



**Agamu v Kenya Civil Aviation Authority (Cause E356 of 2022)
[2024] KEELRC 13250 (KLR) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13250 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E356 OF 2022
K OCHARO, J
NOVEMBER 26, 2024**

BETWEEN

HUMPHREY BULIMU AGAMU CLAIMANT

AND

KENYA CIVIL AVAITATION AUTHORITY RESPONDENT

JUDGMENT

1. Through a statement of claim dated 16th May 2022, the Claimant sued the Respondent alleging that the latter terminated his employment unfairly and wrongfully and resultantly sought; a declaration that the termination was unfair and wrongful; an order of reinstatement to his employment position without loss of benefits; damages for unlawful retention of lawful dues; punitive damages; Damages for violation of his constitutional right to fair labour practice and discrimination.
2. The Statement of Claim was filed contemporaneously with his witness statement of the even date, and a bundle of documents. Later, the Claimant filed a supplementary, witness statement and, bundle of documents under a list of documents dated 24th February 2023, with the leave of Court of 22nd February 2022. At the hearing, he adopted the statement as his evidence in chief, and tendered the documents as his documentary evidence.
3. The Respondent opposed the Claimant’s claim by filing A Reply to the Statement of Claim, dated 13th July 2022. It denied that the Claimant’s employment was unfairly and or wrongfully terminated, and or his constitutional rights violated. Further, his entitlement to the reliefs sought. The Reply was filed side by side with a witness statement of Martin Kivui, who testified herein as the Respondent’s sole witness and adopted the statement as his evidence in chief. Under a list of documents dated the even date, the Respondent lodged documents in court, which documents were tendered in evidence as documentary evidence at the hearing of this matter.



4. After the full hearing of the parties' controversy herein, this Court directed the filing of written submissions. The parties' Counsels did heed the directions. The submissions are on record.

The Claimant's Case.

5. It was the Claimant's case that he was employed by the Respondent Company in April 2016 in the capacity of Senior Airworthiness Inspector under the Department of Aviation Safety and Security Regulations drawing a monthly salary of Kshs. 3 10,998/=.
4. He worked diligently and honestly for the Respondent throughout the 6 years of his employment and was legitimately looking forward to working for the Respondent up to his retirement age, were it not for his abrupt, premature and unlawful dismissal from employment.
5. During his tenure as an employee of the Respondent, he was hardworking, dedicated and a competent team leader with no adverse reports and or charges.
6. He stated that on 20th April 2021, he was asked to explain concerns raised in the Respondent's letter of the even date and to be specific that on the 9th and 10th of February, 2021, he and Albert Mwangeka carried out an "approved maintenance organization" inspection on Aircare Aero Services Ltd, for purposes of renewal of their AMO certificate. He then made a recommendation for the renewal of the certificate of the Respondent's standard Form, on 9th March 2021. On the form, he indicated the fees applicable as 90,000 paid on 11th February 2021 and a receipt number "WAP" issued, without attaching the receipt to the Form. Further, on request of the receipt from the Applicant, it was sent to the Respondent receipt number 2021 WAP135048F of 11th February 2021. The discrepancy needed to be explained.
7. Through his letter dated 20th April 2021, he explained that upon the inspection, he raised an invoice, number 20211448 of KSHS.90,000, from the ERP system. The Applicant complained that previously he had paid KSHS. 80,000, however, it paid the invoice amount, and a receipt was issued and placed on the file. He denied knowledge of the alleged payment of KSHS. 90,000.
8. With malice and in discriminatorily the Respondent issued him with a Show Cause Letter on the 18th of June, 2021. The Respondent asked him to give a response to the letter before 4.00 p.m. on —5th June 2021. He responded to the said letter on 25th of June 2021.
9. The Claimant stated that his woes can be traced to the Memo dated 11th June 2021 which was issued regarding the subject "local AMO surveillance". Per the Memo, Mary Keter, the Manager of Airworthiness intended to accompany him for the Ramp inspection in Eldoret. The activity was slated for 15th July 2021 and approved by the Human Resources Manager. On this day she got engaged for other official duties. As a result, he decided to proceed to Eldoret with the driver alone for the work. He worked from 21st July 2021 to 24th July 2021. When he got back to the office, Mary was bitter and angry with him.
10. The Claimant asserted that though he had never made any report to the Respondent on it because the Respondent has no laid down procedures for reporting sexual harassment, he had for long suffered sexual harassment and threats under the hands of Mary.
11. Subsequently, but without justification, the Respondent issued him with a suspension letter dated 27th July 2021, which he received on 29th July 2021.
12. Later, the Respondent via email, invited him for a first disciplinary committee hearing on 24th August 2021, which was rather rescheduled to 31st August 2021. He attended the meeting with his Counsel.



- Through the Counsel, he requested the Chairman, Mr. Joseph Kiptoo to recuse himself on account of a conflict of interest. He had no confidence in the Chairman. At the end of the meeting, the Respondent indicated that more charges were to be preferred against him.
13. It was the Claimant's case that after the meeting the Respondent went inactive on the matter. After more than four months, the Claimant's Counsel was forced to write to the Respondent, reminding them of the proceedings and, the inaction which was contrary to the Respondent's own Human Resource, Item H2. Further, Item H15 was violated. The Counsel wrote a reminder on 3rd December 2021, but the letter didn't elicit any response.
 14. While still on suspension, on 27th January 2022, the Respondent issued him with another show cause notice via email. He responded to the notice, stating that as action had already been taken against him, issuance of this second show cause notice offended the Human Resource Policies and Procedure Manual of Respondent. Further, as fresh charges had been preferred against him, he needed to access the findings /information/investigation reports which had not been supplied to him.
 15. He contended that the suspension was unprocedural.
 16. On 22nd February 2022, he wrote a reminder to the Respondent, requesting that he be allowed to access each of the files mentioned in the show cause letter of 27th January 2022, to enable him to adequately prepare for his defence. Access to information was an entitlement to him under the Respondent's procedure Manual item F5.
 17. On 22nd February 2022, through a letter dated 22nd February 2022, the Respondent invited him to appear for a disciplinary hearing that was set for 3rd March 2022.
 18. On 12th April 2022 at 23: 25 pm at night, the Claimant received a dismissal letter via email. The letter intimated the Respondent's decision of dismissing him on two grounds of gross misconduct; neglecting, disregarding and without sufficient reason failing to comply with a lawful order, regulations, standing orders or departmental instructions; and falsifying signatures or work records for example overtime claims, stock records, subsistence claims, accounting records, logbooks, medical documents, etc.
 19. He further stated that he remained on suspension without pay for more than seven months, unlawfully and in breach of the Respondent's procedure Manual.
 20. By its acts, the Respondent violated his right to information under Article 35 of *the Constitution*, assumed his guilty of the allegations against him without carrying out any investigations, non-procedurally placed him under suspension without pay, subjected him to unfair labour practice contrary to Article 41 of *the Constitution*, violated his right against discrimination [Article 27], and to fair administrative action [Article 47], and failed to accord him a fair hearing in breach of his right under Article 50.
 21. The investigation report that was prepared by the Respondent doesn't mention him in any substantive manner. It only mentions departments. He has never understood how he was picked as the person to bear liability.
 22. He contended that he cannot be employed anywhere because his skills and knowledge are in aviation. His reputation has been tainted. No player in the industry could want to employ him, further considering that the Respondent is the regulator of the industry.
 23. Cross-examined by Counsel for the Respondent, the Claimant testified that his employment was terminated on 11th April 2021. The termination letter was sent to him via email on the night of that



day. His position was advertised before he was even dismissed. The advertisement was carried out on the 19th of February 2022.

24. He was a Senior Airworthiness Inspector. Once an Inspector carries out an inspection, he only raises an invoice to the concerned entity. In his position, he could not receive cash from them on behalf of the Respondent. All payments were made through the Respondent's Accounts Department. He never received the alleged KSHS. 300,000.
25. He admitted that there were allegations of forged receipts but he wasn't clear as to who raised the matter, whether it was the Kenya Revenue Authority or the Respondent.
26. There show cause letter dated 18th June 2021 did set out the allegations that were levelled against him. He was required to respond to the same on or before 25th June 2021, therefore within seven [7] days. He responded as was asked. In the response, he didn't request for more time. However, he did ask for an extension via email. In the response letter, he asserted that it was a duty on the Operator to prove that he gave him the money.
27. Though the suspension letter recommended that he be placed under half pay during the suspension period, this salary wasn't paid. The pay slip for August 2021 shows that the half salary and house allowance were paid. The half salary was legitimately subjected to statutory payments and a repayment instalment of KSHS. 122, 000 for the loan facility it owed Standard Chartered Bank. All through, he received KSHS. 113,092, half of the basic salary.
28. He further testified that he was first invited for a disciplinary hearing on 25th August 2021. This was within a month of the suspension date. He attended the hearing with his Counsel. He requested for an adjournment as his uncle had passed on. He specifically requested a further hearing date of 31st August 2021. The Respondent acceded to his request. However, on this stated date, the meeting didn't take off, the Respondent informed him and his Counsel that they could communicate another date for the hearing.
29. The Memorandum of 1st November 2021, expressly showed why the hearing was adjourned. The reason wasn't that further investigations were to be conducted.
30. A second show cause letter was issued to him on 22nd January 2022. He responded to the same. Subsequently, he was invited to appear for a disciplinary hearing that was set for 3rd March 2022. He requested documents to enable him to prepare for his defence but he wasn't given them.
31. On 3rd March 2022, he was informed via email that his documents had been assembled for him to pick up at 3:00 pm. Same day for the disciplinary hearing. He did not go to pick up the documents because they could have been sent the same to the address he had provided them. The hearing didn't take place on that date. He told them to send the documents via email.
32. Later, he was invited for a hearing that was slated for 14th March 2022. He communicated to the Respondent indicating that he couldn't attend the hearing as he hadn't been given the documents/information he had requested.
33. Among the grounds set out in the letter of dismissal for the Respondent's decision was that he failed to attend the disciplinary hearing and forgery.
34. At some point, he applied to Kenya Airways for a job. His application wasn't considered favourably. The company communicated to him that on carrying out due diligence, it discovered that it had outstanding issues with its former employer. The Respondent was wrong in providing this information to the company as they truly knew that the matter was pending resolution in court.



35. In his evidence under re-examination, the Claimant testified that he gave the Respondent a specific email address through which to dispatch the documents, but they didn't.
36. The reason upon which he asked the Chairperson of the Disciplinary Committee to recuse himself was that he was related to the accuser. The Respondent invited him to the disciplinary notwithstanding the pendency of a court case.
37. The Claimant reiterated that it wasn't within his province to receive any payments for the Respondent. Payments were handled and directly made to the cash office. In fact, there was a caveat, no payment beyond KSHS. 200,000 in cash was allowed.
38. The manager Mary, confirmed that the operator had made payments. She signed the certificate.

The Respondent's Case

39. Martin Kivui, the Respondent's Human Resources and Administration Manager, testified on behalf of the Respondent. The witness stated that at all material times, the Claimant was an employee of the Respondent as a Senior Airworthiness Inspector and was stationed at the Respondent's Headquarters.
40. The Manager Airworthiness wrote to the witness on suspected fraud regarding regulatory fees involving the Claimant. It was discovered that he had issued payment receipts that were not authentic. Subsequently, he was issued with a show cause letter dated 18th June 2021, accused of falsifying work and account records. He responded to the letter on 25th June 2021.
41. The response wasn't sufficient. Following approval from the Director General, a letter dated 27th July 2021 was issued to the Claimant, suspending him from duty with immediate effect pending review of his case by the Human Capital Management Advisory Committee [HCMAC]. The letter also advised him of his entitlements during the suspension period.
42. The Claimant was invited to appear before the Committee on 24th August 2021 at the Respondent's Headquarters, but the hearing was rescheduled for 31st August 2021 at the Claimant's request.
43. On 31st August 2021, the Claimant appeared before the Committee accompanied by his advocate. However, the Committee wasn't in a position to take his defence as planned, as new issues pointing towards gross misconduct on the part of the Claimant had emerged during the period of separate investigations that required the Claimant's answer [s]
44. A special Management Committee (SMIC) constituted by the Director General and tasked to evaluate regulatory transactions at the Authority to establish whether all operations were carried out in conformity with established regulations and procedures had just concluded its investigations. It concluded that the Claimant had been involved in 14 other questionable transactions in terms of the authenticity of supporting documents. These findings were different from those that had led to his suspension. As such, he was issued another show cause letter dated 27th January 2022 with the approval of the Respondent's Board of Directors.
45. The Claimant responded to the letter stating that he would only respond to the investigations conducted by the Directorate of Criminal Investigations [DCI].
46. Subsequently, the Claimant was invited to appear before HCMAC on 3rd March 2022 via a letter dated 22nd February 2022. He was furnished with a copy of the investigation report
47. The Claimant didn't appear for the meeting as scheduled, and neither did he communicate his decision not to attend. The Respondent decided to give him a final chance to appear before the Committee on



- 14th March 2022 at noon through a letter dated 4th March 2022. Through his letter dated 10th March 22, the Claimant gave reasons why he didn't appear before the Committee on 3rd March 2022.
48. Having declined to appear for the disciplinary hearing and upon consideration of the fact that the Claimant didn't give any evidence to controvert the accusations of falsification of work and accounts records, the Respondent decided to dismiss him from employment. The dismissal was effective 27th July 2021, being the date of the suspension.
49. Cross-examined by Counsel for the Claimant testified that the Memo dated 22nd April 2021 was issued by the Manager Airworthiness. On the Memo, there is a handwritten note that mentions a report by KRA. Steve Makau, a revenue officer, had attended the offices of KRA to authenticate the receipt. KRA didn't have the receipt, which meant that the receipt in issue wasn't authentic. However, KRA didn't write any communication regarding the receipt.
50. The e-slip didn't have the name or signature of the Claimant on it.
51. The suspension letter dated 27th July 2021 informed him that he was entitled to a half salary during the period he remained on suspension. Though the Respondent's Human Resources Manual didn't expressly provide for payment of the half salary, the same was paid to him because the Public Service Regulations demanded so.
52. The Respondent doesn't have a 2018 Human Resource Manual. As such, the document filed by the Claimant doesn't aid his case. There have been attempts to amend the 2011 manual, but it has not been possible as approval by the relevant entity hasn't been given.
53. By the form dated 9th March 2021, the Claimant made a recommendation for the subject operator. Ms Keter, his immediate supervisor, signed the form on 8th April 2021. She explained to the witness that she signed the recommendation, though it had issues, acting on trust.
54. Pension benefits were not being handled by the Respondent directly but by a contracted entity. The Claimant could have applied to the entity for payment of the same.
55. The pay slip for October 2021 shows the net pay as KSHS. 38,024, a figure less than the Claimant's house allowance of KSHS. 40,000.
56. The witness testified further that through his Memo dated 1st November 2021, he urged the Director General to allow further investigations by a Special Investigative Committee on compliance with procedures by the Claimant's Department. The investigations were not targeting a specific individual, therefore. The 14 further transactions and the Claimant's involvement in the same, came out during the investigations.
57. Some invoices and receipts mentioned in the Respondent's exhibit captioned 'Review of Transactions' have not been tendered in evidence by the Respondent.

Analysis and Determination

58. I have carefully considered the pleadings, evidence and submissions by the parties herein and distil the following issues for determination;
- i. Was the termination of the Claimant's employment fair?
 - ii. Were the Claimant's constitutional rights violated as alleged in the statement of Claim?
 - iii. Is the Claimant entitled to the reliefs sought?



Was the termination of the Claimant's employment unfair?

59. No doubt, the legislation of unfair termination represents a major incursion into the common law, limiting the employer's otherwise open-ended power to bring the contract of employment to an end without the need for substantive justification, and imposing general standards of procedural fairness upon the process of termination. Termination of an employee's employment or summary dismissal of an employee from employment cannot be held to have been fair absent of the two statutory aspects of procedural and substantive justification.
60. Section 41 of the *Employment Act*, 2007 provides for a mandatory procedure that must be adhered to by any employer contemplating terminating an employee's employment or summarily dismissing an employee from his or her employment. The procedure stipulated in this provision has three components and the absence of all or any of them will by dint of the provisions of section 45 of the Act, the termination shall be deemed procedurally unfair.
61. The employer must inform the employee of their intention to act against him or her and the grounds igniting the intention, allowing the employee adequate opportunity to prepare and make representations on the grounds. Conjoined with this statutory right to be heard, is the right to be accompanied by a colleague of his choice or a trade union representative where he or she is a member of a Union, and lastly considering the representations by the employee and the accompanying person, before taking a final decision.
62. Undeniably, the Respondent issued the Claimant with a show cause letter dated 8th June 2021, elaborately setting out allegations against him and requiring him to respond to the same within a specific period. Further, through his letter dated 25th June 2021, he made a response.
63. Further, it isn't in dispute that the Claimant was invited to appear before the Respondent's Management Disciplinary Committee on 24th August 2021. The invitation was under the Respondent's letter dated 18th August 2021.
64. Up to here, the Respondent was on the correct track regarding the notification component of the procedure contemplated under section 41 of the Act, the Claimant was made aware of the Respondent's contemplation and the grounds the basis thereof. Considering the period between the date of the invitation and the date set for the disciplinary meeting, one cannot hesitate to conclude that the Claimant was given adequate time to prepare for his defence.
65. Through his email dated 19th August 2021, the Claimant requested for the hearing to be adjournment to 31st August 2021, as he was bereaved. Through their email dated 23rd August 2021, the Respondent expressed willingness to accommodate the Claimant and reschedule the meeting for 31st August 2021. By an email of 23rd August 2021, the Claimant confirmed that he was to attend the meeting on the new date.
66. By reason of the foregoing, I take a clear view that the Respondent was an employer who was committed to ensuring procedural fairness in the disciplinary process it was undertaking against the Claimant.
67. It is common cause that the hearing that was slated for 31st August 2021, didn't take place. The Special Management Investigation Committee that had been tasked to evaluate transactions to establish whether all operations were carried out in accordance with established regulations and procedures had completed the investigations which revealed that the Claimant was involved in more transactions that were questionable in terms of authenticity of supporting documents. There was a need therefore that



charges regarding the discovered infractions, be consolidated with those that were the subject matter of the show cause letter of 18th June 2021 and the disciplinary hearing that was supposed to take place on 31st August 2021, so that a single disciplinary process could be conducted.

68. The question that arises then is, can an employer reasonably and fairly bring on board fresh or additional charges against an employee who has already been issued with a show cause letter and subsequently invited for a disciplinary hearing but which hearing hasn't taken place? Undoubtedly, the situation can be likened to that in a criminal prosecution, the prosecutor could for one reason or the other want to have the charge sheet amended to bring to board fresh or additional charges. Such a move by the employer can only be held unjustifiable, if it, is actuated by malice, infested by bad faith and unreasonableness or if the employer's Human Resource Manual or any instrument speaks against it. I see no evidence by the Claimant that could establish or even suggest that the consolidation and fresh process that the Respondent was to commence was malicious, in bad faith or unreasonable.
69. However, it is pertinent to state that where the employer brings up new allegations against the affected employee in an already initiated disciplinary process, he must be notified of them and given adequate opportunity to prepare and defend himself. Absent of these, the process will be tainted and deemed legally unfair.
70. Following the foregoing premises, the Respondent issued a fresh show cause letter dated 27th January 2022, the letter spoke to the investigations that unearthed further questionable transactions and elaborately set forth 14 allegations against him to which he was required to give a response.
71. By his letter dated 7th February 2022, the Claimant reacted to the Respondent's forestated letter. In my view, the letter didn't address the accusations against him that were in the show cause letter, and indeed, he was categorical that he did not intend to. In the stead, he addressed the suspension that he was serving, lamenting that it was punitive, unlawful and an affront to his constitutional rights. Further, the new show cause letter had brought in new charges that never formed the initial allegations that formed the basis for the suspension.
72. According to him, the only entity that could investigate criminal infractions was the Director of Criminal Investigations [DCI]. He could only respond to the show cause letter as and when he was served with any investigations report by the DCI. Here, the Claimant started taking a blurred and perilous trajectory.
73. By its letter dated 22nd February 2022, the Claimant was invited to appear before the Management Disciplinary Committee on 3rd March 2022. He was informed of his right to attend the proceedings by himself or in the company of a person of his choice. There is no dispute, and the Claimant admitted, that he did not turn up for the proceedings on this appointed date.
74. Noting under its letter dated 4th March 2022 that;

“It is regrettably noted that you did not appear for the meeting as scheduled and neither did you communicate your decision not to attend. This resulted in a waste of the Authority's time as the Committee members sat to wait for you and efforts to reach your cell phone were fruitless.....”

The Respondent extended a final chance to the Claimant to appear before the Committee on 14th March 2022. He was cautioned that failure to attend could usher in a situation where the matter was to be determined without any further reference to him.



75. The invitation attracted a lengthy letter from the Claimant. The letter read in part;
- “..... I also wish to remind you and bring to your attention that the matter has already been filed in court under case number MCERC/ 364/ 2022 before employment and labour court jurisdiction, which clearly and lawfully overrides the Authority's internal disciplinary mechanisms, bearing this in mind, I will not also be in a position to appear before any HCMAC meeting to deliberate on issues that are “ work in progress” in a competent court otherwise that will amount to interfere with a court process and as such undermining the mandate of the court. Regrettably, the Authority's internal disciplinary mechanism failed miserably to solve the matter, which was by then within its jurisdiction for a wholesome period of TEN [10] months despite several reminding letters from my legal counsel dated 21st October 2021 and 3rd December 2021, respectively which were never addressed nor replied to.”
76. True to his communication, the Claimant didn't turn up for the proceedings. The Respondent decided to dismiss him from employment on account of falsifying documents. It becomes important to point out at this time that the pendency of a dispute in a court of law does not oust the employer's managerial authority to undertake or continue with a disciplinary process against its employee as a matter of course. An employee desiring a stoppage or pose of the process on the account has to successfully request the employer for it or move the Court to issue a conservatory, injunctive or any other appropriate for that purpose. Absent of this, the employee cannot be at liberty to decline to appear before a set disciplinary hearing as did the Claimant.
77. It hasn't escaped this Court's mind that the Claimant in his evidence under cross-examination admitted that the case referred to in his letter was all about his license. In my view, it was very relevant to the disciplinary proceedings that related to the various infractions that he had allegedly committed.
78. I note that the Claimant expended immense efforts on the Respondent's action to exclude him from employment by suspending pending review of his case. He alleges that the suspension was punitive. Put in another way it was a sanction short of a dismissal. I am not persuaded that the suspension was a disciplinary sanction. In my view, considering the contents of the suspension letter, the suspension was an administrative one, and the Respondent was entitled to it.
79. Where an employee deliberately absents himself from a disciplinary hearing, the employer will have the right to consider the material before it and make a final decision on the employee's alleged misconduct, capacity or compatibility. I have considered that the charges against the Claimant were preceded by an investigation by the Special Committee and a report emanating from the activity. Without any evidence from the Claimant to rebut the findings that had implicated him, any reasonable employer in the shoes of the Respondent could proceed to rely on the report and the Claimant's correspondences, which I have hereinabove held with great respect were off target, and dismiss him.
80. In the upshot, I find that the dismissal of the Claimant from his employment was procedurally and substantively fair.

Were the Claimant's Constitutional rights violated?*

81. I note that the allegation by the Claimant that his rights were violated was based on his position that the suspension was punitive, an action short of a dismissal. Having found as I have hereinabove, that he misunderstood the nature of the suspension, then the allegation finds no foundation. It is hereby rejected. As a consequence, those reliefs sought on account of the alleged violation, are declined.



Is the Claimant entitled to the reliefs Sought?

82. Having found that the dismissal of the Claimant from employment was both procedurally and substantially fair, all the reliefs that were sought based on unfair termination cannot be availed to the Claimant.

83. In the upshot, I find the Claimant's claim without merit. It is hereby dismissed with costs.

READ, SIGNED AND DELIVERED THIS 26TH DAY OF NOVEMBER 2024.

OCHARO KEBIRA

JUDGE

In the presence of

Mr. Ongoncho for Mutege for the Claimant.

Ms. Rigunya for the Respondent.

