



**Kibui v Camusat Kenya Limited (Cause 2358 of 2017)  
[2023] KEELRC 11 (KLR) (12 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 11 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2358 OF 2017  
AN MWAURE, J  
JANUARY 12, 2023**

**BETWEEN**

**LUCY KIBUI ..... CLAIMANT**

**AND**

**CAMUSAT KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant Lucy Kibui brought a suit via the Memorandum of Claim dated the 15<sup>th</sup> November, 2017. The Respondent filed a response dated 8<sup>th</sup> January, 2018.

**Claimant's case**

2. The Claimant states that by a contract dated 1<sup>st</sup> December, 2008, he was offered Employment by the Respondent effective 1<sup>st</sup> December, 2006.
3. She says she successfully completed her probationary period and was confirmed on permanent basis. She was to keep books of accounts for the Respondent. She says she performed her job faithfully and diligently and her performance was recognised by a contract dated 1<sup>st</sup> May, 2013 where she was promoted as a Finance Manager and a salary at Kshs.149,132/=. At the time of termination, she says her salary was Kshs.200,000/=.
4. She says that on 12<sup>th</sup> May, 2017, she was falsely accused and was suspended on allegation that together with three other colleagues they had collaborated and written letters to Immigration Department making accusations against Respondent's Chief Finance Officer Ms. Mejjide.
5. The accusations against Ms. Mejjide to the immigration Department was discrimination, harassment and malicious decisions against the Claimant.



6. The Claimant was called for a disciplinary meeting on 23<sup>rd</sup> May, 2017 and she denied the allegations. She noted that the Respondent had not produced any evidence to support those allegations.
7. Despite the Claimant's response she was summarily dismissed via Respondent's letter dated 23<sup>rd</sup> May, 2017.
8. The Claimant says the termination was orchestrated by Ms. Meijide and no valid reason was proffered for her termination.
9. She now prays for Judgement to be entered against the Respondent for unlawful and unfair termination of her employment. She prays for compensation for b, c, c, e, f, g, h and I as follows;
  - a. Compensation in accordance with Section 49 of the Employment Act, 2007 in a sum of Kshs.2,400,000/= being the Claimant's 12 months' salary;
  - b. Payment of unpaid house allowance in accordance with Section 31 of the Employment Act, 2007 in the sum of Kshs.1,080,000/= for a period of (36) months at the standard rate of 15% of the basic pay;
  - c. Payment of Kshs.600,000/= being the balance of the service pay for the 9 years worked;
  - d. Payment of a sum of Kshs.200,000/= being one month salary in lieu of notice;
  - e. General damages for discrimination.
  - f. Issuance of a certificate of service that complies with Section 51 of the Employment Act, 2007.
  - g. Costs of this suit.
  - h. Interest on the above until payment in full.

### **Respondent's case**

10. The Respondent in their response denies each and every allegation in the Claimant's memorandum of claim save what is expressly stated to be admitted.

They state that Claimant was employed as an accountant on 1<sup>st</sup> March, 2009 at a gross salary of Kshs.72,000/= subject to statutory deductions, medical expenses and pension.
11. The Respondent states that on 1<sup>st</sup> May 2013, all contracts of their employees were renewed and Claimant was employed as a Finance Manager at a salary of Kshs.149,826/=. This was less statutory deduction and NSSF and NHIF deductions.
12. The Respondent says that they then received a report that there was mismanagement and misuse of funds occasioned by the Claimant. The Directors then posted Ms. Meijide to streamline the company's financial operations and prevent losses.
13. On or about 24<sup>th</sup> April, 2017, the Directors of the Respondent were informed the Claimant had been involved in initiating a false claim with the Directorate of Immigration and Registration of Persons against Beatriz Meijide. They said there were baseless accusations against Miss Meijide of mistreating Kenyan staff and the intention was to incite Immigration Department to deport Miss Meijide.



14. The Respondent further says the internal investigation was conducted and identified most probable authors of the anonymous letters and employees admitted to have been part of the scheme which they claimed was orchestrated by the Claimant.
15. The Respondent says that the Claimant used her position to get her subordinates to second false and give false statements against Miss Meijide who was auditing the Respondent's operations.
16. The Claimant was therefore issued with a letter of suspension to enable the Respondent to carry out further investigations and the said suspension letter is dated 12<sup>th</sup> May, 2017.  
After investigations were carried out, the Claimant was invited for a disciplinary hearing and he states he conducted the disciplinary hearing in accordance to applicable laws.
17. He says three fellow employees were present at the hearing in accordance to the applicable law. The Respondent further says that the disciplinary hearing determined that the Claimant was involved in making false declarations to the Immigration Department against the Respondent's Chief Finance and Accounting Officer (CAFO) Miss Meijide.
18. The Respondent therefore decided that due to the Claimant's wrong doing, she could no longer be retained as an employee of the Respondent. He says that they afforded the Claimant opportunity to defend herself before the termination of her employment.
19. The Respondent avers that they paid the Claimant leave days Kshs.76,196.48 and salary in lieu of notice and severance pay Kshs.446,826/=. They also says there is no pending claim of service pay since Claimant was a member of NSSF and Respondent used to remit the dues on her behalf.
20. Respondent therefore says the Claimant is not entitled to the orders sought as she was terminated lawfully for gross misconduct and further that it was procedurally conducted.  
They therefore pray for claimant's claim to be dismissed with costs.

### **Claimant's evidence**

21. The Claimant in her viva voce evidence presented before the Honourable court on 15<sup>th</sup> March, 2022 basically corroborated the contents of the evidence contained in the Memorandum of Claim. She however added that she went on maternity leave and her boss Miss Meijide employed one Mr. Ngugi as her boss. She was asked to be reporting to Mr. Ngugi instead of reporting to the Managing Director.
22. She also says some of her benefits were withdrawn like fuel allowance which was Kshs.10,000/= per month.
23. She further says she was summoned to Langata Police Station and was shown a letter referring to harassment and mistreatment of staff by Ms Meijide which was purportedly written by staff of the respondent. She says she was asked if she was the one who wrote the same and she declined she had written those letters and she recorded a statement.
24. She states she was then issued a suspension letter dated 12<sup>th</sup> May, 2017 and was then invited for a hearing on 16<sup>th</sup> May, 2017. She says she attended the hearing and was not given a chance to call a witness and all attendees were appointed by Ms. Meijide. She says there were no other co-accused and no evidence was produced to prove she had written those letters. She says she was then served with a written termination letter dated 23<sup>rd</sup> May, 2017.



## Respondent's evidence

25. The Respondent witness who gave viva voce evidence in court on 21<sup>st</sup> June, 2022 was Peterson Githinji who was a staff of the Respondent. He says the Claimant wrote a letter to the Immigration for employee of the Respondent to be deported one Beatrix Meijedi. The letter to Immigration was to the effect that Beatrix Meijedi was mistreating respondent's Kenyan staff members.
26. The witness says other staff members purported to have participated in crafting the letter to the immigration were Tabitha Njoroge and Francis Macharia. He says disciplinary hearing concluded and found the claimant was one of the employees involved in writing that letter and so Claimant was issued a termination letter. He says she was paid Kshs.300,000/= as service pay as good will since NSSF used to be remitted on her behalf.
27. He says Claimant was not discriminated and Mr. Ngugi was not given her position. He also says fuel allowance was a bonus to the Claimant and not an entitlement.

## Claimant's submissions

28. The Claimant in her submission avers that there is no evidence that Claimant was involved in the alleged misconduct as the witnesses alleged to have indicted the Claimant to writing the letter to Immigration including one Mr. Gatechew were not called as witnesses.
29. The Claimant is relying on the case of *Philip Amwayi Wokinda -vs- Rift Valley Railways Limited* (2018) eKLR where the court held;

“As already observed, no reason was given as to why these two witnesses were not called to testify and yet they had featured prominently in the whole transaction. There is therefore nothing to bar us from acceding to the appellant's request that the Respondent's conduct in failing to tender the testimony of these two crucial witnesses is sufficient to give rise to an inference that, had they been called their evidence would have been adverse to the Respondent's interests.”

30. Also, the Claimant submits she was accused of financial mismanagement and yet there is no evidence adduced to demonstrate such.

The Claimant also says that there were several allegations made against Miss Meijide and yet were not investigated.

The Claimant claims she was discriminated against from the other fellow workers mentioned as culprits. She demands Kshs.5,000,000/= for discrimination and also prays for the other reliefs sought in view of substantially and procedurally unfair termination.

31. The Respondent's submissions were not cited by the court.

## Determination

32. Issues for determination
  1. Was the Claimant unfairly and wrongfully terminated from her employment?
  2. Is she entitled to the reliefs prayed?
  33. Was Claimant unfairly and unlawfully terminated from her employment?



The Claimant in her pleadings and evidence in court cites unfair treatment by the Respondent's employee one Ms Beatrix Mejjide who she claims engineered her unlawful and unprocedural termination.

34. The law relating to fair termination is found in Section 41, 43 and 45(2) of the *Employment Act* (E.A). The statutory burden of unfair or wrongful termination is on Section 47(5) of the *Employment Act* which states;

For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

35. The Claimant was served a suspension letter dated 12<sup>th</sup> May, 2017 which read inter-alia that "You and three other employees collaborated to address a letter to the Immigration Offices in Nairobi disparaging the character and integrity of your boss (Chief Financial Officer-Africa).
36. She was informed that after review of the evidence during investigation, it was established that there is compelling evidence linking her to the letter despite her denying any involvement. She was asked to show cause why disciplinary action should not be taken against her.
37. On 16<sup>th</sup> May, 2015, she attended disciplinary hearing and in attendance was Peterson Githinji, Human Resource Manager, Patrick Kamau, Macharia Kenga and Kennedy Swa.

After the meeting, the panel relying on one Gatechew's testimony found Claimant was involved in writing the letter and that she was the coordinator and organizer of the meetings held in relation to drafting the letter and for that reason, it was recommended she should be dismissed. Her letter of dismissal was issued on 23<sup>rd</sup> May, 2017.

38. The evidence before the honourable court is that the Respondent got the information and anonymous letters written to the Immigration Department accusing one of their employees Beatrix Mejjide of discriminating against other staff members. The respondent reported the matter to the police and subsequently the Claimant was summoned by the police and she wrote a statement. She denied having authored the said letters.
39. The court is at pains to decipher why the Respondent deduced that the Claimant co-ordinated the writing of those letters. The other colleagues who were mentioned by Peterson Githinji, the Respondent's witness were Tabitha Njoroge, Gatechewa and Francis Macharia. They were not asked to write statements or to testify as to how they got the information that the Claimant co-ordinated in writing those offending letters.
40. The Respondent has at the best no concrete proof that the Claimant was the one who co-ordinated the writing and delivery to the Immigration Department of those offending letters.
41. Section 43 of the *Employment Act* states;
1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
  2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.



42. The employer is obligated to give a verifiable and a concrete reason to support the termination of an employee.

43. Also in the case of *Willie Kipkoech -vs- County Government of Kericho & 2 others* E016 of 2021, it was held

“The Respondent as well failed to discharge the burden of proving that they dismissed the Claimant for a valid and fair reason. The dismissal was therefore unfair on that ground and especially within the provisions of Section 43 of the *Employment Act*”.

44. Similarly the case before court there is no concrete and tangible evidence to connect the claimant with authoring the offending report to the Immigration Department of the government of Kenya. The employer therefore failed to establish a verifiable and valid reason to justify termination of claimant’s employment.

### Procedure followed

45. The mandatory requirement of the law in terminating an employee is as per the procedure set out in section 41 of the *Employment Act*. Section 41(1) states;

Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

46. It is evident from the pleadings and evidence adduced and the documentation that the Respondent did not give Claimant an ample opportunity to defend herself and call a witness of her choice. It is a sacrosanct right of an employee to be heard before termination and in the presence of his witness. In the case of *David Gichana Omuya -vs- Mombasa Maize Millers Limited* (2014) eKLR, the court held that the requirements of Section 41 of the *Employment Act* have a long pedigree in administrative/ public law and are referred as the rules of natural justice.

47. If the process failed out of the mandatory requirement of Section 41 of the *Employment Act*, that follows the termination of employment then the employment is wrongful due to unfair procedure.

48. In the case of *Raymond Cherekewa Mrisha -vs- Civicon Limited* (2014) eKLR, the court held that the Respondent had not proven that the Claimant had breached a lawful contractual obligation to warrant dismissal. The court added that even if that was to be the case which was not, the Claimant was entitled to a fair hearing under the *Employment Act*.

49. Flowing from the above and having considered the pleadings and the adduced evidence in totality, the court finds the termination of the Claimant’s employment was both unfair and unlawful as well as unprocedural and so court proceeds to enter judgement in her favour.

### Remedies

- a. The court will award the Claimant general damages equivalent to 8 months’ salary – totalling Kshs.1,600,000/=.
- b. House allowance



50. The Claimant was employed from 2008 to 2017 and accepted her contract and salary was gross pay. Therefore, the court finds no justification at this point to claim for house allowance and the same is declined.
- c. Similarly, severance pay is not justified as the Respondent was remitting Claimant's NSSF dues.
  - d. The court awards one month salary in lieu of notice being Kshs.200,000/=.
  - e. The costs are awarded to the Claimant and interest at court rates from date of judgement till full payment.
  - f. Claimant is to be issued with the certificate of service within 14 days from today's date.
  - g. The total award due to the Claimant is Kshs.1,800,000/=.

Orders accordingly.

**Dated, signed and delivered virtually at Nairobi on this 12<sup>th</sup> day of January 2023**

**ANNA N. MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**ANNA N. MWAURE**

**JUDGE**

***JUDGEMENT Nairobi ELRC Cause No. 2358 of 2017 Page 8 of 8***

