



**WNN v TF (Cause E399 of 2023) [2024] KEELRC 13275 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13275 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E399 OF 2023  
BOM MANANI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**WNN ..... CLAIMANT**

**AND**

**TF ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This suit challenges the Respondent’s decision to terminate the Claimant’s contract of employment. According to the Claimant, the Respondent terminated the contract without valid reason and in disregard of the applicable procedure.
2. On the other hand, the Respondent contends that the contract was terminated due to acts of gross misconduct by the Claimant. The Respondent further contends that it observed fair procedure in terminating contract.

**Claimant’s Case**

3. The Claimant avers that the Respondent hired her services as a Donor Compliance Manager as from 19<sup>th</sup> October 2014. She contends that her monthly salary was agreed at Ksh. 580,043.00.
4. The Claimant avers that on 25<sup>th</sup> October 2021, the Respondent served her with a letter suspending her from work. She contends that the reason for the Respondent’s decision was that she had supposedly sexually molested a colleague.
5. The Claimant contends that after the Respondent suspended her from duty, it subjected her to a skewed investigative process. She contends that the Respondent singly procured the Investigator.



6. The Claimant avers that during the investigation interview, she got to learn that the alleged assault was said to have occurred during a house dinner that was attended by two of her colleagues and herself. The event (the house dinner) took place way back in February 2021.
7. The Claimant avers that despite the Respondent accusing her of this infraction which bordered on criminality, it did not provide her with materials to support the accusation. In her view, this violated the law.
8. The Claimant avers that after the casual and skewed investigations, the Respondent served her with a disciplinary hearing letter. She contends that the letter introduced new charges which were not highlighted in the letter of suspension.
9. The Claimant contends that although the disciplinary hearing letter asserted that an investigation had been conducted and certain adverse findings made against her, no material was supplied to her to support this assertion. She further contends that the purported witness statements which the investigator relied on to make adverse findings against her were not supplied to her.
10. The Claimant is of the view that introduction of new charges against her through the disciplinary hearing letter amounted to an ambush against her contrary to the law. She further contends that the failure to supply her with the materials which the investigator relied on to arrive at his conclusion contravened her right to fair hearing thus turning the disciplinary hearing into a window dressing exercise.
11. The Claimant further contends that her lawyers stumbled upon email correspondence from the Respondent which suggested that it had manipulated the investigation process in a bid to find her culpable. As such, she believes that the Respondent had made up its mind to terminate her services through a skewed process.
12. The Claimant asserts that despite the serious nature of the allegations that the Respondent made against her, it did not deem it fit to submit the matter to independent State agencies to inquire into it with a view to prosecuting her. Instead, it elected to handle the matter administratively notwithstanding that its officers had displayed bias and hostility towards her. As such, she contends that the disciplinary process was a sham.
13. The Claimant also contends that the Respondent mishandled the appeal process. She accuses the Respondent of having failed to adhere to procedural safeguards in the process thereby rendering the results of the appeal a charade.
14. It is her case that the Respondent's actions violated her right to fair labour practice. As such, she prays for the various reliefs as set out in the Statement of Claim.

### **Respondent's Case**

15. On its part, the Respondent confirms that the Claimant was indeed its employee. It contends that the latter was expected to discharge her duties in accordance with the terms of her contract of service and the standards of behaviour as set out in its Kenya Staff Handbook, Personal Conduct Policy, Misconduct Policy and Procedure and the Safeguarding Policy.
16. The Respondent contends that on 18<sup>th</sup> October 2021, one of its employees filed a sexual harassment complaint with its Human Resource department. The employee alleged that the Claimant had sexually molested her.



17. The Respondent contends that it considered the accusation against the Claimant as grave. As such, it sanctioned an investigation into the matter.
18. The Respondent contends that it appointed an investigator in accordance with its policies to inquire into the incident. It denies that it was obligated to involve the Claimant in the appointment of the investigator.
19. The Respondent contends that owing to the seriousness of the allegations against the Claimant, it issued her with a letter of suspension from duty. It avers that this was necessitated by the desire to safeguard the integrity of the investigations.
20. The Respondent avers that the investigator gave the Claimant full particulars of the accusations against her. It further contends that the investigator invited the Claimant and her colleague who had been implicated in the infraction to an investigative session on 29<sup>th</sup> October 2021.
21. The Respondent avers that the investigation results showed that the Claimant was in the company of the complainant and another employee who was implicated in the incident on the day the infraction is said to have occurred. It further avers that the investigation also revealed that the incident had distressed the victim and affected her behaviour at work and that the Claimant had sent the victim a text message apologizing.
22. The Respondent contends that from the results of the investigations, it became apparent that it was more likely than not that the Claimant and her colleague had sexually assaulted the victim. According to the Respondent, the Claimant's conduct was in breach of its Personal Conduct Policy.
23. The Respondent avers that based on the investigation results, it came to the conclusion that there were sufficient reasons to warrant the Claimant being subjected to a disciplinary hearing. As such, it issued her with a notice to show cause letter dated 4<sup>th</sup> November 2021.
24. The Respondent contends that the notice to show cause: set out the accusations against the Claimant; asked her to react to the accusations; and scheduled the disciplinary hearing for 9<sup>th</sup> November 2021.
25. The Respondent avers that on 8<sup>th</sup> November 2021, the Claimant's advocates wrote to it asking for more information on the matter. It contends that this prompted the adjournment of the disciplinary hearing to 12<sup>th</sup> November 2021.
26. The Respondent contends that it provided the Claimant and her lawyers a copy of the investigation report which, it is contended, contained a summary of witness statements. The Respondent further contends that it informed the Claimant and her lawyers that the reason why the hearing was adjourned to 12<sup>th</sup> November 2021 was to grant them more time to prepare their defense given that they had just been furnished with the investigation report.
27. The Respondent avers that it did not share with the Claimant the victim's medical report because it contained sensitive medical data on the victim which is protected by law. As such, the information could not be disclosed to third parties without the concurrence of the victim.
28. The Respondent contends that the Claimant attended the disciplinary hearing on 12<sup>th</sup> November 2021 in the company of her workmate. It contends that the Claimant was reminded of the charges against her and given an opportunity to present her defense.
29. The Respondent contends that the Claimant did not deny the grave accusations against her. Instead, she contended that she did not have full recollection of the incident.



30. The Respondent contends that it considered the Claimant's response to the charges as unsatisfactory given the findings by the investigator. As such, it arrived at the conclusion that she was guilty of the infraction she was accused of. In the premises, the Respondent contends that it found the Claimant guilty of gross misconduct and thus terminated her contract of service.
31. The Respondent contends that the Claimant's actions violated its workplace policies. Further, it contends that the conduct had affected the work environment and exposed its (the Respondent's) reputation to the risk of being damaged.
32. The Respondent avers that the Claimant lodged an appeal against the decision to terminate her contract. It contends that she was allowed to lead further evidence during the appeal. However, she failed to avail new evidence of sufficient weight to upset the earlier finding against her. As such, the appeal was dismissed for want of merit.
33. The Respondent contends that the decision to subject the Claimant to a disciplinary process was justified. Further, it contends that the disciplinary process was undertaken in accordance with fair procedure.

### **Issues for Determination**

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

### **Analysis**

35. To determine the first issue, the court has to answer the following two questions:-
  - a. Whether there was substantive justification for the Respondent to terminate the contract of service between the parties.
  - b. Whether the Respondent terminated the aforesaid contract in accordance with due process.
36. The Respondent's decision to terminate the Claimant's contract of service was allegedly triggered by the latter's sexual assault on a workmate. It is contended that on the evening of 5<sup>th</sup> February 2021, the Claimant together with two of her workmates (including the victim) met in one of the workmate's house for a get-together. The three admit that they engaged in heavy drinking of alcohol thus getting considerably inebriated. It is alleged that the three then proceeded to one of the bedrooms in the house where the Claimant and her colleague sexually assaulted the victim.
37. The evidence on record shows that the incident was investigated albeit several months later. According to the investigation report, the Claimant did not deny that she got inebriated that night. She did not deny that she ended up in the same bed with the victim. As a matter of fact, the Claimant's colleague who is said to have participated in the assault confirmed that the three ended up in the same bed even though she could not confirm what the Claimant did.
38. On her part, the victim asserted that when she got drunk, their host took her into the bedroom and removed her cloths. She said that the host then started touching her inappropriately but she (the victim) was unable to fend her off because of her drunken state.



39. When engaged by the investigator, the host confirmed that she indeed took the victim to the bedroom and removed her cloths. She further confirmed that she touched the victim's breasts.
40. The above evidence confirms that the victim was indeed sexually assaulted. At the time of the incident, the host confirmed that the victim was inebriated. As such, the court is convinced that her capacity to give her informed consent to what happened to her had been compromised. The question the court has to grapple with is whether there was reasonable basis for the Respondent to conclude that the Claimant was involved in the assault.
41. The victim told the investigator that although she was drunk, she noticed that the host took her to the bedroom and undressed her. She further stated that she noticed that the host and the Claimant joined her in bed and begun fondling her breasts and vagina. She stated that she was unable to resist the invasion of her privacy because of her drunkenness.
42. The host confirmed that the three were in the same bed at the time the alleged incident happened. However, she said she could not tell what the Claimant did.
43. On her part, the Claimant stated that she staggered into the bedroom and passed out. She told the investigator that she could not recollect what happened due to her drunken state. However, on the dawn of the next day, she said that she found herself in bed alone. The Claimant subsequently denied before the Disciplinary Panel that she had sexually assaulted the victim.
44. It is noteworthy that although the Claimant denied being in the same bed with the victim and the host, both the victim and host confirmed that the three shared a bed. Further, although the Claimant denied assaulting the victim, the victim unequivocally stated that she saw both the Claimant and the host touch her breasts and vagina.
45. It is also noteworthy that the Claimant was ambivalent in the position she took on the matter before the investigator and the Disciplinary Panel. Before the investigator, she neither denied nor confirmed the accusation electing to simply state that she was so drunk on the material night as not to recollect what transpired. Yet, before the Disciplinary Panel, she sought to deny the occurrence.
46. Faced with this conflicting set of facts, the Respondent's Disciplinary Panel chose to believe the victim's story. The Panel considered the fact that despite the Claimant's position that the three did not share a bed, the host confirmed that they did. Further, despite the Claimant's latter attempt to deny the incident, she had earlier told the investigator that she did not recollect what transpired on the material night due to her state of drunkenness.
47. The Panel considered the foregoing against the fact that the host and Claimant later sent the victim text messages apologizing for what had happened on the material day. Despite the Claimant's attempts to say that the apology was in respect of her drunken state, the Panel believed that it related to the sexual assault.
48. Under section 43 of the *Employment Act*, all that an employer is required to establish before he can terminate the services of an employee for an alleged infraction is that he has reasonable grounds to believe that the employee had committed the infraction in question. It is not a requirement that he provides infallible evidence establishing commission of the infraction before he can dismiss the employee from his employment.
49. Having regard to the aforesaid set of facts, would a reasonable employer have reached a similar finding as the Respondent? I think yes. The ambivalence of the Claimant on the events of the night in question would have led any reasonable employer to disbelieve her version of events. First, she told the investigator that she could not recollect what transpired on the material day before she subsequently



sought to deny the accusations against her when she appeared before the Disciplinary Panel. Second, she denied sharing a bed with the victim and the host whilst the latter two confirmed that the three indeed shared a bed.

50. In cases of this nature, it is sufficient that the employer's reaction falls in the band of reactions that a reasonable employer would have had in respect of the incident in question. As long as the response is within this band, the court is not entitled to reverse the employer's decision and substitute it with its own.
51. The above position, which is articulated in the Halsbury's Laws of England, has been restated in a series of decisions. For instance, in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR, the Court of Appeal quoting the aforesaid publication expressed itself on the matter 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.”
52. Having regard to the set of facts that were presented to the Disciplinary Panel, one could quite reasonably have arrived at the conclusion that the Claimant participated in the assault given that: the victim saw her (the Claimant) touch her (the victim's) private parts; the three ladies were in an apparent drunken stupor; and the three shared a bed. Yet, another could quite reasonably have considered that given that there was no independent witness to prove that the Claimant touched the victim's private parts, she did not participate in the assault. Both conclusions appear to me to have been possible from the evidence that was placed before the Panel. As such, they fall in the band of possible responses which any two reasonable employers would have made.
53. There is evidence that the incident may have affected the victim's emotional stability thus affecting her work. Indeed, the Claimant confirmed during trial that the victim had shown signs of depression although she blamed this on other factors.
54. There is also evidence that the Respondent is a Christian based organization. The court takes judicial notice of the fact that Christianity does not embrace conduct that leans towards lesbianism. As such, it is apparent that acts such as the one which the Claimant is accused of are contrary to the values of the Respondent and have the potential of damaging its reputation.
55. Having regard to the foregoing, I find that the Respondent's conclusion that the evidence before its Disciplinary Panel suggested that it was more likely than it was not that the Claimant participated in the assault was a reasonable one within the meaning of section 43 of the *Employment Act*. The Respondent's contention that the act, albeit happening outside the workspace, affected the workspace is also legitimate. This is because the available evidence suggests that the incident affected the victim's emotional stability thus negatively impacting on her work output. It is also apparent for the reasons alluded to earlier that the incident was a threat to the Respondent's reputation. As such, I find that the Respondent had valid reasons to consider terminating the Claimant's contract.



56. The next question for consideration is whether the Respondent terminated the Claimant's contract in accordance with fair procedure. For an employer to be considered to have ensured fair procedure in terminating an employee's contract, section 41 of the *Employment Act* requires that he (the employer): informs the employee of the infraction the employee is accused of in a language that the employee understands; accords the employee an opportunity to respond to the accusations; and permits the employee to be accompanied by a shop steward or fellow employee in the process.
57. Section 41 of the *Employment Act* on fair procedure is often complemented by section 4 of the *Fair Administrative Action Act*. Whilst there is no agreement on whether a decision to terminate a contract of service constitutes an administrative action, judicial decisions that consider it an administrative action require that the employer upholds the procedural strictures imposed by section 4 of the *Fair Administrative Action Act* when processing termination of an employee's services.
58. The procedural strictures under the aforesaid provision include the duty to give the affected party: prior and adequate notice of the administrative action or decision; an opportunity to be heard; an opportunity to seek legal representation; an opportunity to cross examine his accusers; and information, materials and evidence to be relied upon in making the decision or taking the administrative action.
59. The Claimant contends that the Respondent did not ensure fair procedure in the process of terminating her contract. She argues that although the Respondent had notified her of two charges when suspending her from duty, these were increased to three through the letter inviting her for the disciplinary hearing. She further contends that despite asking for statements of witnesses and other evidentiary material such as the medical report on the Claimant, the Respondent failed to provide them to her.
60. In response, the Respondent contends that when the Claimant's lawyers asked for witness statements and a copy of the investigation report, it (the Respondent) forwarded the investigation report to the Claimant. It further avers that the investigation report contained summaries of the witness statements by the witnesses who had been interviewed. The Respondent contends that the medical documents on the victim fall in the category of protected data which it could not share with third parties without the consent of the victim.
61. I have looked at the investigation report. Indeed, it contains summaries of statements by the various witnesses who were interrogated during the investigation process. The statements are sufficiently detailed to bring out the position of the various witnesses on the issues that they addressed. As such, I am satisfied that the Respondent supplied the Claimant with the statements of the witnesses who were interrogated over the matter.
62. It is also apparent that the Respondent supplied the Claimant with the investigation report. This was shared through email on 9<sup>th</sup> November 2021. As such, I am satisfied that the Respondent supplied the Claimant with a copy of the investigation report.
63. The materials which were supplied to the Claimant are the ones which the Respondent relied on to arrive at its decision. As such, the Respondent substantially complied with the procedural strictures on this requirement in terms of section 4 of the *Fair Administrative Action Act*.
64. It is true that the Claimant was not supplied with a copy of the victim's medical report. However, the infraction which she was accused of did not require production of the report to be established. It could be established using other evidence.



65. The record shows that the victim positively identified the Claimant as one of the individuals who fondled her private parts on the night in question. In my view, this, coupled with the evidence of the other assailant which confirmed that the three ladies shared a bed and that the victim's private parts were indeed touched and the Claimant's evidence that she could not recollect the events of the night due to her drunkenness and could therefore neither confirm nor deny occurrence of the incident provided a reasonable basis for the Respondent to arrive at the conclusion that it was more likely than not that the Claimant was involved in the incident. As such, whether the Respondent failed to supply the Claimant with the victim's medical report was of no consequence as the report was not necessary to establish the infraction.
66. Besides, I agree with the Respondent's position that such information was confidential in nature. As such, it would have been inappropriate to disclose it without the victim's concurrence and without it being demonstrated to the only evidence that was required to establish the infraction.
67. There is evidence that the Respondent issued the Claimant with a letter of suspension from duty dated 25<sup>th</sup> October 2021. This letter set out in detail the accusations against the Claimant. However, the details supplied at the time were those that were within the knowledge of the Respondent before the matter was investigated.
68. The record shows that after the investigations were closed, the Respondent issued the Claimant with a letter of disciplinary hearing dated 4<sup>th</sup> November 2021. This letter set out an expanded list of infractions.
69. I do not agree that because the letter of disciplinary hearing set out an expanded list of charges, this necessarily prejudiced the Claimant. I understand the expansion of the charges to have been the result of the investigation process. That notwithstanding, the Claimant retained the opportunity to respond to the charges during the disciplinary hearing. As such, she suffered no prejudice because of introduction of additional charges.
70. The record shows that the Respondent informed the Claimant of her right to be accompanied by a co-employee during the disciplinary hearing. As a matter of fact, the Claimant exercised this right by attending the session in the company of one DM.
71. The record further shows that the Respondent's Disciplinary Panel reminded the Claimant of the charges that she faced. She was given the opportunity to respond to them. Her accompanier was also accorded the opportunity to address the Panel. After the hearing, the Panel rendered its decision in which it found the Claimant guilty of gross misconduct.
72. The Claimant's counsel contends that the Claimant's accompanier was not accorded full opportunity to ventilate. The basis for this contention is that a member of the Disciplinary Panel interrupted the said person during his narration before it.
73. I have considered this contention in the context of the evidence on record. It appears that the reason why the accompanier was interrupted was because the Disciplinary Panel felt that he had strayed from the key issue that was before it. As such, he was asked to focus on the issue before the Panel.
74. I do not think that this reaction by the Panel provides evidence of either bias or reluctance to hear the accompanier. Just like any other decision maker, the Panel was entitled to ensure that those appearing before it addressed the issues before it. As such, there was nothing wrong in reminding the accompanier that he was going off the track.



75. The record shows that the Claimant was dissatisfied with the Respondent's decision. As such, she lodged an appeal.
76. The record shows that the appeal was processed and declined. As a result, the Disciplinary Panel's decision was upheld.
77. The foregoing demonstrates that the Respondent substantially complied with the procedural strictures for a fair hearing of the Claimant's case. There may have been isolated lapses in the process. But I do not think that they were of such a magnitude as to affect the overall result. As such, I am satisfied that the Respondent upheld fair procedure in terminating the contract between the parties.
78. Before I pen off, it is necessary to address two matters which the Claimant flagged. First, she contended that the Respondent had doctored the results of the investigations in a bid to fix her.
79. I have looked at the email trail which the Claimant relies on to advance this argument. It is true that the Respondent's officers indicated that there were changes that were to be made to the investigation report. However, the nature of the proposed changes is not stated. Further, it is not clear whether the changes were eventually effected.
80. During cross examination, the Claimant asserted that the report was doctored. However, she admitted that she was not in a position to flag the changes to the report since she was not the one who had prepared it.
81. The Claimant is asking the court to venture into the space of conjecture when she invites it to rely on the impugned email trail to arrive at the conclusion that the investigation results were altered to her detriment. There is no material on which the court can rely to arrive at such conclusion. The email trail per-se is not proof of what the Claimant asserts. It is also possible that the proposed changes related to the redaction of names of witnesses, the victim and the accused individuals.
82. The Claimant has also accused the Respondent of bias. As such, she suggests that the Respondent should have avoided handling the disciplinary cause and referred the matter to the criminal investigation agencies.
83. For starters, despite the allegation of bias, I do not think that the Claimant established a case for bias. There was no evidence to suggest that any member of the Disciplinary Panel had made up his or her mind on the accusations against the Claimant (*Republic v Engineers Board of Kenya Ex-Parte Oliver Collins Wanyama Khabure* [2018] eKLR). The fact that the investigator observed that from his inquiry, it was more likely than it was not that the Claimant had sexually assaulted the victim cannot be the basis to impute a closed mind on the part of the Disciplinary Panel.
84. Despite the investigator's observation, the Disciplinary Panel was bound to hear the parties and independently assess the evidence tendered before it. There is no evidence to suggest that because of the investigator's observation, the Panel considered the case against the Claimant as closed. If this was the position, why did it (the Panel) take the trouble to hear the parties before it rendered its decision?
85. As regards whether the Respondent ought to have subjected the matter to an external inquiry with a view to instituting criminal proceedings against the Claimant instead of pursuing the internal disciplinary process on account of the perceived partiality of the process, it is necessary to point out that these two processes are distinct and mutually exclusive of each other. As such, an employer is at liberty to elect to either subject an employee who is accused of an infraction with criminal implications to the external criminal process or handle the matter internally or pursue the two processes simultaneously. In the premises, I do not think that the Respondent erred in processing the complaint against the Claimant through its internal disciplinary mechanism instead of escalating the matter to the police.



**Determination**

- 86. Having regard to the foregoing, I arrive at the conclusion that the Respondent’s decision to terminate the Claimant’s contract of employment was justified.
- 87. As such, the Claimant is not entitled to the reliefs that she seeks through the Statement of Claim.
- 88. Consequently, I dismiss the suit with costs to the Respondent.

**DATED, SIGNED AND DELIVERED ON THE 28<sup>TH</sup> 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 12<sup>th</sup> 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.

