



Issak v Independent Electoral and Boundaries Commission (Cause 484 of 2018) [2024] KEELRC 2517 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2517 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 484 OF 2018
M MBARŪ, J
OCTOBER 3, 2024**

BETWEEN

ABDIRAHAMAN BILACHA ISSAK CLAIMANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

JUDGMENT

1. The respondent employed the claimant on 5 January 2010 as the director of risk and compliance earning Ksh.1, 186,901.50 per month. On 6 February 2015, the claimant was suspended from duty because he had violated the law and *the constitution*. Through a letter dated 9 April 2015, the claimant was dismissed from his employment.
2. The claim is that there was unlawful and unfair termination of employment. The respondent failed to give the claimant the necessary support in the performance of his duties and blamed him for failing to meet set targets. The claimant was forced to use his resources for over a year to undertake his official duties including personal car, fuel, and accommodation.
3. The respondent advertised the position previously held by the claimant before the 90 days allowed for his appeal to lapse. The claimant wrote to the respondent seeking records to enable him to respond to the suspension from employment to no avail. There were no reasons or basis to suspend him or dismiss him from his employment. By advertising the position held before the appeal time could lapse the respondent had premeditated the dismissal hence denying the claimant fair administrative action. This was contrary to articles 47 and 236(b) of *the Constitution* which requires fair administrative action and protection of public officers from being dismissed or removed from office without due process.

The claimant is seeking the following orders;

- a. General damages for unfair termination of employment;



- b. Payment of terminal dues;
 - c. A declaration that the suspension from employment violated fair administrative action, fair Labour practices and due process;
 - d. A declaration that there was unlawful and unfair termination of employment contrary to the constitution;
 - e. A declaration that the respondent visited inhuman and degrading treatment on the claimant and hence entitled to general damages;
 - f. An order of compensating until retirement at 60 years at Ksh.185,156,634;
 - g. Costs of the suit.
4. The claimant testified in support of his case that upon employment by the respondent, he worked diligently earning Ksh.1, 186,901.50 per month. He was suspended on 6 February 2015 on allegations that he had failed to obey lawful orders and lacked respect which claims were untrue. He asked for details and particulars of these allegations without any being provided. The allegations that he was insubordinate were false and without justification and the respondent couldn't have carried out investigations within two days of his suspension leading to dismissal from employment. The fact that the position held was advertised before the tile for appeal lapsed was an indication that the respondent had a premeditated mind that upon his suspension, the claimant would be dismissed from his employment.
 5. The claimant testified that he was accused of being absent from work which was not true. He indicated that he was unwell and brought this to the attention of the respondent but this was unfairly used to suspend and dismiss him from his employment. There are instances when he was at meetings but the respondent filed minutes indicating that he was absent. He had no way of verifying the details since he was denied these records. As the director of risk and compliance, he was required to convene several meetings weekly which he did but the records are in the custody of the respondent. Some meetings were delegated to his managers under his supervision.
 6. The claimant testified that he was denied the use of his official motor vehicle and forced to use his vehicle for official duties. He had to fuel the vehicle at his own cost and the respondent failed to refund the financial loss. Other directors were issued with new vehicles but he was singled out and denied such facility. His official vehicle was broken and was not replaced and despite writing to the CEO, he was not issued with the new vehicle. He feared being accused of not attending to his duties and hence opted to use his vehicle for official business. In his letter dated 12 January 2015, he indicated to the respondent that he could not be expected to attend official meetings unless he was provided with an official vehicle and driver like other directors working in a similar position.
 7. The claimant testified that he was accused of failing to obey lawful orders. He asked for particulars of such directions without any success. He could not respond to such general and unspecified allegations.
 8. Concerning the alleged use of abusive language, the claimant testified that he was not aware that the manager was expectant when he shared a joke with her. He was issued with a memo dated 2 February 2015 and recognized he had been friendly to his colleague and had occasionally socially shared official and non-official messages. For any alleged abusive words shared, he did apologise.
 9. Upon cross-examination, the claimant admitted that he received the notice to show cause dated 6 February 2015 and had 14 days to reply to the allegations. On 15 February 2015, he requested additional documents to enable him to file a response but he only got some and not all.



10. The claimant admitted that On 19 February 2015, he was issued with all the necessary records he had requested from the respondent. He was given an additional 10 days to file his response to the notice to show cause. He was invited to attend a disciplinary hearing on 2 March 2015 but he sent a letter dated 4 March 2015 to the CEO and said that he was sick. He was away attending traditional medications and could not attend a disciplinary hearing.
11. The claimant admitted that he got notices dated 2nd and 9 March 2015 inviting him to attend the disciplinary hearing. He was also issued with a letter dated 23 March 2015 but he got it after the date he was required to attend the disciplinary hearing. This was due to his location where he had no access to internet or phone connectivity, he replied and indicated that he was not feeling well. He was avoiding Nairobi due to medical reasons and he needed fresh camel milk due to diabetes. He filed his appeal on 9 January 2016 to the respondent's chairperson but the position he had held had already been advertised.

Response

12. In response, the respondent admitted that the claimant was an employee who was suspended through a letter dated 6 February 2025 on account of gross misconduct. The suspension was on the basis that;
 - a. Absenteeism from work without authority contrary to rule 10.2.5.2 of the respondent's policy;
 - b. Fraudulently fueling unauthorized vehicles using the respondent's fuel card contrary to rule 10.2.5.2 of the respondent's policy;
 - c. Refusal to obey a lawful and proper command from the employer contrary to rule 10.2.5.2 of the respondent's policy; and
 - d. Use of abusive, insulting and derogatory language against a fellow staff of the respondent contrary to rule 10.2.5.2 part 3 of the respondent's policy.
13. The claimant was suspended from work, allowing him to the respondent to these matters and to allow the respondent to complete its investigations. He was given 14 days to respond to the allegations made against him but chose not to respond. The respondent wrote to the claimant requesting him to respond to the allegations made against him through a letter dated 17 March 2015 but he chose not to respond.
14. The respondent invited the claimant for a disciplinary hearing on 2, 11 and 25 March 2015 but he failed to attend.
15. On 11 March 2015 at 10 am when the claimant was expected to attend a disciplinary hearing, he sent an email to the CEO informing him that he would not attend the disciplinary hearing because he was not feeling well.
16. The respondent afforded the claimant all the necessary support and opportunities but he failed to address the allegations made against him or attend the disciplinary hearing. His complaint that he had no official driver was addressed and at all material time an official car and driver were at his disposal but he refused to utilize the same. The failure to attend a disciplinary hearing resulted in the claimant failing to address the accusations made against him leading to his dismissal.
17. The allegations by the claimant that he should have been issued with a warning letter do not apply to him as such only issues for minor offences. He had committed gross misconduct which justified summary dismissal.
18. The indication by the claimant that he would not attend a disciplinary hearing then left him without any grounds of appeal.



19. There are minutes of various meetings where the claimant failed to attend without permission or reasons. Records of the use of the claimant's fuel car indicate he used to fuel unauthorized cars yet his official car was always available. The official fuel card was in the possession of the claimant. The claimant's official driver wrote a letter signifying his availability and that of the official car he was required to drive.
20. The claimant was assigned duties which he refused to attend to for the reasons that he did not have a means of transport. These claims are not true since there are official records to indicate the claimant had a driver and an official car at his disposal.
21. The failure to attend a disciplinary hearing left the respondent with no option but to terminate employment. The claims made are not justified and should be dismissed with costs.
22. In evidence, the respondent called Enock Peter Mulele the human resources officer who testified that the claimant as the director of risk and compliance officer was highly placed in the organization. His employment was regulated under his contract of employment and the respondent's policy. His duties were critical to the organization and hence he was issued with an official driver and vehicle for his duties.
23. Mulele testified that the claimant was dismissed from his employment due to gross misconduct. Before the dismissal, the claimant was suspended and matters made against him were outlined. He was required to respond within 14 days but he failed to address. He was invited to attend a disciplinary hearing on three (3) occasions and failed to attend leaving the respondent with no option but to issue notice terminating his employment.
24. The reasons leading to termination of employment were indicated as the claimant used his official fuel card to fuel unauthorized cars yet his official car was available for his use. He was issued with the fuel card and the work sheet for the official car but he failed to use the fuel card for his official duties. When invited to attend a disciplinary hearing, the claimant wrote back and indicated he would not attend. Through a letter dated 19 February 2015, the claimant declined to appear for the disciplinary hearing and the allegations made against him were not challenged.
25. Mulele testified that the claimant remained absent from duty without permission or good reasons. Called to account, he failed to respond.
26. The claimant used abusive language to a colleague and remained insubordinate. He sent demeaning messages to his manager who was a woman and pregnant. On 2 February 2015, the claimant wrote to Agatha Mahome a derogatory message and she filed a complaint with the respondent. She had been on leave because she was pregnant. At 2.05 am a message was sent by the claimant through his phone to the manager asking her not to deliver a baby girl. This was found offensive to the manager.
27. As the director of his department, he was required to convene and attend critical meetings which he failed to do. Through a memo dated 2 February 2025, the claimant was called to account for being absent and failing to attend critical meetings but he failed to respond. He was also required to account for his motor vehicle GKA 784U for which the work sheet and fuel card had been issued but it was noted that the fuel card was being utilized for unofficial vehicles.
28. The respondent also called Adam Mohamed a driver who testified that he had been assigned to the claimant from the year 2014. The claimant would give him instructions to pick him up at his home to the office and back or to the field. His allocated vehicle was GKA 784U the only vehicle assigned to the claimant and he was the official driver. There were by-elections in Bungoma and after this assignment, the vehicle had a mechanical problem. It was serviced and ready for use. He reported daily at work waiting for directions from the claimant but none were issued. On 3 February 2015, he wrote to the



transport manager and copied the director of human resources regarding the fuel card for the official vehicle but he was issued to the claimant. Whenever he used the vehicle, he signed the work ticket and remitted all such tickets to the transport officer.

29. Adam testified that the claim by the claimant that he never saw his official vehicle is not true since he was made aware that it was parked at KEMU or Anniversary Towers and was not hidden from him. For official duties, he was ready to take directions from the claimant.
30. At the close of the hearing on 5 December 2022, both parties agreed to file written submissions. The matter was placed for mention on 23 January 2023 and the claimant asked for more time to file written submissions.

Only the respondent filed written submissions.

42. The respondent submitted that the claimant was suspended due to gross misconduct relating to absenteeism from work, unauthorized use of the official fuel card, insubordination and use of abusive language. Through notice dated 6 February 2015, he was invited to show cause within 14 days but he failed to do so. He was invited for a disciplinary hearing 3 times but he refused to attend and wrote back on 17 March 2015 that he would not attend. The allegations made were not challenged leading to termination of employment for lawful cause and justification.
43. In the case of *Naim Khamis v Oxford University Press (EA) Limited* [2017] eKLR the court held that where an employer genuinely believes there exists justified reasons for gross misconduct, termination of employment is allowed. In *Beatrice Nyambane Mosiria v Judicial Service Commission* [2019] eKLR the court held that where there are valid reasons leading to termination of employment, just is justified ground.
44. The respondent submitted that in this case, there were fair and valid reasons leading to the termination of employment. The claimant violated his employment contract and the policy by being absent from work without approval, fraudulent use of the fuel card for personal use, refusing to take lawful directions and use of abusive and derogatory language. He was invited to attend a disciplinary hearing and declined. The respondent relied on the case of *Postal Corporation of Kenya v Andrew Tanui* [2019] eKLR and *Rebecca Anne Main & others v Jomo Kenyatta University of Science and Technology* [2014] eKLR. The claim has no merits and should be dismissed with costs.

Determination

45. An employer is allowed to suspend an employee for investigations or to allow disciplinary matters to be addressed when the employee is out of the shop floor. Within the period of suspension, the employee is still subject to the directions and lawful instructions of the employer. At the end of investigations, the employee must be recalled back to respond to any matters identified or invited to attend a disciplinary hearing to respond to stated allegations.
46. The employee is under a duty to remain available to the employer during the suspension period. Employment subsists and hence, upon recall, the employee should unconditionally attend to the address as directed.
47. Through notice dated 6 February 2015, the claimant was suspended for the following reasons;
48. ... You have on various occasions absented yourself from work without permission. You have also consistently absented yourself from management and audit committee meetings without authority.



Even though the commission has allocated to you a vehicle, a driver and a fuel card, you have failed to report to work as expected of you.

Further, records show that the fuel card assigned to you has been debited on several occasions and yet the vehicle remained parked at Anniversary Towers for months. There are reasonable grounds to believe that the fuel card has been used on unauthorized vehicle/s and for other purposes other than the Commission's business. This has resulted in financial loss to the Commission.

On diverse dates, you issued a communication in a language that is unprofessional, derogatory and insulting to members of the commission and staff for no cause whatsoever. In certain cases, you have deliberately refused to obey lawful instructions from your seniors which amounts to insubordination...

49. In this notice, the claimant was given 14 days to respond to the allegations made.
50. On 15 February 2015, the claimant wrote to the respondent concerning an article published in the print media. He noted that it related to his suspension and had caused him embarrassment and intimidation...
51. In the letter, the claimant admitted to having received the notice of suspension dated 6 February 2015. He responded on 15 February 2025 and noted that on alleged absence from duty, he fell sick and left his sick off at the CEO's office and the allegations made were factually incorrect. That some of the issues raised in the notice were new to him and he required more details and particulars. He required the followings;
 - a. The dates of alleged absence from duty;
 - b. The dates he was absent at official meetings without authority;
 - c. Details of the official vehicle allocated to him;
 - d. Details of the fuel card allocated for his use;
 - e. Details and dates of alleged use of abusive language and derogatory messages;
 - f. Evidence and specifics of refusal to obey lawful instructions.
52. On 19 February 2015, the respondent did a detailed response to the claimant about his response and request for dates and detailed particulars of the allegations made against him. These related to;
 - a. Absence from work and Commission meetings without permission;
 - b. His official car allocated by the Commission;
 - c. Vehicle fuel canard allocated to the claimant by the Commission;
 - d. Unprofessional, derogatory, insulting language and complaints made to the Commission through Memos dated 1st and 2nd November 2014;
 - e. Lawful instructions not obeyed.
53. Each hearing had details and particulars of what the claimant had failed to do and the reasons leading to suspension and was required to respond. For this purpose, the claimant was added 10 days to respond to the allegations made and to attend a disciplinary hearing on 2 March 2015 at the respondent's offices.



The claimant did not file any response as required.

54. On the date scheduled for the hearing on 2 March 2015, the claimant did not attend.
55. Through notice dated 9 March 2015, the respondent invited the claimant to attend a disciplinary hearing on 11 March 2015 at the office. He did not attend.
56. The claimant received this notice and responded on the same day and noted that;
57. ... I am still not feeling well. I am sorry I won't be able to attend the committee meeting scheduled for today. Sorry about it.
58. On the same day, through a notice dated 11 March 2015, the respondent invited the claimant to attend a disciplinary hearing on 25 March 2015 at the offices. He did not attend.
59. The claimant's case is that he was not able to stay in Nairobi and was required to attend traditional medicine and take Carmel milk for his diabetes. He did not get the invitations sent in time and hence he could not attend the disciplinary hearing.
60. The letter suspending the claimant from duty was with the following instructions;
61. ... While on suspension, you will only be entitled to house allowance and medical cover as per clause 10.2.5.3 of the IEBC Human Recourses and Procedure Manual.
62. As outlined above, while on suspension, the employee remains at the instructions and directions of the employer. The claimant's work location was in Nairobi. The suspension was conditional that he should respond within 14 days which he failed to do. This period was extended by 10 days but still, the claimant failed to respond.

The allegations made against the claimant remained unchallenged.
63. Fundamentally, called to attend a disciplinary hearing, but the claimant declined to respond or attend. The issue was that he was unwell and hence unable to attend as directed is left bare. There is no evidence of such illness are required under Section 30 and 34 of the *Employment Act*. The claimant was required to submit subject to production by the employee a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre. The assertion that he could not stay in Nairobi and was required to attend traditional medicine whereas the respondent had provided and confirmed his medical cover was available removes the claimant from a defence that he could not attend a disciplinary hearing since he was required to attend alternative medicine. See *Michael Kiboi Gatumia v Mastermind Tobacco (K) Limited* [2012] eKLR. It is the duty of the employee who seeks to rely on the grounds of illness of sickness to submit the medical certificate to the employer as held in the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR.
64. The crux of the matter is refusal by the claimant to attend a disciplinary hearing despite being accommodated on three occasions by the respondent. Through notices dated 6 February 2015, and 19 February 2019 the allegations made were outlined and the claimant noted to respond. he was invited to attend the hearing and opted not to attend.
65. In the case of *Dzila v Kwale County Assembly Service Board & 6 others (Cause 21 of 2020)* [2023] KEELRC the court held that the employer cannot be faulted when an employee invited to a disciplinary hearing fails to attend without any justifiable cause. This position is reiterated in the case of



Redlands Roses Limited v Kenya Plantations and Agricultural Workers Union [2020] eKLR the court affirmed this position and held that;

The court finds that at all material time, the employer set out to comply with the notice and hearing of the grievants per section 41 of the *Employment Act*, 2007. Those of the grievants that effused or failed to attend and participate in the disciplinary process cannot fault the employer and on a balance of probabilities, the procedure invoked by the employer in terminating the grievants' employment was not unfair on the tests in section 41 and 45 of the *Employment Act*, 2007. As submitted for the employer, all the concerned employees had a duty to take steps to attend the disciplinary hearings and if in doubt, take active steps to find out the next course of action.

66. Hence, an employee who squanders the chance to attend the disciplinary hearing to explain his case cannot turn back and blame the employer for the issued sanction including summary dismissal. In the case of *Matilda Tenge Mwachia v Kenya Industrial Estate Limited & another* [2021] eKLR, the court held that;

Where the employee has the right to a hearing, the employer has the right to terminate the employee upon following due process. Where an employee squanders the chance to be heard the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing.

67. The employee cannot hold the employer hostage and take the position that he can only attend disciplinary hearings at his option and time. While the claimant was on suspension, he remained an employee of the respondent under its instructions and directions. The direction to attend a disciplinary hearing was a lawful instruction and direction. Failure to attend as directed, the claimant was in direct breach of his employment contract and provisions of Section 44(3) and (4) of the *Employment Act*. The sanction of dismissal is hereby found justified and lawful.
68. The claims made for payment of terminal dues are not justified save, the requirement to proceed on suspension without pay is a matter that perpetuates unfair Labour practices and the same due for the period from 6 February 2015 to 9 April 2015 should be paid upon full clearance.
69. Accordingly, the claim is without merit and is hereby dismissed. The claimant shall attend and clear for payment of his salary while on suspension if this has not been paid. Each party is to bear its costs.

DELIVERED IN VIRTUAL OPEN COURT AT MOMBASA ON THIS 3 DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

