



Ogot v Kenya Water and Sanitation Civil Society Network (Cause 1334 of 2016) [2024] KEELRC 2605 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2605 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1334 OF 2016
MA ONYANGO, J
OCTOBER 24, 2024**

BETWEEN

MARIAM DORSY OGOT CLAIMANT

AND

KENYA WATER AND SANITATION CIVIL SOCIETY NETWORK RESPONDENT

JUDGMENT

1. The Claimant filed her Memorandum of Claim dated 5th July 2016 on 8th July 2016 seeking the following reliefs: -
 - a. A declaration that the termination of the employment of the Claimant was unlawful, illegal and unprocedural
 - b. A declaration that the employment contract of the Claimant was breached by the Respondent by premature and unlawful termination
 - c. An order that the Respondent pay the Claimant her terminal dues and damages as outlined in the statement of claim plus interest from the date of judgment
 - d. An order that the Respondent gives the Claimant a Certificate of Service for the period served
 - e. An order that the Respondent should pay the costs of this suit and interest.
2. The Claimant avers that she was employed by the Respondent as an Administrative Assistant on a two-year renewable contract from 5th August 2013 and her contract of employment provided that the Respondent would have the right to introduce and administer policies and standards. She stated that these policies did not form part of the Employment Agreement.



3. The Claimant contended that the first contract of employment ran from 5th of August 2013 to 4th August 2015. That on 21st August 2015, the Claimant's request for renewal of her employment contract was granted and she was offered a new three (3) year contract.
4. That the new 3 year employment contract was subject to the terms of her contractual agreement as contained in the initial employment letter dated 1st August 2013.
5. According to the Claimant, the renewal of the contract of employment was to be effective from the 1st August 2015 to 31st July 2015 at a salary of Kshs 64,800 per month and the new contract was deemed as an addendum to the existing contract.
6. The Claimant contends that on 3rd May 2016, she was served with a letter from the Chief Executive Officer of the Respondent in which she was accused of several alleged infringements of the law and policies of the Respondent and given 5 days to respond.
7. It is the Claimant's case that on 5th May 2016, she wrote a letter to the Respondent providing explanations to all the accusations that had been levelled against her in the letter dated 3rd May 2016.
8. She states that the Respondent through its Chief Executive Officer totally ignored her explanations and through a letter dated 9th May 2016, proceeded to accuse her of non-existent infringements but did not address the various explanations which the Claimant had offered in her defence.
9. The Claimant states that the Respondent through the Chief Executive Officer proceeded to unlawfully terminate her employment without observing the minimum requirements for the termination of employment contracts.
10. The Claimant therefore sought to be compensated as a result of the alleged unfair termination as follows:
 - a. 3 months' salary in lieu of notice pay @Kshs. 64,800.... Kshs. 194,400
 - b. Untaken leave days @ 14 days Kshs. 34,892
 - c. Unspent part of 3 years contract
@Kshs 64,800 Kshs. 1,814,400
 - d. Damages for unlawful termination
@12 months' salary Kshs. 777,600
11. In response to the Memorandum of Claim, the Respondent filed a Memorandum of Response on 5th October 2016 in which it denied the averments in the claim. It stated that the policies and standards governing the Claimant's work and duties including her job description were clearly spelt out and signed by the Claimant.
12. In rebuttal, the Respondent averred that in total breach of her fiduciary and proprietary obligations to the Respondent the Claimant was found to have engaged in various acts of financial and proprietary malpractices which brought to fore matters of financial fraud, misuse of privilege and employers property inclusive of time, all of which led to a justifiable finding that she was subject to the Respondent's disciplinary process.
13. The Respondent states that the Claimant was served with a notice to show cause and upon giving her answer to the notice to show cause letter which was found to be unsatisfactory, she was taken through a disciplinary hearing where she was given a chance to defend herself.



14. It is contended by the Respondent that upon conclusion of the disciplinary process, it was proved that the Claimant had breached her fiduciary and proprietary duty to her employer leading to her summary dismissal from employment.
15. The Respondent states that it opted to terminate the Claimant's employment by paying her terminal dues as opposed to dismissing her summarily but the Claimant declined to receive her terminal dues.
16. The Respondent avers that the Claimant is not entitled to any other payment except her terminal dues which she was offered but declined to collect.

Evidence

17. The Claimant testified as CW 1 on 26th January 2022 and adopted her witness statement recorded on 4th July 2016 as her evidence in chief. She further relied on her two bundles of documents dated 5th July 2016 and 17th February 2021 as her exhibits.
18. In brief, the Claimant testified that during the course of her employment with the Respondent, the Respondent procured the services of service providers and during the preparations for the World Water Day in Kisumu scheduled for 22nd March 2016, the Claimant as the Respondent's Administrative Assistant was tasked with getting accommodation and flight bookings for the identified participants in the Respondent's employment.
19. It was her evidence that she sent Request for Quotations to the Imperial Hotel, the Vic, Sovereign Suites and Acacia Hotel to get quotations on their rates and then present them to the Procurement Committee for consideration and award.
20. The Claimant testified that in response, the Imperial Hotel quoted Kshs 9,800, the Vic quoted Kshs 12,500, Sovereign Suites quoted Kshs 12,000 while Acacia quoted Kshs 12,500.
21. The Claimant testified that during past events, employees of the Respondent had been accommodated at the Vic at a price of Kshs.9, 800 but this time round the Vic had increased the rate to Kshs. 12,500. That after negotiating with them, the accommodation charges were reduced to Kshs.11,000. That the Respondent's Finance and Administration Manager decided that the team would be accommodated at Acacia.
22. The Claimant stated that she chose Acacia Hotel over the Vic Hotel which was charging higher as directed by the office.
23. She stated that she made all the necessary transport and accommodation arrangements from Nairobi to Kisumu for all the participants but an intern by the name Dennis opted to travel by bus and not by air as he did not have his Identity Card which was a requirement for the flight.
24. The Claimant stated that Dennis did not show up at the hotel as a result of which the Respondent was charged for a no show for the 1st night.
25. The Claimant testified that he was issued with a notice to show cause over Dennis travelling by bus.
26. The Claimant averred that she was never invited for a formal disciplinary hearing. It was her evidence that one day, her boss dropped a letter inviting her to a meeting at 1pm. That when she got to the meeting, she realised that it was a disciplinary hearing. She stated that she did not actively participate in the said disciplinary hearing. That after the meeting she was told to go and write another letter explaining herself.
27. She stated that she complied and was thereafter issued with a letter of termination of her employment.



28. On cross examination, the Claimant stated that in the first notice to show cause letter she was issued with, the first issue was procurement of Acacia Hotel instead of the Vic; the second issue was on the accommodation of Dennis Ojaro; and the third issue was that the Claimant had changed tickets for herself from Kenya Airways to Fly 540.
29. The Claimant stated that the invoice she signed indicated that Mr. Denis had been booked in Room 520 on 21st March 2016.
30. The Claimant further stated that she did not travel with Kenya Airways which had been paid for by the Respondent because she wanted to travel with her spouse and her baby. She stated that she sought approval not to travel by Kenya Airways and opted to use Fly 540 airline which was more expensive. That she topped up the difference between Kenya Airways and Fly 40 air tickets and also paid for her spouse and child. She denied that part of the money paid for her ticket by the Respondent was applied to a second ticket as alleged by the Respondent.
31. The Claimant testified that she gave an elaborate explanation to her immediate supervisor, Esther Kiarie and the CEO over all the three issues raised by the Respondent but was still terminated from employment unfairly and unlawfully.
32. The Claimant was re-examined on 29th September 2022 and stated that her role in the reservations was limited to receiving the quotations only and that Denis was part of the team that was to travel to Kisumu. That the hotel charged for no show by Denis and not because Denis spend the night at the hotel.
33. The Respondent called Samson Malesi Shivaji its Chief Executive Officer who testified as RW1. He adopted his witness statement dated 27th June 2018 as his evidence in chief and relied on the documents filed by the Respondent in support of its case.
34. RW1 testified that the employment of the Claimant was terminated after all the staff missed their flights back to Nairobi after attending the World Water Day event in Kisumu as a result of which the Respondent incurred additional costs.
35. He testified that while seeking an explanation from the Claimant as to why staff missed their flights, he established that the Claimant had changed her flight details without informing her supervisor by directly engaging with the service provider contrary to policy. He also stated that before the issue of air tickets was concluded, another matter came up when the hotel that had hosted the team in Kisumu sent an invoice indicating that a number of staff who had not travelled had been booked in the hotel.
36. RW1 stated that the Respondent had booked the entire team on Kenya Airways flight but the Claimant engaged a different airline and asked for 3 tickets, herself, her spouse and her newborn baby.
37. It is the evidence of RW1 that the Claimant did not have authority to make such alterations without authority.
38. With regard to the issue of Dennis Ojaro, RW1 maintained that the Acacia Hotel where the Respondent's team was accommodated confirmed that according to the rooming list, Mr. Dennis Ojaro had occupied the room booked for him under the instructions of the Claimant when in the real sense, the said Dennis had not travelled to Kisumu on the said date. He explained that in contrast to the explanation given by the Claimant that the hotel charged the room on the basis of no-show, the factual position was different, that Denis was not in the rooming list as he was not part of the delegation to Kisumu. He stated that the hotel confirmed that the room was occupied.



39. Regarding the issue of accommodation of employees at Acacia instead of the Vic, RW1 stated that a higher quote was issued by Vic Hotel which later revised its quotation downwards to a cheaper rate compared to Acacia Hotel. RW1 stated that this information was not presented to the procurement committee as a result of which the Respondent incurred unnecessary costs.
40. The Respondent's witness testified that the Claimant was invited to a disciplinary hearing and was found to have violated the code of conduct. That as a result the Claimant's employment was terminated.
41. RW1 stated that the Claimant was called to collect the cheque for her terminal dues but she declined.
42. On cross examination, RW1 maintained that the Claimant was invited to a disciplinary hearing and was informed of her right to be accompanied by her supervisor. He stated that the Claimant's name was missing from the rooming list. RW1 stated that he did not attach the procurement policy to the Respondent's bundle of documents filed in court.
43. At the close of the Respondent's case, the court directed parties to file written submission.
44. The Claimant's submissions are dated 6th October 2022. The Respondent's submissions are not on the court record.

Issues for Determination

45. I have considered the pleadings and evidence of the parties tendered in court. I have also considered the submissions on record and the cited authorities
46. The issues that arise for this court's determination are:
 - i. Whether the Claimant's contract was unfairly terminated,
 - ii. Whether the Claimant is entitled to the reliefs sought.
47. Under section 45 of the *employment Act*, termination of the employment of an employee is unfair if the employer fails to prove that the termination was grounded on a valid and fair reasons and that a fair procedure was followed.
48. The letter to show cause issued to the Claimant is reproduced below:

Kenya Water and Sanitation

Civil Society Network

3RD MAY 2016

Mariam Dorsy Ogot

Administrative Assistant

KEWASNET

BOX 46163 -00100

Nairobi

Dear Mariam,

RE: Violation of Code of Conduct



In the last one month, my office has been conducting a review of the world water day in Kisumu following the incident in which most staff missed flight back to Nairobi. In the process of this investigation, a number of things have unraveled and which point to abuse of office and violation of our code of conduct on your part.

Specifically, you are hereby accused of the following;

1. That you failed to inform the procurement committee, or its chairperson thereof of an amended quotation from a service provider (Vic Hotel) that was received on 17th March 2016, yet this would have potentially saved the organization a substantial amount of money for the period. This points to a violation of main principles underline proficient procurement, and which are outlined in our policy.
 - a. Economy and efficiency to achieve quality, cost effectiveness and timely delivery in procurement;
 - b. Equitable, fair and open competition giving all eligible/qualified bidders an opportunity to participate;
2. That you acted with deceit and without authority, to instruct a service provider (Acacia Premier hotel) to accommodate one 'Dennis Ojuro' on 21st March 2016. From our records, the rooming list given to the service provider does not include Dennis Ojuro, and in fact Dennis never travelled to Kisumu. Enquiry with the hotel has confirmed that you gave instruction of this-occupancy, and you further went on to confirm and sign the hotel invoice for payment by the organization.
3. That you used the organizational facility of service providers to access personal services with respect to interactions with Kendritas Tours and Travel Ltd. There is evidence that you represented yourself as KEWASNET staff in conducting personal business with a service provider, which puts you in a position of probable conflict of interest since you are the first point of interaction to suppliers at KEWASNET I will refer you to the HRM provisions on the above violations..' the general rule is to avoid any conflict of interest or even the appearance of a conflict of interest."

My findings have been that you have been in violation of the code of conduct, which requires you to "Act in the best interest of KEWASNET while performing your job for the organisation. A conflict of interest arises when your personal activities and relationships interfere, or appear to interfere, with your ability to act in the best interest of the organisation"; and the requirement to "... Protect the organization's assets, and use those assets in the manner intended.

Further to the above, you are in a violation of the code that requires Further to the above, you are in a violation of the code that requires you ... "not to use organisation assets for your personal benefit or the benefit of anyone other than the organisation."

These accusations fall within the definition of gross misconduct, by policy and law. According to our HRM, an employee who has committed an act of gross misconduct within the meaning of Sec. 44 of the Employment Act 2007 may



be summarily dismissed and shall not receive any notice or payment in lieu of notice. By way of this letter, you are asked to provide your response, within 5 days of date of this letter, on what you are accused of and/or show cause as to why prescribed action should not be taken against yourself.

Sincerely,

Signed

Samson Shivaji

Chief Executive Officer

KEWASNET

cc. Departmental Supervisor.

49. The Claimant's response to the show cause letter is at annexure "MDO-3" of her list and bundle of documents. In the said letter she stated what she told the court in her testimony at the hearing of the Claim.
50. The letter of termination is reproduced below:

Kenya Water And Sanitation

Civil Society Network

11th May 2016

Mariam Dorsy Ogot

Administrative Assistant

KEWASNET

Dear Mariam,

Re: Termination of Your Employment

I am writing to you about the termination of your employment with KEWASNET.

I refer to our meeting on 9th May, 2016 which was attended by you and your supervisor as witness. During the meeting we discussed the code of conduct violations that you are accused of, consisting of the following amongst others;

That you instructed a service provider, without authorization of your supervisor, to invoice KEWASNET for a flight that you did not take as payment for a self-procured personal flight. That you withheld information about your Kisumu itinerary, and willfully made submissions to insinuate that you had attended flights provided for by the organization. That you absconded duty on 21st and 23rd of March 2016, having not had authorization to be away from duty, and making submissions with intent to withhold such facts. That you instructed a second service provider to accommodate an unknown person in the name of Dennis Ojuro' and for which KEWASNET Was invoiced. That you willfully withheld information, and made it unavailable by deliberately deleting email information that would have incriminated you over your actions.

As discussed during the meeting, your conduct above:

was willful and deliberate behaviour by you, an abuse of office, and inconsistent with KEWASNET values, and your contractual obligations. caused a serious and imminent risk to the reputation of KEWASNET's business-in that it violates the standards of integrity



that we define ourselves by and demand of others.was conduct in the course of your employment engaging in theft by employment, and in the circumstances your continued employment during a notice period would be unreasonable.

We consider that your actions constitute serious misconduct. as prescribed in law and policy warranting summary dismissal.

You will be paid any accrued entitlements and outstanding remuneration, up to and including the date of this letter. You are required to hand over all KEWASNET assets and obligations in your name by close of business today.

With utmost regret,

Signed

Samson Shivaji

Chief Executive Officer

KEWASNET.

51. The letter was sent to the Claimant by email sent on 11th May 2016. The email is reproduced below:

Termination of Employment

Dear Mariam,

Further to our meeting held on 9th May 2016, and having considered your submissions in response to the points of inquiry, I am satisfied that indeed your conduct was gross and in direct violation of our code of conduct and policies as per section 9.4 of the HR policy, and provisions of the employment Act Section 44. You are hereby notified of your summary dismissal, as per the attached letter.

Clear with your supervisor as per the guidance in the attached letter.

With regards,

Samson M. Shivaji

Chief Executive Officer

Kenya Water and Sanitation Civil Society Network

PO Box 46163-00100

Nairobi

52. Section 43 of the Act provides as follows –

43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.



53. From the evidence of the Claimant, she adequately responded to the issues raised by the Respondent in the notice to show cause letter. On the first issue the Claimant stated that she did not see the letter dated 17th March, 2016 amending the quotation from the Vic Hotel. She explained that during that period she was working half day as she had a baby and was entitled to breastfeeding time. She further explained that the email account was used by several members of staff who could have picked up the issue and acted on it. She further explained that there were several emails from the same address which were responded to during her absence. That she should not be held solely responsible for the lapse.
54. On the second issue the Claimant testified that Mr. Dennis did not travel by air as he did not have his Identity card which was required for air travel. That Denis was supposed to travel by bus but did not. That his room was charged for no-show for the first night.
55. RW1 however insisted that the invoice did not reflect what the Claimant was saying and that the room was occupied according to the rooming list and the hotel staff. The hotel staff were however never called as witnesses. The hotel further did not produce the particulars of identity of the person who is alleged to have occupied the room on the said night. It was further an uncontested fact that Denis did not travel to Kisumu and could not therefore have occupied the room. There was thus no reason not to believe the explanation of the Claimant without other more compelling and controverting evidence.
56. On the third charge against the Claimant, the Respondent did not produce any policy document or instructions to staff not to use the contracted service providers of the Respondent for private services. It was not explained how by securing tickets through the contracted service provider the Claimant put herself in a situation that could amount to conflict of interest. The Claimant adduced evidence that she paid for the tickets she secured through the contracted service provider. Refer to pages 31 to of Respondent's List and Bundle of Documents dated 27th June 2018 and filed on 28th June 2018.
57. Section 43 of the *employment Act* provides that:
- “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
58. From the foregoing, I find that the Respondent did not discharge the burden of proving that it had valid reason to terminated the Claimant's employment.
59. With regard to due process followed in the termination of the Claimant's employment, section 41 of the Act provides that:-
- “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
60. RW1 testified that the Claimant was taken through a disciplinary process in the presence of her supervisor. The Claimant on the other hand maintained that apart from the notice to show cause letter that initiated her eventual termination, she was never invited to a disciplinary meeting. She maintained that on 9th May 2016, she was invited to a meeting only to realize while in the meeting that she was undergoing a disciplinary hearing. She contended that she was not given adequate time to prepare nor told the charges levelled against her prior to the alleged disciplinary hearing.



61. It is trite that before terminating the employment of an employee the employer is required to give a fair hearing to an employee which includes affording the employee time to prepare for the hearing and informing the employee of the charges against them. The Respondent did not the evidence of the Claimant that she was called to a meeting and only realized when at the meeting that she was being taken through a disciplinary hearing.
62. Further, there were no minutes of the alleged disciplinary hearing to prove that the Claimant was given an opportunity to defend herself.
63. It is thus my finding that the Respondent had no valid reason to terminate the employment of the Claimant and that the Claimant was not taken through a fair disciplinary process. The termination of the Claimant's employment was therefore unfair both substantively and procedurally.

Reliefs

64. In view of the finding above that the termination of the Claimants employment was not based on valid reason and that fair procedure was not followed, I declare that the dismissal was unfair and therefore unlawful.
65. I will address the compensation sought by the Claimant as outlined in her Statement of Claim under the different heads as hereunder-
 - i. 3 months' salary notice pay @ Kshs. 64,800
The Claimant's employment contract dated 5th August 2013 which was an addendum to the new contract provided for three months' notice or salary in lieu of notice. I award the Claimant 3 months' notice as prayed.
 - ii. Untaken leave days @ 14 days totaling to Kshs. 34,892
The Claimant pleaded and testified that she did not utilize the above leave days. The Respondent did not dispute the claim for unpaid leave days. I therefore award the Claimant Kshs 34,892 as pay for leave earned but not taken.
 - iii. Unspent part of 3 years contract @ Kshs 64,800 totaling to Kshs. 1,814,400
The Employment Act provides for compensation for termination of employment to a maximum of 12 months gross pay. There is no legal or contractual basis for an award for the unexpired term of a fixed term contract. The prayer is thus dismissed.
 - iv. Damages for unlawful termination @ 12 months salary
The Claimant had served the Respondent for three years as at the time her employment was terminated. It is my view, taking into account the length of service, the circumstances around the termination of her employment and all other relevant factors under section 49(4) of the Act, that maximum compensation would be excessive in the circumstances. It is my view that an award of 6 months' salary is reasonable. I accordingly award her the same.
66. In summary, judgment is entered for the Claimant against the Respondent in the following terms:
 - a. 3 months' salary notice pay Kshs. 194,400
 - b. Untaken leave days @ 14 days Kshs. 34,892
 - c. 6 months' compensation for



unlawful termination Kshs. 388,800

Total Kshs. 618,092

67. A certificate of service to be issued to the Claimant within 30 days of this judgment,

68. The Claimant is awarded costs and Interest.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF OCTOBER, 2024

MAUREEN ONYANGO

JUDGE

