.8 of the said Manual for the Public Service.

10. The Claimant further submitted that the onus of proving she had been paid her salary between August 2017 and 29th January 2020 was on the Respondent, who did not discharge the same. That she has made a case for a declaration that the Respondent's action of terminating the Claimant's employment on 3rd August 2017 was null and void and that since this Court already made an order to reinstate her but this order having been disobeyed, she is entitled to her salary as sought. She also seeks exemplary damages against the Respondent for its disobedience of the Court Order of 8th November 2017 and for seeking to bring this Court into disrepute and relied on the analysis of the Court of Appeal in *DK Njagi Marete v Teachers Service Commission* [2020] eKLR. She submitted that on the basis of the Respondent's conduct, she is entitled to damages and notice pay in terms of section 49 of the *Employment Act*. In this regard, she relied on the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR in which the Court of Appeal awarded the Respondent 12 months' salary as compensation for the unfair termination and failure to reinstate the Respondent.
11. The Respondent had not filed any submissions as at the time of penning this judgment.
12. The Claimant was dismissed for alleged failure to undertake tasks required of the position she held. She was in particular accused of failing to provide an employee who had been employed two year prior to her employ with a job description. The Claimant faulted the Respondent for failing to follow its own disciplinary processes and Mwongozo in her termination. Clause 12.4 of the HR Manual lays down the procedure to be followed in disciplinary action as follows:-

12.4 Procedure for disciplinary action

In case there is a disciplinary case to answer; the Head of Department will consult with the HRM before establishing a disciplinary hearing.

The HRM will bring the alleged offence to the attention of the MD. The HRM will recommend to the MD provisional measures. Upon receipt of the case the MD shall cause a full investigation by the Disciplinary Committee. A disciplinary committee will be convened by the MD as appropriate, consisting of two senior managers, and one middle manager. One of Senior Managers should be Chair. A member of the Human Resources Department must be present during the hearing to give professional advice to the Disciplinary Committee members. An officer from the union will attend the meeting if the case involves unionisable employee.

The order of the hearing will be as follows:-

1. Introductions as appropriate
2. Panel Chair will explain the complaint/charges.
3. The Disciplinary Committee members will appointment investigation team.
4. The investigating officer will present the findings of their report and present any witnesses and explain the evidence supporting the charges to the Panel
5. The Chair shall have the opportunity to ask questions to investigating officer and any witnesses.



6. The employee (or his/her chosen companion) shall have the opportunity to ask questions of the investigations and witnesses and raise points about information provided by them.
7. The employee will then set out his/her case and present any witnesses in response to the charges.
8. The Panel Chair shall have the opportunity to ask questions of the employee and any witnesses.
9. The investigating officer shall have the opportunity to ask questions of the employee and witnesses and raise points about information provided by them
10. The panel shall have the opportunity to ask any final questions of the employee, investigating officer or witnesses
11. The investigating officer shall have the opportunity to sum up his/her case.
12. The employee (or his/her chosen companion) shall have the opportunity to sum up his/her case
13. The Panel Chair and members shall sum up the main points of the evidence put forward.
14. If considered necessary by the Panel Chair, the meeting shall be adjourned to allow further investigation into the matters raised or to ask questions of any witnesses who were unable to attend the hearing.
15. If further evidence or witnesses are sought, and the Panel Chair relies on this evidence to form a decision, they will reconvene the hearing to allow consideration of the evidence by both parties and/or cross-examination of witnesses.
16. The hearing should end with the Panel Chair asking the employee if they have anything further to say. [underline for emphasis]

13. These provisions among others in the disciplinary manual were not followed and as such the Claimant's termination was unfair as it was unlawful. The Claimant was issued regular workplace memos and expected to respond to them as if they were show cause letters. There was no investigation carried out to ascertain the veracity of the accusations levelled against the Claimant by the then Ag. CEO who seemed to have a vendetta against the Claimant. The Respondent had actually no basis for the termination and went on a fishing expedition. The Claimant's case was not presented to the Board for ratification as required due to her position in the Respondent. It was not forwarded to the State Corporations Advisory Committee (SCAC) as required. These all pointed to the fact that the dismissal could not be defended before the State Corporations Advisory Committee hence the omission to raise it before the Committee. The Claimant had sought reinstatement but given the long passage of time and the impossibility in securing compliance, the only remedy will be compensation under section 49. As the dismissal was egregious and the conduct of the Respondent less than honourable, the Court will grant the full 12 months. The Respondent will also meet costs of the suit. In the final analysis I enter judgment for the Claimant against the Respondent for:-
 - a. A declaration that the termination of the Claimant's services was unfair and unlawful.
 - b. 12 month's salary as compensation – Kshs. 5,760,000/-



c. Costs of the suit.

d. Interest at court rates on the sum in (b) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

