



**Ongoro v Kenya Red Cross Society & another (Cause 1467 of 2018)  
[2024] KEELRC 2547 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2547 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1467 OF 2018  
SC RUTTO, J  
OCTOBER 18, 2024**

**BETWEEN**

**DANIEL OCHIENG ONGORO ..... CLAIMANT**

**AND**

**KENYA RED CROSS SOCIETY ..... 1<sup>ST</sup> RESPONDENT**

**ABBAS GULLET ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. It is common cause that the Claimant was employed by the 1<sup>st</sup> Respondent as a Clerk of Works with effect from 2011. From the record, the employment relationship soured when the Claimant was invited to appear before an investigating committee to give clarifications on some irregularities that had been raised during an internal audit query. The Claimant was subsequently issued with a Notice to Show Cause dated 12<sup>th</sup> April 2018. The disciplinary hearing was initially scheduled for 16<sup>th</sup> April 2018 but was rescheduled following a request by the Claimant.
2. Through a letter dated 20<sup>th</sup> April 2018, the Claimant tendered his resignation but the 1<sup>st</sup> Respondent refused to accept the same on account of the disciplinary proceedings that were pending at the time. Subsequently, the Claimant was invited for a disciplinary hearing scheduled for 11<sup>th</sup> June 2018. The disciplinary hearing did not proceed and the same was rescheduled to 14<sup>th</sup> June 2018.
3. On 14<sup>th</sup> June 2018, the Claimant did not appear for the disciplinary hearing. Consequently, through a letter dated 3<sup>rd</sup> July 2018, the 1<sup>st</sup> Respondent terminated the Claimant from its employment on grounds that he did not appear for the disciplinary hearing and that management had not heard from him and was unaware of his whereabouts.
4. It is the Claimant’s contention that he was never accorded a fair hearing in accordance with the rules of natural justice. He further avers that the disciplinary process instigated by the Respondents was conducted in a hasty, haphazard and vindictive manner.



5. Against this background, the Claimant prays for Judgment against the Respondents as follows:
- a. An order to issue compelling the Respondent to remit the withheld Claimant's benefits to the staff retirement benefits scheme.
  - b. Damages for unlawful and unfair termination of employment.
  - c. Twelve months pay being Kshs. 91,952.2/= net pay multiplied by 12.
  - d. Severance pay at the rate of 15 days for each year completed.
  - e. General damages for psychological torture and unfair labour practices amounting to Kshs. 5,000,000/=.
  - f. Special damages for travel via matatu from Kakuma to Nairobi and local flight from Lodwar to Nairobi amounting to Kshs. 15,300/=.
  - g. Three months' pay in lieu of notice.
  - h. The Respondent be compelled to issue the Claimant with a certificate of service.
  - i. The Respondent be permanently restrained from giving any negative information to prospective employers of the Claimant.
  - j. Costs of this Suit and interest thereto.
  - k. Any other award that the Court may deem fit.
6. The Respondents opposed the Claim through a Memorandum of Response dated 25<sup>th</sup> June 2019. It is the Respondents' case that they observed the rules of natural justice, the 1<sup>st</sup> Respondent's Human Resource policy and procedures, and the *Employment Act* throughout the disciplinary process and did not act contrary either *the Constitution* of Kenya, the Fair Administrative Actions Act, 2015 or any applicable laws. Consequently, the Respondents have urged the Court to dismiss the Claim with costs.
7. The matter proceeded for hearing on diverse dates, during which both parties called oral evidence.

### **Claimant's Case**

8. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He proceeded to produce the list and bundle of documents filed alongside the Amended Memorandum of Claim as his exhibits before Court.
9. It was the Claimant's evidence that the Respondents had already decided to take disciplinary action against him even before he was given an opportunity to respond to the allegations raised in the Notice to Show Cause as he was invited for a disciplinary meeting on 16<sup>th</sup> April 2018.
10. The Claimant averred that no documents were furnished upon him as the basis upon which the Show Cause letter was issued. That further, he was never given the opportunity to peruse the evidence the disciplinary panel intended to rely on.
11. It was the Claimant's further evidence that he painstakingly attempted to give a detailed response to the allegations raised in the Show Cause letter as he was given one day to respond and prepare for the disciplinary hearing.
12. That in the meantime, he was making travel arrangements from Kakuma Refugee camp, Turkana County where he was stationed, to Nairobi where the disciplinary hearing was scheduled to take place.



- He sought transport facilitation by air from the 1<sup>st</sup> Respondent but the same was denied and since he could not afford to pay for the flight from his pocket, he had to travel to Nairobi by road. It took two days for him to get to Nairobi and it was apparent that he could not make it to the hearing.
13. This necessitated the meeting to be rescheduled to 17<sup>th</sup> April 2018. Unfortunately, he was taken ill and upon treatment, the doctors recommended that he takes three days off from work hence the disciplinary rescheduled for 17<sup>th</sup> April 2018 could not proceed. This information was duly relayed to the Respondents.
  14. The Claimant further averred that he was left with no choice but to tender his resignation vide a letter dated 20<sup>th</sup> April 2018 in light of the efforts deployed by the Respondents to frustrate him and the fact that the events that had transpired had taken a toll on his health.
  15. His resignation was rejected vide the 1<sup>st</sup> Respondent's letter dated 7<sup>th</sup> May 2018. In the said letter, he was subsequently suspended from employment for an indefinite period of time to purportedly allow conclusion of investigations into the matter.
  16. He was thereafter invited for a meeting on 11<sup>th</sup> June 2018. The Claimant contended that the invitation did not outline the agenda of the meeting and upon inquiry from the 1<sup>st</sup> Respondent's Human Resource Manager, he was vaguely informed to refer to previous email communication without reference to any specific correspondence.
  17. When he attended the said meeting on 11<sup>th</sup> June 2018, he informed the disciplinary committee that he was never made aware of the meeting's agenda hence the meeting had to be rescheduled.
  18. He was invited for another disciplinary hearing on 14<sup>th</sup> June 2018 whereupon he wrote to the Respondent requesting for information and documents the Respondent intended to rely on as evidence against him during the hearing.
  19. According to the Claimant, the notice given for the follow-up disciplinary hearing was too short and he was not in a position to attend the said meeting as he was scheduled to travel out of Nairobi to fend for his family as payment of his salary had not been made. He pleaded with the Respondent for the hearing to be moved but the Respondent was adamant.
  20. He was eventually issued with a letter of termination dated 3<sup>rd</sup> July 2018 which indicated that the basis upon which his employment was terminated was failure to attend the disciplinary hearings scheduled by the Respondent.
  21. It was the Claimant's case that his failure to attend the said disciplinary proceedings was engineered by the Respondent.
  22. The Claimant further averred that the Respondent had been irregularly withholding his salary and benefits for two months which left him in a dire and precarious situation financially as the job was his sole source of income and he had a family to support.
  23. Concluding his testimony in chief, the Claimant asked the Court to allow his claim as prayed.

### **Respondents' Case**

24. The Respondents called oral evidence through Ms. Christine Muriuki who testified as RW1. She identified herself as the 1<sup>st</sup> Respondent's Senior Human Resource Business Partner and proceeded to adopt her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed on behalf of the Respondents as exhibits before Court.



25. RW1 testified that the Show Cause letter issued to the Claimant outlined 9 grounds which were of concern and amounted to a gross contravention of the 1<sup>st</sup> Respondent's procurement procedures and standards. The Show Cause letter gave the Claimant an opportunity to respond by Friday 13<sup>th</sup> April 2018, and he was subsequently invited for a hearing on Monday 16<sup>th</sup> April 2018 with an option of a witness.
26. RW1 denied the Claimant's assertions that he sought to be furnished with any documents prior to the said hearing. To this end, she averred that the Respondent was under no obligation to furnish the Claimant with documents as the issues of concern that were raised in the Show Cause letter fell within his scope of work and thus within his knowledge.
27. She further averred that the Claimant wrote an email to the 1<sup>st</sup> Respondent's officials informing them that he could not make it to the hearing on grounds of heavy rainfall within Turkana making roads inaccessible. Subsequently, the hearing was rescheduled to 17<sup>th</sup> April 2018. The Claimant replied indicating that he was unwell and thus could not attend the said meeting and he subsequently requested the meeting to be rescheduled to some other convenient time.
28. RW1 was categorical that in dispensing its duties, the Respondents have never deployed efforts to frustrate the Claimant. She termed the allegations false, unfounded and made in bad faith with an aim of tarnishing the Respondents' image and reputation.
29. In RW1's view, undertaking preliminary steps in the disciplinary process by the 1<sup>st</sup> Respondent should not be equated as efforts to frustrate/harass the Claimant.
30. She is aware that the Claimant tendered his resignation vide a letter dated 20<sup>th</sup> April 2018 in an attempt to negate Human Resource policy and the principle of fair labour relations. However, as there was a disciplinary case against the Claimant, the 1<sup>st</sup> Respondent could not accept his resignation unless it was established that he was not culpable of the issues that had been raised.
31. RW1 further denied the Claimant's assertions that he was suspended for an indefinite period of time. On this issue, she averred that the Claimant's suspension was for two weeks to allow the Respondent conduct conclusive investigations with the cooperation of the Claimant.
32. RW1 further averred that when the Claimant was invited for a 3<sup>rd</sup> time for a disciplinary hearing on 11<sup>th</sup> June 2018, through the email thread that was previously used in communicating and rescheduling the past two meetings that never took place. The Respondent made him aware of the agenda on 11<sup>th</sup> June 2018 and proceeded to reschedule the meeting at the request of the Claimant to 14<sup>th</sup> June 2018, a date suggested by the Claimant.
33. That as a courtesy, the 1<sup>st</sup> Respondent's Human Resource Personnel did a follow-up email to the Claimant to affirm that the meeting shall be held on 14<sup>th</sup> June 2018. RW1 added that when settling for the said date, the Claimant did not indicate that he was scheduled to travel out of Nairobi noting that the Respondent duly notified the Claimant that the hearing would not be rescheduled again so as to bring the matter to closure.
34. That on 14<sup>th</sup> June 2018, a disciplinary meeting was held at the 1<sup>st</sup> Respondent's Board and the Claimant failed to attend; this is despite starting the meeting 30 minutes after the scheduled time, in a bid to wait for the Claimant to turn up for the meeting.
35. According to RW1, the Claimant's actions reflect that he indeed wanted to shun away from the disciplinary hearing. It was her view that the Claimant failed to take the internal policies and Procedures of the 1<sup>st</sup> Respondent seriously thereby sabotaging the disciplinary process since he failed to appear



for the disciplinary hearing that was scheduled for 14<sup>th</sup> June 2018 having postponed three previous hearings at the Claimant's request. The Claimant's action thus led to his summary dismissal.

36. She is aware that the Respondent indulged the Claimant when he could not make it for the first two meetings after giving his reasons for his inability to attend the hearings.
37. She is also aware that the Claimant was on suspension on full salary and that at no time have the Respondents been non-committal on remitting the Claimant's Salary, benefits and terminal dues.
38. That further, the 1<sup>st</sup> Respondent paid the Claimant all his dues that he was entitled to as at termination and none is outstanding.

### **Submissions**

39. After close of the hearing, both parties filed written submissions. On his part, the Claimant submitted that the unfairness in the termination of his employment stems from the fact that he was taken through an unfair process and was never afforded a fair hearing in accordance with the rules of natural justice in accordance with Article 48 of *the Constitution* of Kenya, 2010 and the Fair Administrative Actions, 2015. In support of his argument, the Claimant placed reliance on a number of cases including *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* (2014) eKLR and *Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited Cause No. 74 of 2013*.
40. The Claimant further submitted that his failure to attend the disciplinary proceedings was well engineered by the Respondent to frustrate him and ensure his employment was ultimately terminated. According to the Claimant, the Respondent did not even bother to follow the disciplinary procedure as per the *Employment Act* as it had a clear goal in mind.
41. On the Respondents' part, it was submitted that the law does not bar an employee from terminating their employment during disciplinary, nor does it place an obligation for an employer to accept such resignation for it to be termed as valid. To buttress this argument, the Respondents placed reliance on the case of *Edwin Beiti Kipchumba vs National Bank of Kenya Limited* (2018) eKLR and *Kenya Hotels & Allied Workers Union v Mara Siria t/a Safari camps (K) Ltd* (2016) eKLR.
42. Citing the case of *Kennedy Obala Oaga vs Kenya Ports Authority* (2018) eKLR, the Respondents argued that the Claimant's dismissal on 3<sup>rd</sup> July 2018 was null and void as the 1<sup>st</sup> Respondent had already lost its capacity and jurisdiction as an employer since the Claimant's notice period had already lapsed by this time.
43. It was the Respondents' position that the letter of resignation tendered by the Claimant was valid and enforceable in terminating the employment contract, and took effect on 19<sup>th</sup> May 2018, which happened before the 1<sup>st</sup> Respondent issued him with a termination letter.

### **Analysis and Determination**

44. Flowing from the pleadings and the evidentiary material on record as well as the submissions by both parties, the Court has isolated the following issues for determination: -
  - a. Whether the Claimant's termination was of any legal consequence in light of his resignation;
  - b. Depending on the answer in (a), whether the Claimant was unfairly and unlawfully terminated from employment;
  - c. Is the Claimant entitled to the reliefs sought?



## Legal consequence of the Claimant's termination

45. It is common cause that the Claimant tendered his resignation from the 1<sup>st</sup> Respondent's employment through his letter of resignation dated 20<sup>th</sup> April 2018. The said letter is couched in part:

“Re: Notice Of Resignation As Clerk Of Works

I hereby tender my resignation as the clerk of works with Kenya Red Cross. With effect from the date of this letter, I wish to give one month notice as per the organization's policy...I am fully aware of the investigations going on with regard to my conduct. I take this opportunity to request the investigating team to complete the investigations within my notice period. I promise to fully cooperate with the investigating team as I have always done since the commencement of the investigation...”

46. It is apparent that at the time the Claimant tendered his resignation, he was in the middle of a disciplinary process as he had been issued with a Notice to Show Cause and was scheduled to appear before the 1<sup>st</sup> Respondent's disciplinary panel at a later date.

47. From the account of both parties, the 1<sup>st</sup> Respondent rejected the Claimant's notice of resignation on grounds that there was a pending disciplinary case against him. Upon rejecting the Claimant's notice of resignation, the 1<sup>st</sup> Respondent proceeded to schedule a disciplinary hearing for 11<sup>th</sup> June 2018. This was later rescheduled to 14<sup>th</sup> June 2018 and on 3<sup>rd</sup> July 2018, the 1<sup>st</sup> Respondent issued the Claimant with a letter of termination citing his failure to attend the scheduled disciplinary hearings.

48. In view of the foregoing sequence of events, the question that begs is whether the termination of the Claimant's employment by the 1<sup>st</sup> Respondent had any legal consequence in light of his resignation?

49. Perhaps I should start by considering the definition of the term resignation. The Black's Law Dictionary (10<sup>th</sup> Edition) defines the term resignation to mean: -

“The act or an instance of surrendering or relinquishing an office, right or claim. A formal notification of relinquishing an office or position; an official announcement that one has decided to leave one's job or organisation, often in the form of a written statement.”

50. Applying the above definition to the case herein, it is clear that through his letter of resignation, the Claimant unequivocally announced his intention to leave the 1<sup>st</sup> Respondent's employment subject to the notice period. As such, it did not matter whether or not the 1<sup>st</sup> Respondent accepted the Claimant's notice of resignation. If I may say, there was no action required on the part of the 1<sup>st</sup> Respondent to validate the Claimant's resignation. It was valid as is and could not be negated by whatever action the 1<sup>st</sup> Respondent took.

51. As was held in the case of *Edwin Beiti Kipchumba vs National Bank of Kenya Limited* [2018] eKLR, resignation by an employee from employment, is a unilateral act and the *Employment Act* does not require the employer to accept a notice of termination issued by the employee, for that notice to take effect.

52. Fundamentally, the resignation by the Claimant had the effect of terminating the employment relationship. Differently expressed, the rights and obligations that ordinarily accrue in an employment relationship had ceased. As such, there was nothing left by the 1<sup>st</sup> Respondent to terminate. Such was the determination in the South African case of *Lottering vs Stellenbosch Municipality*, (2010) 31 ILJ 2923 (LC).



53. Subsequently, the ensuing disciplinary hearings and the letter of termination dated 3<sup>rd</sup> July 2018 were of no legal consequence. What the 1<sup>st</sup> Respondent was doing by purporting to conduct further disciplinary hearings was akin to flogging a dead horse.
54. On this score, I will follow the determination by the Court in the case of Kennedy Obala Oaga vs Kenya Ports Authority [2018] eKLR, in which the Court cited the South African case of Mtati vs KPMG (Pty) Ltd (2017) BLL 315 (LC) where it was held that where an employee tenders a resignation immediately, there and then, the employer is deprived of jurisdiction to continue with the disciplinary process as resignation takes effect immediately. The Court went on to hold that “authority to discipline the Employee is based on the existence of a contract of employment. Without a contract, there is no authority.”
55. Coming back to this case, I find and hold that the purported termination by the 1<sup>st</sup> Respondent through its letter dated 3<sup>rd</sup> July 2018, was of no effect hence is null and void.
56. Having found that the termination by the 1<sup>st</sup> Respondent was null and void, it is not logical to determine whether the same was unlawful and unfair. My position is fortified by the holding in the case of Kennedy Obala Oaga vs Kenya Ports Authority (supra) thus: -
- “Summary dismissal was null and void, not based on an Employer-Employee relationship, and it makes no sense to inquire whether, or declare, such a decision is fair or unfair. The decision must be treated as if it was never made. It was null and void, without any legal consequences. To say it was unfair, would suggest that decision has legal consequences.
57. That said, I now turn to consider whether the reliefs sought by the Claimant lie in law.

#### **Reliefs?**

58. As there has been no finding of unfair and unlawful termination, the claim for compensatory damages and notice pay cannot be sustained.
59. The claim for severance pay is misplaced as the same only arises where termination is by way of redundancy under Section 40 of the *Employment Act*. As it is, this was not a case of redundancy.
60. The claim for special damages to cover the travel expenses incurred by the Claimant from Lodwar to Nairobi, is declined as the Claimant failed to lay a basis for reimbursement of the same, for instance through a policy document.
61. As the employment relationship has been admitted, the Claimant is entitled to a Certificate of Service in light of Section 51(1) of the *Employment Act*.

#### **Final Orders**

62. In the end, the Court finds that the Claimant effectively resigned on 20<sup>th</sup> April 2018 and his subsequent termination on 3<sup>rd</sup> July 2018, by the 1<sup>st</sup> Respondent was null and void.
63. Consequently, the claim for unfair termination collapses with an order that each party bears their own costs.
64. The 1<sup>st</sup> Respondent shall issue the Claimant with a Certificate of Service within 30 days from the date of this Judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF OCTOBER, 2024.**



**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Ms. Amutavi

For the Respondents Ms. Mbithe

Court Assistant Millicent Kibet

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

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