



**Egesa v Women Enterprise Fund Advisory Board (Cause 967 of 2016)
[2024] KEELRC 2646 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2646 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 967 OF 2016
J RIKA, J
OCTOBER 31, 2024**

BETWEEN

FAUSTINE EGESA CLAIMANT

AND

WOMEN ENTERPRISE FUND ADVISORY BOARD RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim, on 25th May 2016.
2. She states that she was employed by the Respondent, a Semi-Autonomous Government Agency, with effect from 2nd January 2014. The letter of appointment is dated 26th November 2013.
3. She was employed as Finance and Administration Manager.
4. On assumption of the role, she found serious issues of finance and procurement, that touched on lapsed contracts, under which services continued to be provided to the Respondent. She terminated those contracts, and undertook reorganization of her department.
5. She met stiff resistance from some of the staff, in undertaking reorganization. She did not get the support of her deputy, who had executed the expired contracts.
6. On or about April 2014, the Claimant received the first letter to show cause, from her CEO. This was followed by other letters to show cause, alleging that her performance was unsatisfactory.
7. Her probation period was extended by 3 months, on account of poor performance.
8. In October 2014, the serving CEO left employment. The Claimant, among others, applied to fill the CEO position. The Acting CEO, Charles Mwirigi, who had worked for the Respondent for more than 3 years, was appointed CEO.



9. Upon his appointment, Mwirigi embarked on a vindictive journey against the Claimant. He reissued her the letters to show cause. The Claimant's relationship with the new CEO deteriorated. The CEO felt insecure. The Claimant had vast experience and knowledge in finance and administration, while the CEO did not. The Claimant came to learn that the CEO had recruited relatives, and former Employees of Family Bank, in a disturbing show of nepotism.
10. Her department had a huge portfolio, but the Claimant was not given adequate support staff. The limitations notwithstanding, the Claimant continued to execute her mandate with enthusiasm.
11. In September 2015, the Audit Manager unearthed irregularities in advancement of loans to certain women groups. Some of the loans were found out to be fictitious. The loan docket was under the credit department. It was formerly under the then Acting CEO. The Respondent alleged unfairly, that the Claimant was interfering with the investigations on the issue. She was aware that the matter of the loans was in Court. She was called to a meeting by the Board Chair and CEO. She explained her position and felt that this was the end of the matter.
12. She was however summoned by the new CEO Mwirigi, to appear before the finance, staff and administration committee of the Advisory Board on 7th October 2015 for disciplinary hearing. There was no letter to show cause preceding the hearing.
13. She submitted herself to the committee, and gave her explanation. She explained why it was difficult for her to procure chain of custody. She explained that she was appraised only once by the Respondent, in 2014.
14. She had not attended any training, since she was employed.
15. She experienced health problems. In October 2015, she developed low blood pressure due to fatigue, leading to her fainting. On 29th October 2015, she was advised by her doctor to take a rest from work. She informed the Human Resource Manager and the CEO about this.
16. When she reported back to work on 4th November 2015, she was issued a letter of termination. She was asked to clear. She was mistreated, and her office desk drawers and cabinet locks, broken into.
17. She prays for: -
 - a. Reinstatement, without loss of benefits.
Alternatively,
 - b. Notice of 3 months at Kshs. 345,189.
 - c. 12 months' salary in compensation for unfair termination at Kshs. 1,380,756.
 - d. Compensation for breach of contract at Kshs. 1,495,819.
 - e. Damages for discrimination at Kshs. 5,000,000.
Total... Kshs. 8,221,764.
 - f. Declaration that the Claimant suffered unfair, wrongful termination, in the first instance.
 - g. Declaration that the Respondent intentionally breached Sections 41, 45 and 46 of the *Employment Act*, Articles 10, 26, 27, 28, 41, 43, 47, and 50 of *the Constitution*.
 - h. Maximum compensation for loss of employment.
 - i. General damages.



- j. Aggravated and exemplary damages.
 - k. Any other suitable relief.
 - l. Costs of the Claim.
18. The Respondent filed its Statement of Response on 24th June 2018. It is conceded that the Claimant was employed by the Respondent.
 19. The Claimant was placed on probation for 6 months at the beginning. She signed a performance contract at the beginning of the year. She would be appraised at the end of the year.
 20. It was her duty to ensure the overall management of the Respondent's procurement processes. In March 2014, the former CEO directed that audit is carried out, of all contracts, after irregularities were detected.
 21. The audit disclosed lapses in the administration and management of the contracts. The CEO called upon the Claimant to explain these lapses.
 22. In April 2014, she was advised by the former CEO, that payment on account of fuel was deferred, until she attached the expenditure [utilization] listing to the payment voucher. Payment was effected, while the Claimant was in charge, contrary to the advice of the CEO.
 23. The CEO issued the Claimant a letter to show cause, on account of her failure to execute the CEO's instructions.
 24. In April 2014, the Claimant was instructed to ensure that all the Respondent's assets were insured. She had not done so, by August 2014, leading to another letter to show cause. Lack of insurance led to loss of the Respondent's machines at Embu, through burglary.
 25. In July 2014, the Claimant was appraised by her supervisor. She was found not to have met expectations, with the recommendation that her probation is extended, by 3 months. In October 2014, probation was extended by another 3 months.
 26. The Acting CEO was appointed CEO competitively, based on his fit for the role. All heads of departments were given the opportunity to apply for the CEO role. The Acting CEO emerged the top, of the interviewees.
 27. The Claimant's contract was confirmed on 11th December 2014, despite the fact that her performance was unsatisfactory. She was given a lifeline to improve her performance, but did not improve.
 28. The Acting CEO signed her letter of confirmation, and the relationship between the 2 was cordial and not hostile as alleged by the Claimant.
 29. The Claimant's department was not understaffed. The number of staff was adequate, and was supported by several interns. The Claimant's poor performance was occasioned by her attitude, not inadequacy of staff.
 30. The Advisory Board gave Management a go-ahead, to procure an audit firm, to carry out forensic audit, that would provide evidence against 5 Employees of the Respondent, who were on suspension for fraudulent activities.
 31. The Claimant was instructed to urgently procure a chain of custody process. She delayed procurement, despite the urgency of the matter. This amounted to negligence. Disciplinary action was initiated



- against the Claimant. She was called to appear before the disciplinary committee, on 7th October 2015. The committee heard the Claimant, and recommended termination of her contract.
32. She had been appraised severally by the CEO, before termination. She had attended trainings. She attended 2 weeks' training on corporate governance and strategic leadership.
33. Termination was for 4 reasons: -
- I. Insubordination, by failure to take lawful instructions from her supervisor.
 - II. Continuous underperformance.
 - III. Carrying out irregular procurement.
 - IV. Gross misconduct and disrespectful behaviour towards her supervisor.
34. The Respondent did not at any time, harass or intimidate the Claimant. Termination was fair and lawful. The Respondent prays the Court to dismiss the Claim with costs.
35. The Claimant gave evidence on 3rd February 2022 and 5th July 2023, when she rested her case. Paul Wangai, Finance and Administration Manager of the Respondent, gave evidence on 11th October 2023, and was due for further cross-examination on 27th February 2024. The Respondent however, opted to dispense with further evidence by the witness and closed its case on 27th February 2024. The Claim was last mentioned on 4th July 2024, when the Parties confirmed filing and exchange of their closing submissions.
36. The Claimant relied on her witness statement and documents, in her evidence-in-chief. She restated that she was dismissed upon appraisal. She did not sit down with the CEO, to set targets. She was not taken through an induction course. The Respondent gave her a poor rating, and extended her probation by 3 months. She received several letters to show cause, from the CEO alleging that, she failed to execute instructions. The disciplinary process was not fair. There was no negligence on her part. She was not able to secure alternative work, after dismissal.
37. Cross-examined, she stated that her letter of appointment is dated 26th November 2013. She commenced working on 2nd January 2014.
38. She found services being offered by service providers, whose contracts had expired. She terminated these contracts. It was within her mandate to do so. Her deputy resisted reorganization. She did not hand over to the Claimant. The Claimant received a flurry of letters to show cause from the Respondent's CEO, relating to performance.
39. There were 6 Employees, serving the Claimant's department. She ought to have had 15 Employees, based on 4 units. The organizational structure exhibited by the Claimant, indicated the various positions, but not the number of Employees to work in those positions.
40. The decision by the CEO to extend the Claimant's probation by 3 months, was done without her knowledge. She was confirmed in December 2014.
41. After 2014, there was a new CEO. He engaged in witch-hunt against the Claimant. The Claimant was told she was late in reporting to work. The CEO was her boss. She alleged that she had more experience than him. She did not insubordinate him. She alleged that he employed relatives. She did not have any names of such relatives. He employed a nephew. Nepotism was common knowledge at the workplace. She did not have evidence to show that most Employees were former Employees of Family Bank.



42. She did not attend training. She made requests to attend. It was in the discretion of the Respondent, as to who was trained. Other staff attended trainings.
43. Low blood pressure did not contribute to the Claimant's poor performance. She was away on sick-off. She informed the CEO and the Human Resource Manager, of her illness, through text message. She did not exhibit an extract of the message before the Court.
44. The Claimant denied that she was disorganized. She had problems with successive CEOs and some other staff. She did not agree that she was the problem. She did not have evidence that the CEO wanted procurement skewed in favour of his companies.
45. Redirected, the Claimant told the Court that the reason for extension of probation, was not communicated to her in writing. She was instructed by the CEO, to approve training for a lady named Lydia, while she herself did not benefit from training. The Claimant was only appraised once, in 2014. There was no appraisal in 2015.
46. Paul Wangai relied on his witness statement dated 13th March 2023 and documents filed by the Respondent [1-30]. He confirmed the employment details pleaded by the Claimant.
47. Wangai was not aware of contracts which had lapsed, at the time the Claimant joined the Respondent. The Claimant was accorded all support. There were issues raised by her supervisor, concerning lateness, insubordination and poor performance. Probation was extended. The Respondent had adequate regular staff and interns. There was no evidence that the CEO employed relatives.
48. The Claimant did not take her procurement role seriously. She was given clear guidance by the CEO and the Audit Manager, which she ignored. There were about 3 appraisals made on the Claimant's performance, preceding termination. She attended training twice. In her appraisal form of June 2015, she disclosed that she had attended training twice. The Respondent was not aware of the Claimant's illness, when she failed to report to work. Termination was founded on valid reason and was executed fairly.
49. Cross-examined, Wangai told the Court that there was only one appraisal. The Claimant ought to have been consulted on extension of probation. Probation should have ended in July 2014. It was extended in October 2014. Wangai did not agree that the Claimant was confirmed by operation of the law, in July 2014. She was not told in October 2014, that probation was over. Her performance was poor. She attended training for 2 weeks on corporate governance. In her e-mail to Claire, she stated that she was taken through training of 2 days, on board paper-writing.
50. The issues, as understood by the Court, are: whether the Claimant's contract was terminated by the Respondent, fairly and for valid reasons; and whether she merits the remedies sought.

The Court Finds: -

51. The Claimant was appointed by the Respondent, a Semi-Autonomous Government Agency, as the Finance and Administration Manager, through a letter dated 26th September 2013.
52. Appointment became effective on 2nd January 2014.
53. Her contract provided for a probation period of 6 months, from the date she reported for duty.
54. She commenced service on 2nd January 2014, and her 6 months' probation, would logically end, on 1st July 2014.



55. The Respondent did not write to the Claimant indicating that her probation was successful or unsuccessful, on 1st July 2014, or any date soon thereafter.
56. The Respondent instead wrote to the Claimant on 14th October 2014, advising her that her probation had been extended by another 3 months, on account of unsatisfactory performance.
57. The Claimant was entitled to consider her appointment confirmed after serving probation of 6 months, without word from the Respondent at the end of the stated period, on the outcome of probation.
58. There was a prolonged period of more than 3 months, to the date the Respondent alleged to extend the Claimant's probation, for unsatisfactory performance, from the date the probationary service of 6 months ended.
59. She cannot have been serving on probation in the months of July, August, and September 2014, for probation to be extended in October 2014. There was nothing to extend, in October 2014. The law does not contemplate that probation, is at any time, to be presumed. It cannot have been presumed that the Claimant continued to work on probation, 3 months after her 6 months' probation under contract, ended.
60. Section 42 [2] of the *Employment Act*, provides that probationary period shall not exceed 6 months, but may be extended for a period of not more than 6 months, with the agreement of the Employee.
61. Extension is to be considered immediately the initial period ends. It is never to be presumed or deferred. Even where extension is made, the law states that it must be with the concurrence of the Employee.
62. The Claimant never agreed to the belated extension. She wrote to the Respondent on 16th October 2014, denying that her performance was unsatisfactory. She stated that there was no appraisal, justifying extension in October 2014. She clearly did not agree with the Respondent's decision to belatedly extend probation, charactering it as malicious and intimidatory.
63. Curiously, on 8th October 2014, less than a week before the purported extension of probation, the Respondent had invited the Claimant for an interview, for the position of Acting CEO. It is not likely that an Employee who was on probation, in her substantive docket, and whose performance in that docket was unsatisfactory, would merit invitation to interview for the position of Acting CEO.
64. It is likely extension of probation was motivated by ulterior motive.
65. The Court agrees with the Claimant that extension of probation on 14th October 2014, was irregular and the Claimant was correct in her conclusion that, her appointment was confirmed through the operation of the law, on 1st July 2014. There was no probation to extend, on 14th October 2014.
66. The purported extension of probation in October 2014, and subsequent confirmation in December that year, were redundant motions, the Claimant having been confirmed by operation of the law, after 1st July 2014.
67. The former CEO of the Respondent, Samuel Wainaina, issued the Claimant a letter to show cause, dated 26th August 2014, alleging that there was a burglary at the Respondent's offices, and that its assets had not been insured. He blamed the Claimant for exposure, in the amount of Kshs. 196,000. The Claimant replied, and there was no disciplinary action taken against her as threatened. Notably, the complaint was made when the Claimant was allegedly still on probation.



68. On 23rd February 2015, the incoming CEO and who was among the Claimant's rivals, in the interview for the role of Acting CEO, wrote to the Claimant another letter to show cause, alleging that the Claimant had been late for meeting for meetings held on 18th February 2015 and 23rd February 2015.
69. She responded, explaining that in the first instance, she had passed her child's school to pay fees, and notice for the meeting was not well-communicated. On the second instance, the meeting was scheduled at 7.30 a.m. She was using public transport, and woke up as early as 5.30 a.m. only to be held up in traffic jam.
70. She regretted lateness in either case, and sought accommodation.
71. On 22nd June 2015, Acting CEO Charles Mwirigi, who again it must be recalled, was one of the Claimant's rivals for the Acting CEO's docket, wrote another letter to show cause to the Claimant, making wide-ranging accusations.
72. She was charged with delay in procuring transportation for Board Members to Naivasha for a meeting. She was also alleged to have severally authorized payments, beyond her limit of Kshs. 100,000. Thirdly, Acting CEO alleged that the Claimant had refused to process training payment for the Assistant Audit and Risk Manager. The Acting CEO charged that the Claimant's conduct, was tantamount to insubordination.
73. The Claimant replied comprehensively on every allegation, through her letter dated 1st July 2015. It was her view that having worked for the government for 14 years, she had never been in a situation where her supervisor issued a flurry of letters to show cause, for every minor default. Her parting shot to Mwirigi was that: visionary leaders develop employee talent and nurture them for retention, and employee development, leading to productive work output.
74. On 7th July 2015, Mwirigi wrote to the Claimant making it known to her, that he was not satisfied with her response. The Claimant was however not subjected to a disciplinary hearing, with the Acting CEO warning the Claimant that he expected excellence and improved performance from her, going forward.
75. There was a special meeting of the Board Finance, Staff and Administration Committee, held on 7th October 2015. Among the agenda items was to consider disciplinary action against the Claimant, and the Deputy Human Resources Manager.
76. The charges against the Claimant were gathered from past charges made by Mwirigi. They included:
- I. Failure to take lawful instructions from her supervisor.
 - II. Lack of teamwork.
 - III. Rudeness.
 - IV. The accusations against the Claimant had persisted from the era of the previous CEO, who had recommended non-confirmation of the Claimant's contract in December 2014. However, she was given a lifeline and confirmed in the hope that she would change.
77. The Committee made rather peculiar findings and recommendations. They adjudged both the Claimant and the Deputy Human Resource Manager, to have acted against the spirit of *the Constitution* of Kenya, the *Leadership and Integrity Act*, the Code of Regulations and the Terms and Conditions of Service.



78. Details of the Articles of *the Constitution* of Kenya, the provisions of the *Leadership and Integrity Act*, the Cod of Regulations and the Terms and Conditions of Service, infringed by the Claimant, are not recorded by the Disciplinary Committee.
79. It was not in the mandate of a Disciplinary Committee, to determine if the Claimant acted contrary to *the Constitution* of Kenya and the *Leadership and Integrity Act*.
80. The Committee did not even recommend that the Claimant's contract is terminated.
81. Instead, the Committee arrogated itself the mandate of advising the Respondent, to restructure the Finance and Administration department. It proposed that the department is split into two. Finance and Strategy would be headed by the sitting Deputy Finance and Administration Manager, Paul Wangai. Administration department, which would include procurement, would be headed by none other than the Claimant herein, Faustine Egesa.
82. The Disciplinary Committee transformed itself into a business restructuring, advisory entity. It did not make recommendations concerning the disciplinary hearing against the Claimant. It did not recommend termination of her contract. It instead advised the Respondent to reform its departments, and even proposed names, of those who would head the new departments.
83. In his letter of termination to the Claimant dated 28th October 2015, Mwirigi based his decision on the disciplinary hearing that took place on 7th October 2015. But there clearly was no recommendation to terminate the Claimant's contract, from this meeting.
84. Even as he was terminating the Claimant's contract, Acting CEO Mwirigi, issued the Claimant a Memo, on the same date, 28th October 2015, alleging that in a bush dinner for Board members, held at Naivasha, 3 days before termination, on 25th October 2015, the bill for the dinner was inflated. He blamed the Claimant for the inflation. She was also accused, of allowing two Employees to travel for Kitale Agricultural show by flight, on 26th October 2015, while the Acting CEO Mwirigi, had instructed that the Employee travel by road.
85. When was the Claimant given the opportunity to defend these charges, coming simultaneously, with the letter of termination?
86. In the end, the Court can only conclude that the Respondent did not establish valid reason, justifying termination of the Claimant's contract. The Acting CEO appears to have been insecure, in having a hardworking Manager and past rival for the position of Acting CEO, next door. He found fault with her, with every new sun, issued a flurry of letters to show cause to her, and resolved to eject her, by all means, even when the Disciplinary Committee did not recommend termination of the Claimant's contract. He crafted new charges against her, on the very date he terminated her contract.
87. The Claimant's statement, at paragraph 14 of her Statement of Claim, that the Acting CEO embarked on a vindictive journey against her, from the date he became Acting CEO, cannot be an idle statement.
88. On remedies, the Court is not able to accede to the prayer for reinstatement. The Claimant was on a 3-year contract, whose Effective Date of Termination [EDT], is well in the past. The remedy of reinstatement, restores all the terms and conditions of service, including the EDT. It is not practicable to grant reinstatement after the EDT has passed. It would also be against Section 12 [3] [vii] of the *Employment and Labour Relations Court Act*, setting a time-limit of 3 years, on grant of the remedy of reinstatement, from the date of dismissal.



89. The Court does not see any purpose served, in characterization of the dispute as a constitutional dispute. The dispute wholly falls within the 4 corners of the *Employment Act*, and there are sufficient remedies available to the Claimant, under Statute.
90. The prayers for constitutional declarations, while attractive to the eye, and technically sound, are not necessary. The Court declines to issue declaratory orders relating to the specified Articles of *the Constitution*.
91. The Claimant has not established her claim for discrimination. What was the nature of discrimination? Who are her comparators? The prayer for damages for discrimination at Kshs. 5 million is declined.
92. The Claimant makes other prayers for general damages, and separate damages for breach of contract. There is a prayer for aggravated and exemplary damages. All these prayers have no legal foundation and are surplus, to the needs of industrial justice.
93. The multiple prayers for damages, create the impression that the Claimant, veered off from a reasonable search for industrial justice, into the territory of cash-grab litigation, also characterized as a pursuit for unjust enrichment.
94. She earned a monthly salary of Kshs. 115,063. She did not cause or contribute to the circumstances, leading to termination of her contract. She was employed on 2nd January 2014. Her contract was for a period of 3 years. It was terminated on 28th October 2015 after 22 months. She had about 14 months to the end of her contract. She did not clarify to the Court whether she secured an alternative job, after termination.
95. She is granted equivalent of 7 months' salary in compensation for unfair termination at Kshs. 805,441.
96. Clause 8 of the contract provided for notice period of 1 month, or equivalent of 1-month salary in lieu of notice. It is not clear what the prayer for 3 months' salary, is based on. The Claimant is granted notice of 1 month, at Kshs. 115,063.
97. Costs to the Claimant.
98. Interest allowed at court rate, from the date of Judgment, till payment is made in full.
99. IT IS ORDERED: -
 - a. It is declared that termination of the Claimant's contract by the Respondent, was unfair.
 - b. The Respondent shall pay to the Claimant, compensation for unfair termination, equivalent of 7 months' salary at Kshs. 805,441 and 1-month salary in lieu of notice at Kshs. 115,063 – total Kshs. 920,504.
 - c. Costs to the Claimant.
 - d. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF OCTOBER, 2024.

JAMES RIKA
JUDGE

