



**Kivunzyo v Oxfam GB, Kenya Proqramme (Cause 1599 of 2013)
[2024] KEELRC 13274 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13274 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1599 OF 2013
BOM MANANI, J
NOVEMBER 28, 2024**

BETWEEN

NZOMO KIVUNZYO CLAIMANT

AND

OXFAM GB, KENYA PRORGAMME RESPONDENT

JUDGMENT

Introduction

1. This action challenges the Respondent’s decision to terminate the Claimant’s employment. Whilst the Claimant contends that the decision was unmerited, the Respondent believes that it (the decision) was justified both substantively and procedurally.

Claimant’s Case

2. The Claimant avers that he was engaged by the Respondent in November 2005 in the position of a Logistics Officer. He contends that he initially served on fixed term contracts before he was granted an indefinite term contract.
3. The Claimant contends that on 20th February 2013, the Respondent issued him with a letter suspending him from duty indefinitely. He contends that the Respondent indicated that it had discovered irregularities in its procurement processes prompting the aforesaid decision. He however contends that the Respondent did not give particulars of the alleged irregularities.
4. The Claimant avers that by a letter dated 16th April 2013, the Respondent invited him to a formal disciplinary meeting. He contends that the said letter was accompanied by a summary of eight allegations against him.
5. The Claimant avers that he responded to every of the eight grounds. Further, he says that he attended the formal meeting convened by the Respondent on 23rd April 2013. It is his case that although



- the Respondent failed to provide him with all information on the allegations made against him, he responded to all the accusations truthfully based on the limited information that was available to him.
6. The Claimant avers that on 30th April 2013, he received a letter from the Respondent contending that the allegations had been established. Consequently, it (the Respondent) had resolved to summarily terminate his contract of service.
 7. The Claimant avers that he appealed against the decision. He contends that the Respondent acknowledged receipt of the appeal and set it down for hearing on 20th May 2013.
 8. The Claimant avers that the appeal meeting was held as scheduled. However, the Respondent still did not provide him with information on the accusations against him.
 9. The Claimant contends that although the appeal was heard, the Respondent failed to address the specific complaints which he had raised. He maintains that the Respondent failed to provide him with the requisite material that would have assisted him to effectively prosecute his case.
 10. The Claimant avers that the Respondent had no valid grounds to terminate his contract. At the same time, he contends that the Respondent failed to uphold fair procedure in the process that resulted in the termination of his contract of service.

Respondent's Case

11. On its part, the Respondent confirms that the Claimant was indeed its employee in the logistics department. It contends that the Claimant's duties included: monitoring procurement practices; organizing procurement for all supplies; and assuming responsibility for procurement processes.
12. The Respondent avers that sometime in December 2012, a whistle blower raised concern regarding suspected malpractices in the procurement department. There were allegations of suppliers being asked to provide kickbacks for various supply contracts. The Respondent contends that the above concerns were preceded with complaints that its procurement officers were procuring low quality goods at inflated prices.
13. The Respondent contends that following these reports, it commissioned an internal investigation into the matter. It avers that the purpose of the investigation was to establish whether there were fraudulent activities taking place within the procurement department.
14. The Respondent contends that at the close of the internal investigations, it became apparent that there was need for further inquiry into the matter. As such, it contracted KPMG to conduct an independent audit of the department.
15. The Respondent avers that the audit by KPMG revealed that there had been procurement irregularities in the department which had resulted in substantial losses to it. For instance, it (the audit) suggested that the Claimant and another officer had sanctioned payments to suppliers at inflated rates resulting in the loss of approximately Ksh. 5.6 million. The Claimant was also accused of single sourcing suppliers without necessary approvals and documentation.
16. The Respondent contends that following the various procurement irregularities that were flagged in the audit report, it invited the Claimant to explain the apparent discrepancies. It avers that it issued him with a letter dated 16th April 2013 inviting him to a hearing which was scheduled for 23rd April 2013.
17. The Respondent contends that it cautioned the Claimant regarding the seriousness of the accusations against him and notified him of the possibility of his contract being terminated if his explanation was



not satisfactory. As such, it advised him of his right to be accompanied by a representative of his choice during the session.

18. The Respondent contends that the Claimant was given a hearing on 23rd April 2013. It avers that he exercised his right to have an accompanier as required by the rules.
19. The Respondent avers that after the hearing, it found the Claimant's explanation wanting. As such, his contract was terminated.
20. The Respondent contends that the Claimant was allowed to challenge the decision on appeal. It contends that he filed the appeal which was heard and determined confirming the initial decision to terminate his employment.
21. The Respondent confirms that prior to the investigations by KPMG, it suspended the Claimant from duty. It contends that the reason for this decision was to ensure the integrity of the investigations. It further contends that the Claimant remained on its payroll with full pay during this period.
22. The Respondent believes that it had valid reasons to terminate the Claimant's employment. It further contends that it adhered to fair procedure before it released him from employment.

Issue for Determination

23. After evaluating the pleadings and evidence on record, I am of the view that the following are the issues that arise for determination:-
 - a. Whether the Claimant's contract of service was terminated unfairly.
 - b. Whether the Claimant is entitled to the reliefs which he seeks through this action.

Analysis

24. In order to answer the first question, the court is required to settle two issues thus:-
 - a. Whether the Respondent had substantive justification to terminate the Claimant's contract.
 - b. Whether the decision to terminate the contract was processed in accordance with fair procedure.
25. The law on these two aspects is encapsulated in sections 41, 43, 44 and 45 of the *Employment Act*. Sections 41 and 44 of the Act identify some of the grounds upon which an employer may terminate a contract of service. These include: poor performance by the employee; misconduct by the employee; and physical incapacity of the employee. Together, these provide the substantive justification for terminating a contract of service.
26. On the other hand, sections 41, 43 and 45 of the Act deal with the procedural strictures that should be observed whilst processing termination of a contract of service. These include: notifying the employee of the infraction he is accused of; and allowing him the opportunity to respond to the accusation. In addition, the employer is obligated to establish the validity of grounds upon which he proposes to terminate the contract.
27. Although the law places the obligation of justifying the reasons for termination of a contract of service on the employer, there is no requirement that he discharges this burden on a standard that is higher than on a balance of probabilities. All that he (the employer) is obligated to provide is evidence which tends to demonstrate that it is more likely than not that the employee is guilty of the infraction in question.



28. Under section 43 of the *Employment Act*, the employer is only required to demonstrate that he has reasonable grounds to entertain a genuine belief that the employee has committed the infraction in question. As such, he is not bound to provide infallible proof that the employee committed the infraction.
29. The foregoing was considered by the Court of Appeal in the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR. In the case, the court observed that an employer has no obligation to undertake a forensic evaluation of the grounds upon which he proposes to terminate a contract of service in a bid to establish their validity beyond reasonable doubt. All that is required of him is to demonstrate that he genuinely believed that the grounds in fact exist.
30. In the instant case, the Claimant was accused of various procurement malpractices. Convinced that there was something amiss in his department, the Respondent hired an independent audit firm, KPMG, to investigate it (the department).
31. The evidence on record demonstrates that the audit firm conducted investigations and prepared a report dated 14th May 2013. The report concluded that the Claimant failed to comply with the requirements of his role in the Respondent's establishment. It indicated that the Claimant had on a number of occasions permitted payments for transactions before documentation in respect thereof were complete in contravention of the Respondent's policies. It further indicated that the Claimant had sometimes single sourced suppliers without authorization and documentation. The report further indicated that the Claimant had on one occasion sought quotations from three firms owned by the same individuals. Finally, it stated that the Claimant had issued a purchase order to a supplier before the competitive bid analysis was signed. In effect, the audit firm indicted the Claimant on various audit queries.
32. It is this report which informed the Respondent's decision to subject the Claimant to a disciplinary hearing. The Respondent contends that although the Claimant offered an explanation to the accusations against him, it (the Respondent) was not satisfied with the responses. Consequently, it terminated his services.
33. The court notes that the Respondent's decision to terminate the Claimant's employment was informed by the findings of the audit firm. The court further notes that because the Respondent appreciated that it lacked expertise in conducting a forensic audit of its procurement department, it contracted KPMG to undertake this exercise.
34. In the court's view, the findings by the audit firm provided a reasonable basis upon which the Respondent could entertain a genuine belief that the Claimant had misconducted himself. As such and in terms of section 43 of the *Employment Act*, I arrive at the conclusion that the Respondent has demonstrated that it had a substantive justification to terminate the Claimant's contract of service.
35. The court's role whilst evaluating the validity of an employer's decision to terminate an employee's contract of service is limited to determining whether the decision falls within the band of reasonable responses that were expected of the employer in reaction to the infraction in question. If the decision falls within this band, the court must uphold it irrespective of whether the judicial officer considers that he would have considered the matter differently had he been in the employer's shoes. On the other hand, if the decision falls outside the band of responses that were expected of the employer, the trial court has an obligation to set it aside.



36. The above guidelines, which are set out in the Halsbury's Laws of England, are highlighted in the decision of Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others (supra). The court set out the guidelines as follows:-

“...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

37. Having regard to the contents of the KPMG report that was placed before the Respondent's disciplinary panel, I am convinced that the decision by the panel fell within the band of responses that were expected of a reasonable employer in reaction to the alleged misconduct by the Claimant. As such, I am not entitled to interfere with the finding.

38. On procedural fairness, I note that after the Respondent completed investigations into the matter, it wrote to the Claimant on 16th April 2013 inviting him to a formal disciplinary hearing on 23rd April 2013. In the letter, the Respondent informed the Claimant that the purpose of the session was to hear his side of the story in order to determine whether the accusations against him were justified. The Respondent notified the Claimant that if the allegations were established, they could result in the loss of his employment. As such, he was notified of the need to be accompanied by a colleague if he wished. Further, the letter forwarded a summary of the charges that had been framed against the Claimant.

39. The evidence on record shows that the Claimant prepared a detailed written defense to each and every of the accusations. He concedes that he attended the disciplinary hearing and ventilated his case.

40. The record shows that the Respondent issued the Claimant with a letter dated 30th April 2013 informing him of the results of the disciplinary hearing. The Respondent informed the Claimant that the charges against him had been substantiated. As such, it had arrived at the decision to summarily terminate his contract of service on account of negligence and misconduct.

41. The record further shows that the Claimant filed an appeal against the decision. The letter of appeal is dated 7th May 2013.

42. In the appeal, the Claimant raised a number of issues. Importantly, he contended that the Respondent had failed to provide him with material in respect of the charges that he faced. He contended that he was not supplied with: the investigation report; witness statements; and particulars of the charges including the dates on which some of the events allegedly happened.

43. The court notes that prior to the hearing of 23rd April 2013, the Respondent supplied the Claimant with information on the accusations against him. However, the information was in summary form. The summary was produced in evidence and appears at pages 57 to 58 of the Claimant's bundle that is attached to the Statement of Claim.



44. The court also notes that on the basis of this information, the Claimant was able to prepare a detailed statement of defense addressing all the issues which the Respondent had flagged. The statement of defense appears at pages 59 to 65 of the bundle that is attached to the Statement of Claim.
45. On appeal, the Claimant stated that the information he was supplied with was vague and lacking in particulars. As such, he contended that he had found it difficult to prepare a suitable defense to the charges. He therefore asked that he be supplied with further particulars of the charges to enable him comprehensively prepare the appeal.
46. The minutes of the appeal proceedings are produced at pages 71 to 74 in the bundle accompanying the Statement of Claim. From the minutes, it is apparent that in response to the Claimant's request, the Respondent's officers undertook to share with him the particulars that he had sought before a decision on the appeal was rendered.
47. At pages 31 to 33 of the Respondent's bundle of documents is an email trail dated between 30th May 2013 and 3rd June 2013. The email trail was between the Claimant and one Nigel. By this trail, the Respondent's officers forwarded to the Claimant further documents as per his request. The trail reads in part as follows:-

“Dear Nzomo,

Please find attached additional information you requested at the appeal meeting. I hope it helps clarify the points that have been raised.

This is your opportunity to use the additional information to further build the defense you have already forwarded. If you decide to use this information to update your written defense, please do so and resend to Margaret, Felix and myself by 11.00 am on Friday 7th June.

I can inform you that I have consulted with Helios experts and with independent managers on this matter, as per your request, and will continue to do so.

I would like to apologize for the email below, which was intended for you on 31.05.13 but was clearly wrongly addressed, which I have just discovered.

Regards,

Nigel”

48. At page 75 of the bundle attached to the Statement of Claim is the letter dated 17th June 2013 by which the Respondent informed the Claimant of the results of the appeal. The letter informed the Claimant that he had lost the appeal.

49. Importantly, the letter stated as follows:-

“During the appeal meeting, your request for further evidence to further support your appeal was granted and the same was submitted to you on 3rd June 2013. However, as stated in your email dated 10th June 2013, you chose not to provide any further explanation to substantiate your earlier written defense.”

50. The Claimant may have been supplied with inadequate information at the disciplinary hearing stage. However, this inadequacy was addressed on appeal when he was supplied with further information on the issues under consideration.

51. During trial, the Claimant confirmed that indeed the Respondent supplied him with further information. However, he contended that it was still inadequate and in summary form.



52. This contention was however controverted by the defense witness who stated that the information which the Claimant asked for was supplied to him before the appeal was determined. The witness clarified that the investigation report by KPMG covered various issues some of which had no connection with the infractions which the Claimant was accused of. As such and in order to ensure confidentiality, they provided him with details which touched on his case.
53. The court has looked at the report and notes that apart from the Claimant, it covers another employee referred to as Judy Mwendwa. As such, the contention by the Respondent that portions of the report were confidential as they related to other individuals has merit. I thus agree with the Respondent that it was necessary to redact the report in order to share with the Claimant only that which related to his case.
54. Having regard to the foregoing, I am convinced that the Respondent supplied the Claimant with sufficient information to enable him to respond to the accusations against him. Indeed, this position is supported not only by the fact that he was able to present a detailed response to the charges at the disciplinary hearing stage but also by the fact that he was supplied with additional information before his appeal was determined.
55. The totality of the foregoing brings me to the conclusion that the Respondent substantially complied with the procedural strictures on fair handling the Claimant's case. As such, I find that the Claimant was accorded procedural fairness in the process.
56. Besides the issues discussed above, the Claimant has flagged other grievances. For instance, he contends that his suspension from employment was unjust because it overshot the fourteen (14) day period that had been alluded to in the letter of suspension. It is true that the letter of suspension suggested that the suspension period would be for about fourteen (14) days. However, I do not understand the letter to have been stating that the fourteen (14) days were cast in stone. All that the Respondent indicated was that it would endeavor to ensure that the suspension was not unreasonably prolonged. It further promised that it will strive to conclude the investigations within fourteen days. This is not the same thing as stating that the investigations will by all means be finalized in fourteen (14) days.
57. What I understand the Respondent to have been stating is that it will strive to finalize the investigations promptly and therefore lift the suspension within the shortest time possible. Indeed, the Claimant's letter of appointment acknowledges this by providing that the Claimant could be suspended from duty whenever necessary in order to allow for investigations into a matter but that such suspension would not be unreasonably elongated.
58. The Claimant also took issue with the fact that the letter terminating his contract was signed by the Respondent's Operations Manager. He argued that this officer had no such powers.
59. The decision to terminate the Claimant's contract was by a duly constituted disciplinary committee. The letter by the Respondent's Operations Manager merely communicated this decision. I do not agree that the mere fact that the decision was communicated by an officer who may not have been authorized to sign the letter had the effect of nullifying it (the decision).

Determination

60. The upshot is that the court arrives at the conclusion that the Claimant's contract was terminated fairly.
61. As such, this suit is dismissed with costs to the Respondent.

CONCLUSIONS



DATED, SIGNED AND DELIVERED ON THE 28TH DAY OF NOVEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE

