



**Gichobi v Oracle Technology Systems (Kenya) Limited (Employment and Labour Relations Cause 1661 of 2017) [2023] KEELRC 43 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 43 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1661 OF 2017**

**L NDOLO, J  
JANUARY 19, 2023**

**BETWEEN**

**CHARLES GITHINJI GICHOBI ..... CLAIMANT**

**AND**

**ORACLE TECHNOLOGY SYSTEMS (KENYA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The dispute before me arises from the termination of the Claimant's employment by the Respondent. The Claimant, Charles Githinji Gichobi, was an employee of the Respondent from October 20, 2005 until June 9, 2017, when his employment was terminated. At the time of separation, he held the position of Technology Sales Representative, Kenya Public Sector.
2. The Respondent, Oracle Technology Systems Limited, is a limited liability company engaged in the provision of technology solutions to customers.
3. The Claimant's claim against the Respondent is contained in a Statement of Claim dated August 23, 2017 and filed in court on August 25, 2017.
4. The Respondent's defence is by way of a Statement of Defence dated September 18, 2017 and filed in court on even date.
5. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Mukunya Mugo. Both parties also filed written submissions.

**The Claimant's Case**

6. The Claimant states that in the course of his employment with the Respondent, he was involved in organising the sale of Oracle Audit Vault to the Kenya National Audit Office, in August 2013.



7. On November 11, 2016, the Claimant was summoned and interviewed by the Ethics and Anti-Corruption Commission(EACC) in respect of a cheque for Kshs 500,000 issued to him by Njuguna & Partners Advocates, allegedly being payment in respect of the sale of the Oracle Audit Vault to the Kenya National Audit Office. At the meeting with EACC, The Claimant was accompanied by the Respondent's Compliance & Ethics Counsel, Muthoni Nyoike and the Senior Compliance and Ethics Counsel, Julia Windermuth.
8. On November 22, 2016, the Respondent's Managing Director together with the Compliance & Ethics Counsel and the Senior Compliance and Ethics Counsel held a follow up meeting with the Claimant where they sought clarification from the Claimant on allegations that the payment made to him by Njuguna & Partners Advocates was an inappropriate payment for organising the sale of Oracle Audit Vault to the Kenya National Audit Office in August 2013. The Claimant avers that the minutes of the said meeting were not availed to him and the record was not factually correct.
9. On January 20, 2017, the Respondent's Senior Compliance & Ethics Counsel and Human Resource Manager, summoned the Claimant for a meeting where they demanded that the Claimant allows the Respondent access to his personal mobile phone and other personal equipment, citing the Respondent's Global Acceptable Use Policy.
10. The Claimant declined to allow the Respondent access to his personal mobile phone and/or equipment on the ground that the move was an invasion of his right to privacy.
11. Subsequently, the Respondent wrote to the Claimant on January 24, 2017 and demanded that the Claimant provides the following within three (3) business days:
  - a) The Claimant's mobile phone for purposes of content imaging;
  - b) Documentation to confirm payment of Kshs 500,000 was for construction materials.
12. The Claimant responded to the Respondent's letter through his Advocate on January 25, 2017 and demanded proof from the Respondent that the payment of Kshs 500,000 was an inappropriate payment for organising the sale of Oracle Audit Vault to the Kenya National Audit Office in August 2013.
13. The Respondent's Advocates responded to the Claimant's letter on February 23, 2017 denying that the Respondent had alleged that the Claimant was guilty of receiving any cheque from Njuguna & Partners Advocates. The Claimant avers that the Respondent's Advocates further stated that there was no need to access the Claimant's phone.
14. On February 10, 2017, the Claimant was issued with a notice to attend a disciplinary enquiry on February 14, 2017. The Claimant was also suspended from duty on the date of the notice.
15. The Claimant states that the disciplinary meeting did not take place on February 14, 2017 because he was denied legal representation. The meeting was rescheduled to March 3, 2017.
16. The Claimant denied all the allegations levelled against him and stated that since the matter was under investigation by the EACC, the Respondent should wait for the outcome of the investigation.
17. On April 24, 2017, the Respondent wrote to the Claimant asking for a written explanation on the issues raised at the disciplinary enquiry being:
  - a) An allegation of receiving kickbacks and/or proceeds of corruption;
  - b) Failing to adhere to reasonable requests to provide information;



- c) Loss of trust and confidence in the Claimant as a result of the allegations;
  - d) Exposure to the Respondent to reputational risk and damage as a result of the allegations made against the Claimant.
18. In response, the Claimant's Advocates wrote to the Respondent on April 26, 2017, stating that the disciplinary hearing had already taken place on March 3, 2017 and all that was awaited was the decision made by the disciplinary panel.
19. On May 12, 2017 the minutes of the disciplinary meeting were sent to the Claimant's Counsel, at his request. The Claimant states that the said minutes were factually incorrect and did not represent a true record of the meeting held on March 3, 2017.
20. The Claimant's employment was terminated by letter dated June 9, 2017. His case is that the termination was unlawful and malicious.
21. An Appeal Panel made up of Hardeep Sound, Ayotunde Afolabi and Julia Windermuth was set up. The Claimant objected to the Appeal Panel, stating that Julia Windermuth was not impartial since she had attended a meeting at the EACC, prior to the disciplinary proceedings.
22. The Claimant claims that the Respondent refused to drop Julia Windermuth from the Appeal Panel and proceeded to hear the appeal on July 7, 2017, in the Claimant's absence.
23. The Claimant seeks the following remedies:
- a) Reinstatement without loss of rank, salary and/or benefits;
  - b) Damages for unlawful termination of employment;
  - c) Costs of the suit.

### **The Respondent's Case**

24. In its Memorandum of Defence dated September 18, 2017 and filed in court on even date, the Respondent denies that the termination of the Claimant's employment was unlawful or unfair.
25. The Respondent admits having employed the Claimant from October 20, 2005, as a Technology Sales Representative.
26. By a letter dated November 9, 2016, the EACC notified the Respondent that it was investigating procurement irregularities in respect of a company known as OSI Kenya Limited. In its letter, EACC asked for the attendance of three (3) of the Respondent's employees, including the Claimant, for interview on November 11, 2016.
27. The Respondent states that the Claimant himself requested for the attendance of Muthoni Nyoike and Julia Windermuth at the meeting with EACC.
28. The Respondent avers that during the meeting of November 11, 2016, the EACC stated that the Claimant had received a cheque for Kshs 500,000 drawn by Njuguna & Partners Advocates, which was suspected to have been a kickback paid to him in relation to a transaction with the Kenya National Audit Office through OSI Limited.
29. The Respondent further avers that as a result of the allegations made against the Claimant and in accordance with its Code of Ethics and Business Conduct, the Respondent's Compliance and Ethics team commenced investigations into the matter. A video conference is said to have been held on



November 22, 2016 between the Claimant and the Respondent's Managing Compliance & Ethics Counsel, Marc Shanker and Senior Compliance and Ethics Counsel, Muthoni Nyoike.

30. The Respondent asserts that during the video conference, the Claimant admitted that he had received and banked the cheque that the EACC had shown to him during his interview. He however denied that the cheque was a kickback and claimed that the payment was in respect of construction equipment and services he had provided to a friend. The Claimant is said to have informed the Respondent that he would provide supporting documentation in relation to the transaction.
31. According to the Respondent, the Claimant did not provide the aforementioned documentation relating to the transaction and as a result by a letter dated January 16, 2017, he was given three (3) days to do so. The Claimant did not avail the documents and did not respond to the Respondent's letter.
32. The Respondent sent a letter dated January 24, 2017, inviting the Claimant to a meeting to discuss inter alia, his failure to provide the Company with the required documentation. The Respondent also requested the Claimant to provide his personal mobile phone for purposes of carrying out investigations pursuant to the Respondent's Global Acceptable Use Policy.
33. The Claimant responded through his Advocates' letter dated January 25, 2017, declining the Respondent's request. The Claimant further accused the Respondent of denying him the right to legal counsel. The Claimant's Advocates demanded that the Respondent provide proof or documentation in support of the allegation that the Claimant had received the cheque.
34. The Respondent admits having suspended the Claimant by letter dated February 10, 2017. On the same day, the Respondent invited the Claimant to attend a show cause meeting on February 14, 2017, for his failure to provide documentation he had undertaken to provide.
35. The Respondent states that as an exception and in the interest of ensuring a fair and transparent process, owing to the complexity of the issues at hand, the Claimant was allowed to attend the meeting of March 3, 2017 in the company of his Counsel.
36. At the meeting of March 3, 2017, the Claimant denied ever having agreed to provide the Compliance and Ethics team with supporting documentation and stated that he could not recall the contents of the meeting held on November 22, 2016.
37. The Respondent maintains that the Claimant had a duty to provide an explanation regarding the allegations made against him by the EACC. The Respondent further maintains that the Claimant breached this duty by failing, neglecting and/or refusing to provide any documentation in respect of the allegation, despite being given adequate opportunity and support to do so.
38. The Respondent asserts that it was justified in terminating the Claimant's employment on June 9, 2017 and adds that it observed due process in the termination.
39. Regarding the Claimant's appeal against the termination, the Respondent states that it appointed an impartial panel of staff members who were not involved in the initial disciplinary hearing. The Respondent accuses the Claimant of refusal to attend the appeal hearing. The Appeal panel upheld the termination and the Claimant was notified of this decision by letter dated July 14, 2017.
40. The Respondent defends its request to the Claimant to provide his mobile phone for purposes of imaging to confirm the Claimant's statement that the Kshs 500,000 from Njuguna & Partners Advocates was for payment of construction materials.



41. The Respondent states that it respected the Claimant's right to privacy and adds that in the termination letter dated June 9, 2017, the Claimant was informed that his failure to avail his mobile phone was not a relevant factor in the decision to terminate his employment.

### **Findings and Determination**

42. There are two (2) issues for determination in this dispute:
- a) Whether the termination of the Claimant's employment was lawful and fair;
  - b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

43. The Claimant's employment was terminated by letter dated June 9, 2017 stating as follows:

' Dear Charles,

RE: Termination of your Contract of Employment

We refer to the above matter and in particular to the disciplinary hearing held on March 3, 2017.

After careful consideration of the representations and statements made by you and your Advocate, Mr Mungai during the disciplinary hearing, Oracle Kenya (the Company) has taken the decision to terminate your contract of employment on the basis that it has lost trust and confidence in you as its employee for the following reasons:

1. The Kenyan Ethics and Anti-Corruption Commission vide a letter dated November 9, 2016 informed Oracle that it was investigating procurement irregularities in respect of a company known as OSI Kenya Ltd. In its letter the EACC specifically requested that you attend an interview with them on November 11, 2016. During the interview with you and two of Oracle's compliance officers, the EACC made allegations that you had in your capacity as an employee of Oracle received a cheque of Kshs 500,000 which the EACC suspected had been paid to you as a kickback in relation to a transaction with the Kenyan National Audit Office through OSI Kenya Ltd.
2. Oracle is a successful multinational company, which champions ethical business values and practices. To this end, Oracle has established the Code of Ethics and Business Conduct (hereinafter the Code) whose terms are incorporated into your employment contract and therefore binding upon you. This Code prohibits Oracle employees from receiving any kickbacks, bribes and other improper payments. The Code further provides that employees have a duty to fully cooperate with any investigations carried out by the Company into any suspected breach of the Code and, in particular, to 'promptly, completely and truthfully comply with any requests for information.' You were contractually bound to provide any information that would assist Oracle in investigating the matter.
3. Oracle's Compliance and Ethics team commenced investigations pursuant to the terms of the said Code, in respect of the allegations made by the EACC against you. In the course of those investigations, you informed the compliance



officers on November 22, 2016 that you had indeed received and banked the cheque which the EACC has shown to you during the interview. You however denied that the said cheque was a kickback and claimed that the payment was in respect of construction equipment and services you provided to a friend. You agreed to provide the Compliance and Ethics team with supporting documentation in relation to the transaction.

4. During the disciplinary hearing held on March 3, 2017, you informed the disciplinary panel that you did not recall the details of the meeting held on November 22, 2016. The Company however notes that the meeting of November 22, 2016 had been referenced in various letters to you, particularly those dated 16<sup>th</sup> and January 24, 2017. You had never responded to the letters denying or challenging the content of the meeting of November 22, 2016, neither had you sought clarification about the meeting referred to. The Company's view therefore is that the position you took during the disciplinary hearing was an afterthought as it is inconsistent with your previous statements and conduct.
5. Notwithstanding the foregoing, pursuant to the terms of your employment contract, the Code and even from a moral and ethical perspective you were duty bound to provide an explanation to the Company as regards the serious corruption allegations as they were made against you as an employee of Oracle. You however failed, refused and/or neglected to provide the organization with the relevant information in respect of the allegations promising that you would avail the information. As you are aware, these allegations are of a very serious nature with potential criminal implications and have been widely published in the media; accordingly, the allegations have exposed the Company to a significant reputational risk and damage.
6. The Company has therefore lost trust and confidence in you due to your failure to co-operate with its investigation into the serious allegations and, in particular, your failure to provide information on the cheque you received, which information was squarely within your knowledge and ability to provide. In addition, your failure to co-operate and provide the information and your subsequent and persistent refusal to comply with the request for information was in breach of the Code and your contractual obligations towards Oracle. Your actions amount to an offence of serious misconduct.

Strictly without prejudice to the foregoing and for the avoidance of doubt, during the disciplinary hearing you and your advocate indicated that the Company's request that you provide it with your mobile phone for purposes of the internal investigations had infringed your Constitutional right to privacy. We would like to clarify that the Company respected your decision as regards the mobile phone and your failure to provide the same to the Company was also not a consideration when determining whether to terminate the employment relationship.

Clause 5 of Oracle's Disciplinary policy provides that you have a right to appeal the Company's decision. Should you opt to appeal the decision, please submit to the Human Resources Manager your full grounds of appeal within the next five (5) days. A copy of the Appeals process is attached to this letter.



As you are being dismissed for serious misconduct, the Company is terminating your services with immediate effect and your final day of employment with Oracle is today, June 9, 2017 (the 'Termination Date').

The Company shall pay to you the following dues,

- (1) 1 month's salary in lieu of notice;
- (2) All accrued annual leave days earned up to the Termination Date; and
- (3) Any commission to which you are entitled up until the Termination Date pursuant and subject to the FY17 Compensation Plan and applicable terms and conditions.

The payments set out above shall be subject to the normal statutory deductions. Payment shall be made to you in the June payroll run subject to your execution of the handover of any property belonging to the Company in your possession to Mukunya Mugo, HR Manager by no later than 17:00 on June 14, 2017. Company property includes items listed in the handover form attached (an Lenovo office laptop, an Apple iPad, submission of all your American Express, Expense claims on the system, American Express cards for FY16, FY17, Oracle Staff Badge and Oracle Business Cards, any written material in either soft or hard copy, etc in your possession).

Please also find enclosed a certificate of service.

We thank you for your service with Oracle and wish you all the best in future endeavors.

Yours faithfully,

On behalf of Oracle Technology Systems Kenya Limited

(Signed)

Folake Adeniyi-Adeleye,

HR Director'

44. The events leading to the termination of the Claimant's employment were set in motion by a letter dated November 9, 2016 addressed to the Respondent by the EACC, by which the following persons were required to report to the Commission for interview and statement recording:
  - a) Kenneth Muiga-Channel Manager;
  - b) Charles Gichobi- Sales Executive (the Claimant in this case);
  - c) Officer in charge of Compliance.
45. In its letter, EACC disclosed that it was carrying out investigations on procurement irregularities against a company by the name OSI Kenya Limited.
46. It is on record that when the Claimant appeared before the EACC, he was confronted with a cheque of KShs 500,000 drawn in his favour by Njuguna & Partners Advocates. The Claimant admitted having received the said cheque but denied the insinuation that it was in payment of a kickback or proceeds of corruption.
47. It was reported that the Claimant had indicated that the payment in issue was in fact made by his friend for supply of building equipment and services. He is said to have undertaken to provide documentation to support this proposition.



48. The Respondent, having been jolted by the proceedings at EACC, began its own internal investigations into the allegations of impropriety on the part of the Claimant. In this regard, the Claimant was required to provide documentation to back his account that the payment in question was on account of provision of construction equipment and services to a friend.
49. The Claimant was also required to avail his mobile phone for purposes of content imaging but this latter requirement appears to have been dropped upon the Claimant raising concerns on intrusion of his privacy.
50. On his part, the Claimant took the view that because the matter of the payment was before the EACC, the Respondent ought to withhold any action, pending the outcome of the investigations by EACC. The Respondent did not share this view and in a series of written communication, persisted in asking the Claimant to provide information regarding the payment of Kshs 500,000 made to him.
51. From the evidence on record, the Claimant did not accede to his employer's demand and a reading of the termination letter dated June 9, 2017 demonstrates that this failure by the Claimant is what led to loss of confidence and trust resulting to the termination. The question before the Court is whether this was a valid reason for termination of employment as contemplated by Section 43 of the Employment Act.
52. In the submissions filed on behalf of the Respondent, reference was made to the decision in *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] eKLR* where the Court of Appeal considered the burden placed on an employer by Section 43 of the Employment Act and adopted 'the range of reasonable responses test' as set out in *Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol 16(1B)* para 642 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.'
53. A similar position was adopted by Lord Denning in *British Leyland UK Limited v Swift [1981] IRLR 91* at 93 stating:
- ' There is a band of reasonableness within which one employer may reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair; even though some other employer may not have dismissed him.'
54. Correspondingly, in the South African case of *Nampak Corrugated Wadeville v Khoza (JA 14/98) [1998] ZALAC 24* Ngcobo JA held that:
- ' The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court



should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.'

55. Scanning the evidence on record, it is not in doubt that the Claimant was required by his employer to provide information regarding a payment of Kshs 500,000 made to him by the law firm of Njuguna & Partners Advocates and that the payment had been flagged by the EACC as potential proceeds of corruption.
56. Having been duly notified of this by the EACC, the Respondent was not only expected but was in fact obligated to conduct its own investigations. This was more so because the transaction in issue involved a large procurement by a public body namely, the Kenya National Audit Office.
57. In the circumstances, it was reasonable for the Respondent to ask the Claimant to explain himself on this issue. The Court notes that instead of responding to his employer's probe the Claimant chose to pass the matter to his Counsel. While in principle there was nothing wrong with this approach, the Claimant could not be absolved from his duty to account to his employer by referring the matter to his Counsel.
58. In its decision in *Mary Wagikuyu Komu v The Kenya Hospital Association t/a The Nairobi Hospital [2016] eKLR* this Court held that an employee cannot, without justifiable cause, decline to participate in a disciplinary inquiry initiated by the employer.
59. Regarding the Claimant's request that the Respondent withholds disciplinary action pending the outcome of the investigation launched by the EACC, the only thing to say is that there was no legal basis for this request.
60. The Court of Appeal settled this issue in its decision in *Attorney General v Andrew Maina Gitbinji & another [2016] eKLR*, holding that criminal proceedings and internal disciplinary proceedings at the work place are separate and distinct, with different procedures and standards of proof. An employer is therefore not obliged to withhold action against an employee on the basis of pending criminal proceedings nor is the employer bound by the outcome of such proceedings.
61. That said, I find and hold that the Respondent was justified in calling for an explanation by the Claimant regarding the payment of Kshs 500,000 made to him, which was the subject of investigations by the EACC. By failing to provide the required information, the Claimant impeded investigations initiated by his employer and thus jeopardised the disciplinary proceedings against him.
62. In the circumstances, the Respondent was justified in losing trust in the Claimant and Zbringing the employment relationship to an end.
63. Regarding the Claimant's objection to the composition of the Appeal Panel, the Court finds that none of the members of the panel could be said to have been impartial. The verdict on this issue therefore, is that the Appeal Panel was properly constituted and the Claimant had no valid reason not to attend the appeal hearing.
64. On the whole, I find and hold that the termination of the Claimant's employment was substantively and procedurally fair. In the result, his claim for unlawful and unfair termination of employment fails and is dismissed with costs to the Respondent.
65. It is so ordered.

**DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY 2023**



**LINNET NDOLO**

**JUDGE**

**Appearance**

**Mr. Mungai for the Claimant**

**Mrs. Wetende for the Respondent**

