



**Achiya v Sight Savers International (Cause 551 of 2019)  
[2024] KEELRC 2583 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2583 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 551 OF 2019  
L NDOLO, J  
OCTOBER 24, 2024**

**BETWEEN**

**ERIC OYOO ACHIYA ..... CLAIMANT**

**AND**

**SIGHT SAVERS INTERNATIONAL ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The employment relationship between the Claimant and the Respondent commenced on 1<sup>st</sup> December 2017, pursuant to a letter of appointment dated 27<sup>th</sup> November 2017, by which the Claimant was employed in the position of Finance and Support Services Officer.
2. By the aforesaid letter, the Claimant was offered a two year fixed term contract, subject to a 3 months' probation period. The Claimant accepted the offer and an employment contract was executed on 30<sup>th</sup> November 2017.
3. The Claimant did not however serve his full contract as he was summarily dismissed on 28<sup>th</sup> June 2019, on allegations of poor performance and gross misconduct. It is this dismissal that forms the subject matter of this dispute.
4. The Claimant states his case in a Memorandum of Claim dated 22<sup>nd</sup> August 2019. The Respondent filed a Statement of Response dated 17<sup>th</sup> September 2019, to which the Claimant responded on 7<sup>th</sup> October 2019.
5. The matter went to full hearing where the Claimant testified on his own behalf, with the Respondent calling two witnesses; Timothy Nyongesa, the Finance and Support Services Manager and Alexandria Parraud, the Senior Human Resource Business Partner. The parties thereafter filed written submissions.



### **The Claimant's Case**

6. The Claimant was employed by the Respondent as Finance and Support Services Officer, earning a monthly salary of Kshs. 283,542. He worked from 1<sup>st</sup> December 2017 until 28<sup>th</sup> June 2019, when his employment was terminated on account of what he refers to as minor shortcomings.
7. The Claimant alleges that the termination of his employment was unlawful and unfair, citing the following particulars of malice and bad faith on the part of the Respondent:
  - a. Summarily dismissing the Claimant on the basis of minor shortcomings capable of being resolved informally under Clauses 4.1, 4.2 and 4.3 of the Respondent's Global Disciplinary Policy and Procedures;
  - b. Summarily dismissing the Claimant prematurely without exhaustive investigations to establish a fair and balanced view of the facts relating to the allegations made against the Claimant, contrary to Clause 8.3 of the Global Disciplinary Policy and Procedures;
  - c. Summarily dismissing the Claimant contrary to Clause 8.4 of the Global Disciplinary Policy and Procedures and the fundamental and basic rules of natural justice, especially during the disciplinary hearing on 10<sup>th</sup> January 2019 and 26<sup>th</sup> June 2019 and appeal hearing on 19<sup>th</sup> July 2019;
  - d. Summarily dismissing the Claimant at the premature stage/second disciplinary hearing contrary to Clause 9 of the Global Disciplinary Policy and Procedures;
  - e. Shortening the period for filing an appeal from one week to five days contrary to Clause 11 of the Global Disciplinary Policy and Procedures.
8. The Claimant accuses the Finance and Services Manager, Timothy Nyongesa of actuating a personal vendetta against him. He lays a claim of wrongful and unfair dismissal and therefore claims the following:
  - a. Salaries & emoluments for July-November 2019.....Kshs. 1,417,710
  - b. One month's salary in lieu of notice.....283,542
  - c. 12 months' salary in compensation.....3,402,504
  - d. Employer's pension contribution @ 10%.....510,376
  - e. 18 days' leave pay.....170,126
  - f. Certificate of service
  - g. Costs plus interest

### **The Respondent's Case**

9. In its Statement of Response dated 17<sup>th</sup> September 2019, the Respondent admits having employed the Claimant in the position of Finance and Support Services Officer, on a fixed term contract which was to run from 1<sup>st</sup> December 2017 to 30<sup>th</sup> November 2019.
10. The Claimant was however summarily dismissed on 28<sup>th</sup> June 2019. The Respondent defends the dismissal as lawful and fair and denies the Claimant's assertion that the grounds of dismissal were minor shortcomings.



11. The Respondent states that the shortcomings in the Claimant's performance and conduct started in 2018, adding that the Claimant's line manager spent a lot of time, giving the Claimant support and guidance to solve the issues informally. It is however alleged that the Claimant kept repeating the same mistakes over and over again.
12. According to the Respondent, its accountability scores in 2018 were adversely affected by the Claimant's poor performance. It is alleged that on numerous occasions, the Claimant failed to comply with established policies and procedures as well as instructions issued by his seniors.
13. By a letter dated 3<sup>rd</sup> January 2019, the Claimant was invited to a disciplinary hearing on 10<sup>th</sup> January 2019. The letter asked the Claimant to respond to alleged misconduct relating to:
  - a. Failure to carry out instructions and feedback given on various dates between May 2018 and December 2018;
  - b. Indifferent attitude to work, including failure to appropriately handle urgent and serious work on various occasions in 2018;
  - c. Constant non adherence to month end procedures;
  - d. Dishonesty on various occasions in 2018.
14. The Respondent avers that the Claimant was informed of his right to be accompanied at the hearing, and was given an opportunity to respond to the allegations raised in the letter, at least three days prior to the date of the disciplinary hearing.
15. The Claimant responded on 9<sup>th</sup> January 2019 and on 10<sup>th</sup> January 2019, he together with his representative, Moses Chege, attended the disciplinary hearing.
16. *Vide* a letter dated 18<sup>th</sup> January 2019, the Respondent communicated the outcome of the disciplinary hearing to the Claimant. He was issued with a final written warning and was also placed on a Performance Improvement Plan (PIP). According to the Respondent, the Claimant did not avail himself of the opportunity to appeal this decision.
17. The Respondent states that between 18<sup>th</sup> January 2019 and 30<sup>th</sup> January 2019, the Claimant, his line manager and the Human Resource Department discussed and agreed on the objectives, timelines, targets and other related matters for the PIP. In this regard, the Respondent lists the following areas listed for improvement:
  - a. Poor planning leading to late journal entries and payment processing;
  - b. Inadequate documentation;
  - c. Wrong journal use and coding;
  - d. Inaccurate transaction description;
  - e. Non-compliance to set policies and deadlines;
  - f. Late report preparation;
  - g. Indifferent approach to work;
  - h. Doubtful integrity and dishonesty.



18. The Respondent adds that monthly reviews were agreed upon, with initial review periods covered being 18<sup>th</sup> January 2018-11<sup>th</sup> February 2019, 12<sup>th</sup> February 2019-21<sup>st</sup> March 2019 and 22<sup>nd</sup> March 2019-25<sup>th</sup> April 2019.
19. It is pleaded that on 16<sup>th</sup> April 2019, during a PIP review meeting, it was agreed that the PIP would be extended to 18<sup>th</sup> June 2019, with a final review meeting scheduled to be held two to three weeks before the end date. The Respondent maintains that it had a genuine interest in according the Claimant an opportunity to improve in line with its Manager's Guide for Performance Improvement Plan.
20. The Respondent avers that despite being given an opportunity to improve in his performance during the PIP, the Claimant did not improve. A final review meeting was held on 14<sup>th</sup> June 2019, when the Claimant was informed that he did not complete the PIP to a satisfactory level. He was informed that he would be invited to a disciplinary hearing on 26<sup>th</sup> June 2019.
21. The Claimant attended the disciplinary hearing on 26<sup>th</sup> June 2019, accompanied by an employee of his choice and on 28<sup>th</sup> June 2019, he was issued with a letter of summary dismissal. He was allowed an opportunity to appeal against the dismissal, within five working days.
22. The Claimant lodged an appeal through his Advocates' letter dated 4<sup>th</sup> July 2019, stating that he had been dismissed on account of minor shortcomings which could have been resolved informally, that there were no prior investigations and that the disciplinary hearing was conducted by officers who were also his accusers.
23. By letter dated 10<sup>th</sup> July 2019, the Claimant was invited to an appeal hearing on 19<sup>th</sup> July 2019. At the appeal hearing, the Claimant objected to the attendance of Elizabeth Oyugi, who was chairing the appeal hearing. The Respondent did not agree with the Claimant's objection and the appeal hearing ended, with the summary dismissal being upheld and communication issued to the Claimant vide letter dated 19<sup>th</sup> July 2019.
24. The Respondent points out that Elizabeth Oyugi was not involved in the original disciplinary process and asserts that the constitution of the appeal panel was proper in line with Clause 11 of the Disciplinary Policy and Procedures Manual.
25. The Respondent further asserts that there were valid reasons justifying the Claimant's dismissal, including; non-compliance with organisational policies, poor performance during the PIP, questionable integrity and unacceptable behaviour at work.
26. The Respondent avers that the Claimant was availed adequate time to prepare for the disciplinary hearing and that he received all the necessary documentation in advance. The Respondent denies the Claimant's allegation that there were no prior investigations and states that it is due to the Claimant's failure to provide answers on issues raised by his line manager that the matter was escalated to the disciplinary level.
27. The Respondent denies that the allegations levelled against the Claimant were minor shortcomings and maintains that it complied with the law, as well as its internal disciplinary policy and procedures.

### **Findings and Determination**

28. There are two (2) issues for determination in this case:
  - a. Whether the Claimant's dismissal was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.



## The Dismissal

29. The Claimant's dismissal was communicated by a long detailed letter dated 28<sup>th</sup> June 2019, under the reference; 'Outcome of disciplinary hearing'.
30. It is on record that the Claimant's tour of duty at the Respondent was not without challenges. Several concerns were raised regarding his performance. By an email dated 11<sup>th</sup> June 2018, addressed to the Claimant by his line manager, an issue was taken with regard to the month-end checklist while another email dated 24<sup>th</sup> July 2018 raised the issue of late postings. There was further communication on poor petty cash management, delayed reconciliation and un-updated staff debtors account. Other issues raised were; capacity gaps, inadequate documentation, non-compliance with policies and deadlines, indifferent approach to work and unauthorised absence. By his own admission in his response dated 3<sup>rd</sup> June 2019, the Claimant confirmed that he had failed to report to work after having had some alcoholic drinks the previous night.
31. Yet, the Claimant maintained that all these were minor shortcomings that did not warrant a disciplinary process, much less the ultimate disciplinary action of summary dismissal. In determining whether a disciplinary action taken by an employer against an employee is reasonable and proportional, the Court is not called upon to substitute the employer's decision with its own. In other words, the Court does not ask what action it would have taken had it been in the employer's position. All the Court asks is whether the action taken by the employer is one that an ordinary employer would have reasonably taken.
32. The foregoing constitutes the 'reasonable responses test' whose beacons were established by Lord Denning in *British Leyland v Swift* (1981) IRLR 91 as follows:

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”
33. The Claimant's supervisor, Timothy Nyongesa told the Court that the incidents giving rise to the disciplinary hearing were not minor shortcomings because they were repetitive and they affected the performance of the entire Finance Department. Moreover, the Claimant's failures affected the Respondent's rating among key stakeholders.
34. The Claimant himself confirmed to the Court that his line manager offered him guidance on how to address these issues. He further admitted having participated in formulating goals for the PIP. He attended review meetings and at the end of the PIP period, he was invited to a disciplinary hearing on 26<sup>th</sup> June 2019, which he duly attended.
35. Arising from the foregoing, I find and hold that the Respondent had a valid reason for terminating the Claimant's employment as contemplated by Section 43 of the *Employment Act*. I further find that the Claimant was fully supported to improve on his performance as set out in *Jane Wairimu Machira v Mugo Waweru & Associates* [2012] eKLR. He failed to improve and the Respondent had no choice but to let him go.



36. With regard to the disciplinary procedure adopted, the Claimant was duly notified and given an opportunity to respond. In addition, he was fully supported and given time to improve; he was put on a participatory PIP, for 3 months with a subsequent extension of 1 month and regular review meetings in between. The PIP provided an objective benchmark against which the Claimant's performance could be gauged (see *Jane Samba Mukala v Ol Tukai Lodge Limited* [ 2013] eKLR).
37. The Claimant declined to complete the appeal process, ostensibly because he was not allowed adequate time and the appeal panel was not properly constituted. There is evidence however that the Claimant was availed the time provided for in the Respondent's policy. Moreover, the Court did not find any substance in the objection regarding the composition of the appeal panel.
38. Overall, I have reached the conclusion that the Claimant was availed the procedural fairness requirements set by Section 41 of the *Employment Act*. Additionally, the Respondent fully complied with its own internal policies and procedures. The Claimant's dismissal was therefore lawful and fair and the claims for compensation and notice pay are therefore without basis and are dismissed.
39. No evidence was adduced to support the claims for salary and emoluments, pension contribution and leave pay. These claims therefore also fail and are dismissed.
40. Finally, the Claimant's entire claim fails and is dismissed with an order that each party will bear their own costs.
41. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Jaoko for the Claimant

Mrs. Kashindi with Mr. Aringa for the Respondent

