



Kavila v Beta Healthcare International Limited (Employment and Labour Relations Cause 1632 of 2017) [2023] KEELRC 498 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 498 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1632 OF 2017**

J RIKA, J

FEBRUARY 28, 2023

BETWEEN

BRIAN KAVILA CLAIMANT

AND

BETA HEALTHCARE INTERNATIONAL LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on August 22, 2017.
2. He states that he was employed by the Respondent, between July 21, 2014 and May 12, 2017. He last held the position of Manager, Credit Control.
3. He was suspended indefinitely, without reason, on September 21, 2016.
4. He was issued a letter dated November 21, 2016, to show cause why he should not be disciplined. He requested for certain documents from the Respondent, to enable him respond, which were not supplied. The Respondent proceeded to terminate the Claimant's employment, a decision which was reversed by the Respondent, after the Claimant's Advocate wrote a demand letter dated January 20, 2017.
5. The Respondent supplied the Claimant some documents on March 3, 2017. He was not supplied all the requested documents. Some of the documents were prepared after the Claimant had been suspended, with the sole aim of propping up the Respondent's position. The Claimant demanded for additional documents which were not supplied. He had been accused of falsifying excel sheets, which were not availed to him.
6. The meeting held over the letter to show cause, was irregular, because all key documents needed by the Claimant, were not availed to him. He was not paid salary for the period of suspension, from October 2016 to May 12, 2017. His last salary was Kshs 137,800.



7. He prays for Judgment against the Respondent for: -
 - a. 12 months' salary in compensation for unfair termination at Kshs 1,653,600.
 - b. 22 days of annual leave at Kshs 137,800.
 - c. House allowance in arrears of 3 years at Kshs 744,120.
 - d. 1-month salary in lieu of notice at Kshs 137,800.
 - e. Salary for the period of suspension at Kshs 1,102,400.
 - f. Interest.
 - g. Costs.
8. The Respondent filed its Statement of Response on September 15, 2017. It is admitted that the Claimant was employed by the Respondent. He was warned for underwhelming performance through a letter dated April 22, 2016. He delayed remitting important data, which affected the performance of the entire Organization. A meeting followed between the Claimant, the CEO and the Finance Manager. It was agreed at the meeting that the Claimant had not improved his performance. He admitted as much, and undertook to improve.
9. He was suspended on September 21, 2016 having passed invalid credit notes worth Kshs 2,482,245 to Willis Ochieng' who was a vans salesman. The Claimant did so with other vans salesmen's debtor accounts, using his login identification, without the knowledge of his Supervisors. Investigations by the Finance Manager disclosed that the Claimant had also been using Fredrick Ogare's login identification, while Obare was on leave. Confronted with the information by the Finance Manager, all the Claimant did was promise that he would reverse the transactions. He gave an undertaking for reversal through his e-mail dated September 6, 2016, which was an admission that he had passed invalid credit notes.
10. The letter of suspension specifically informed the Claimant that he was being suspended, to facilitate investigations into the transactions. He was invited for a meeting on September 30, 2016. He turned up in the company of a Kenya Defence Force Officer, with the intention of intimidating the Respondent. He did not participate in the meeting, insisting that before he could do so, he had to see the Respondent's CEO. He failed to meet the CEO. This Claimant continued to threaten the Respondent, to drop the disciplinary action against him. He was issued letter to show cause dated November 21, 2016. The Respondent accommodated him, by withdrawing a letter of termination dated 5th December 2016. The Respondent availed all the documents the Claimant had requested. He was provided with the letter of appointment. He went on to dispute the authenticity of the letter of appointment supplied to him. He had signed some documents during employment, and nothing prevented him from producing the relevant copies in his custody. He was given adequate opportunity to defend himself. Suspension took long because of the incessant demands by the Claimant, before he could submit himself to disciplinary hearing. Termination was fair. The Respondent prays that the Claim is dismissed, with costs to the Respondent
11. The Claimant gave evidence, and closed his case, on March 25, 2022. Regional Head of Governance Richard Kariuki, and Regional Head of Human Resource and Administration Margaret Mathenge, gave evidence for the Respondent on July 19, 2022, when the hearing closed. The matter was last mentioned on November 2, 2022, when Parties confirmed the filing and exchange of closing submissions.



12. The Claimant adopted his Witness Statement, Original and Supplementary Bundle of Documents, in his evidence-in-chief. He restated his employment details. He was unfairly dismissed on 2 occasions. Defined disciplinary procedure was not followed. Irregular transactions attributed to the Claimant were not humanly possible. They were alleged to have been made same date, and at the same time- June 22, 2016 at 9.39 am. He requested for 8 documents before termination. He was only supplied 3. He saw others in Court for the first time. This included Company Policy, which was generated in a rush, after the Claimant was out of employment. Human Resource Documents were signed annually. The Claimant never signed what was presented in Court by the Respondent. The Policy was copy-pasted in a rush, and is full of mistakes. It refers to Public Employees, whereas the Respondent is a Private Company. The Claimant felt handicapped by non-supply of requisite documents.
13. Cross-examined, he told the Court that disciplinary procedure was not followed. He received letter to show cause. He was issued letter of suspension. He attended the meeting of September 30, 2016. He was accompanied by a soldier and asked to see the CEO. There was another meeting of December 2, 2016. He did not attend this meeting. Figures involved were disputed. There was another meeting to discuss disputed figures.
14. A letter of termination issued on December 5, 2016. The Claimant wrote to the Respondent through his Advocates, asking for reversal of termination. The Respondent obliged, and the Claimant was reheard on March 29, 2017. He attended the hearing, but was not provided the required documents. E-mail of May 12, 2017 refers to documents supplied to the Claimant. It was from the Respondent's Advocates. It informed the Claimant that because he did not attend hearing, the Respondent would reinstate the letter of termination. The Claimant never saw this e-mail from the Respondent's Advocates.
15. There is an ongoing criminal case against the Claimant, as shown in the charge sheet on record. He could not confirm that his annual leave balance is 10.5 days, as shown at page 46 of the Respondent's documents. Suspension with full pay ended on September 30, 2016. He seeks salary up to May 2017. He was not advised which letter of termination was applicable. He did not appeal against termination, communicated in the second letter. He told the Court on redirection that he appealed against the first letter. He attended the meeting of March 19, 2017, but was not interested in the hearing. It was for the Claimant, not the Human Resource Office, to determine the validity of documents. He has not been convicted for any offence in the criminal proceedings. He last worked in September 2016. His last salary was paid in September 2016.
16. Richard Kariuki adopted his Witness Statement, and Bundle of Documents filed by the Respondent running from page 1-132. The Claimant posted transactions totalling Kshs 2.4 million, using his account. Access was password-enabled. He was the Credit Manager at the time. Kariuki conducted investigations and prepared report at page 108 of Respondent's Bundle.
17. Employees were entrusted consignments by the Respondent. They reduced the amounts owing gradually. The Claimant reduced their debts, without the Employees meeting those debts. An example related to Willis Ochieng,' at page 108 -109 of the Respondent's Bundle. The Claimant was never able to supply documents to support the transactions. Credit notes would need the support of documents. At page 58 of Respondent's Bundle, the Claimant said he would supply attachment which he did not. Willis should have been captured as owing the Respondent. The Claimant manipulated the accounts to show that the Respondent owed Willis. The correct balances as redone by Kariuki, are shown at page 67 and 108 of the Respondent's Bundle. Page 109 to 120 are screenshots of postings done by the Claimant.



18. The screenshots are end outputs. The person posting can post at the same time. Numerous transactions could be posted at the same time. Even if there were 10 journals, time shown would be the same. It would be the time the Claimant clicked 'post.'
19. There were other postings made by the Claimant, beyond the one on Willis. These are shown at page 66 of the Respondent's Bundle. Fred was on sick leave when the Claimant used his account to post. Correct balances were reworked by Kariuki. Willis owed the Respondent Kshs 2.3 million from 2015. After reversal, debit notes were generated. The Claimant acted in collusion with Employees, leaving the Employer in the dark.
20. Cross-examined, Kariuki told the Court that the Claimant asked for certain documents before the disciplinary hearing. He asked for Company Policy on Credit Notes Approval. Kariuki was not sure if the document was availed to the Claimant. Respondent's page 60 to 63 is a computer printout. Kariuki did not alter the document. It was possible to make changes on excel sheet. The individuals concerned were van sales Employees. There were various categories of Employees who sold Respondent's products. Kariuki talked to the Finance Manager and other Employees. He did not record their statements. Their answers led to investigations by Kariuki. He did record a statement from Fred. Kariuki is a CPA and Systems Auditor, not a ACP expert. It is possible to carry out multiple transactions at the same time. He was not there when the postings were done. Redirected, Kariuki told the Court that not a single document was supplied to him by the Claimant, to support his postings. Screenshots clearly show that the Claimant made the postings.
21. Margaret Mathenge adopted her Witness Statement on record. There were reports of anomalies in postings made by the Claimant. He did not respond to a letter written by the Respondent, asking for clarification. He instead wrote asking for certain documents which were passed to him. He was called for a hearing, and presented himself in the company of an armed Police Officer. The Officer said that the Claimant was his child. The Officer was advised about the nature of the proceedings and left. The Claimant followed the Officer, passed Mathenge's Office, and told her he wished to speak to the CEO. Suspension was extended without pay, because the Claimant had occasioned adjournment.
22. The issues were well-stated in the letter to show cause. He failed to attend the rescheduled meeting of December 2, 2016. The Committee met. Termination letter dated December 5, 2016 followed. There was understanding in 2017 that the letter of termination is rescinded, and the Claimant taken through another hearing. The respective Advocates were involved in this arrangement. Rehearing was set for March 29, 2017. The Claimant did not turn up. He was on extended suspension. He was frustrating the process. The Respondent went ahead and reinstated the letter of termination of December 5, 2016.
23. He was paid all terminal dues, dating to December 5, 2016. He was paid annual leave of 10.5 days and salary earned. He appealed after December 2016, and this explains reinstatement and rehearing. Termination was fair. He did not work in 2017, and is not entitled to salary claimed over this period. His activities were reported to the Police, and a criminal case is pending at Makadara Law Courts.
24. Cross-examined, Mathenge told the Court that anomalies were brought to her attention by Kariuki. This was in early September 2016. On September 19, 2016, there was a preparatory, not a disciplinary meeting. The Claimant was invited with 9 other Employees to explain the transactions. He was issued letter to show cause, and responded, asking for certain documents. Mathenge did not give him the documents. ACP process was in Finance. The System showed who made transactions. Mathenge did not avail the documents because she was not their custodian. She did not avail the Human Resource Policy. The meeting of September 30, 2016 was a disciplinary hearing. The Claimant availed himself, accompanied by a Police Officer. The Claimant asked to see the CEO, and hearing was rescheduled. Another hearing was scheduled for December 2, 2016. He was provided Policy on suspension. Other



documents had not been supplied. He appealed and termination was set aside. Hearing was scheduled for March 29, 2017. He attended. It was incorrect to say he did not. He did but continued to ask for more documents. He specified documents he required. It was for the Claimant to say what documents he needed. Hearing did not proceed again on March 29, 2017 because of the Claimant's stance. The Respondent believed documents already provided, were sufficient. The Respondent decided to terminate, going back to December 5, 2016. The events of 2017 were disregarded. Redirected, Mathenge stated that the email of March 3, 2017, shows that documents were availed to the Claimant. The CEO was not involved with the disciplinary hearing. The Claimant was on a gross salary. The email of May 12, 2017 was to clarify that termination was effective December 5, 2016.

25. The issues are: whether termination was procedurally fair; whether it was founded on valid reason or reasons; and whether the Claimant merits the remedies pleaded. These issues are based on Sections 41, 43, 45, 47 and 49 of the [Employment Act](#), as well as Section 12 of the [Employment and Labour Relations Court Act](#).

The Court Finds:-

26. The Claimant was employed by the Respondent on July 21, 2014. Paragraph 3 of the Statement of Response indicates that the Respondent does not dispute the employment history of the Claimant. The date of employment is not disputed, and it was not clear why the Claimant persistently pursued a copy of the appointment letter, insisting that it would confirm the date 'I was appointed to that position'
27. He held ranks such as Management Accounts, and lastly was Manager Credit Control. He was alleged to have in the latter position, passed invalid credit notes to Willis Ochieng, a van salesman, worth Kshs 2.4 million. He was said to have made other fraudulent transactions, using the login details of a colleague Fredrick Ogare, while Ogare was on sick leave.
28. He was invited for meetings, and on December 5, 2016, was issued a letter of termination. He made an Appeal through a letter dated December 28, 2016 to the Respondent, through his Advocates. His main ground was that he had requested for certain documents to enable him defend himself appropriately, and that those documents had not been supplied at the time of termination.
29. The Respondent wrote to the Claimant's Advocates on January 20, 2017, expressing its willingness to recall the letter of termination, and to supply the Claimant with the relevant documents. The Claimant was effectively reinstated.
30. On March 23, 2017, the Respondent wrote to the Claimant's Advocates, informing the Claimant that rehearing would be on March 29, 2017. The Claimant's Advocates wrote back a day to the scheduled rehearing, on March 28, 2017, complaining that the Employee Handbook availed to the Claimant was substantially different from the one he signed; and the SOP for van sales availed to the Claimant was a strange document he had never seen during his employment. He made further demands for excel sheets that were alleged to have been manipulated, and credit notes approved by his predecessor.
31. The request meant that the hearing, scheduled for the following day, March 29, 2017, did not go on to its logical conclusion.
32. About a month later, the Respondent's Advocates emailed their Counterparts, advising that after thorough investigations, the Respondent had decided to terminate the Claimant's contract. This was followed by another email dated May 12, 2017, where the Respondent clarified that because the Claimant had declined to attend internal hearing, the original letter of December 5, 2016, terminating the Claimant's contract, had been reinstated. The Court understands this to mean that



- the Respondent's position, was that the Effective Date of Termination [EDT] remained the December 5, 2016.
33. Procedural Fairness. The evidence on record shows that the Claimant was confronted with specific charges, concerning the Claimant's passing of credit notes, worth Kshs 2.4 million, to various van salesmen debtor accounts. The charges were communicated in a detailed letter to show cause dated November 21, 2016. The Claimant had been suspended earlier, on September 21, 2016, to allow for investigations. Investigations took place, and involved several Employees, including the Claimant. The letter to show cause issued against this background.
 34. The Claimant was invited for a meeting on September 29, 2016. He turned up for the meeting with a Police Officer, which the Court would agree, was meant to intimidate the Respondent. Why would an Employee bring to the workplace a Police Officer, who introduces the Employee as his son, when the Employee is facing a disciplinary process? Instead of giving his side of the story, the Claimant insisted that he had to speak to the CEO first. He did not explain to the Court why it was necessary for him to see the CEO, before submitting to the investigatory and disciplinary process that was underway.
 35. The Claimant responded to the letter to show cause, on November 30, 2016. He made certain demands from the Respondent, ostensibly to enable him 'substantially respond to your letter.' He wished to be supplied breakdown of the sum in question of Kshs 2.4 million; various accounts affected; dates involved; the SAP Users involved; approval policy on credit notes; policy on issuance of stocks; process of clearing and releasing van salesmen back to the field; and company policy on suspension of Employees.
 36. He did not respond to the actual charges contained in the letter to show cause, but gave conditions to the Respondent, for him to respond to the letter to show cause.
 37. He was invited to attend disciplinary hearing scheduled for December 2, 2016. 8 members of the disciplinary panel convened on December 2, 2016. The Claimant declined to attend the hearing, holding that the Respondent had not supplied him necessary documents.
 38. It was determined to terminate the Claimant's contract, a decision that was communicated in the letter dated December 5, 2016.
 39. As discussed above, the Claimant appealed. He was reinstated. He was offered a rehearing, which he did not submit to, holding onto his position that he had not been supplied certain documents. He failed to attend hearing on March 29, 2017, raising demands for documents on the eve of the hearing, on March 28, 2017.
 40. The Respondent decided to terminate the Claimant's contract on May 10, 2017, the Claimant having failed to submit to the disciplinary re-hearing.
 41. This communication was clarified by the Respondent through the email dated May 12, 2017, which was to the effect that the Respondent had reinstated the letter of termination dated December 5, 2016.
 42. The Court is persuaded that procedure was fair, the only defect being on the EDT.
 43. Investigations took place; charges were communicated to the Claimant; he was suspended; he was issued a letter to show cause; he responded; he was invited for investigatory meeting which he chose to attend in the company of his Police Officer; he was invited to a disciplinary hearing on December 2, 2016, which he failed to attend; his contract was terminated; he was reinstated on appeal; he was given the benefit of a second hearing, which he declined to participate in; and was finally dismissed on May 10, 2017.



44. The Respondent bent backwards, to accommodate the Claimant at every turn. He appears to have made up his mind from the inception, not to submit himself to the disciplinary process.
45. While an Employer has an obligation to facilitate the fair hearing of an Employee under disciplinary proceedings, failure by the Employer to provide necessary documents requested by the Employee for purposes of answering to the charges, does not mean that the disciplinary hearing remains in abeyance, indefinitely. Any protest on denial of fair facility to conduct the defence ought to continue to be raised on the floor the disciplinary hearing. The disciplinary panel would have the opportunity to hear the request and /or protest, and make findings. It is not permissible for an Employee to refuse to attend the hearing on the ground that relevant documents have not been supplied. The Claimant failed to attend hearing not once, but twice. He should have attended the hearing and given the panel the opportunity, to rule on his demands. The Claimant was set from the beginning to frustrate the disciplinary process, and cannot in the end, hold that he was denied a fair hearing.
46. On the EDT, the defect was in pushing it back to December 5, 2016. The Claimant successfully appealed termination decision. He was reinstated. His contract was revived, upon reinstatement. It remained in force until May 10, 2017 when the Respondent communicated its termination. There was one EDT-May 10, 2017.
47. Substantive justification: The Claimant went to great depths denying wrongdoing and demanding for documents before he could attend disciplinary hearing. In his e-mail of September 6, 2016, he wrote to the Finance Manager undertaking to reverse some of the irregular van salesmen transactions he had carried out. He specifically stated that he would reverse Willis Ochieng' transaction for Kshs 307,200.
48. The Claimant did not explain to the Court about this email. He did not discount evidence from the Respondent, that he was the brains behind the irregular transaction. He said nothing about the use of Fredrick Ogare's credentials to transact irregularly, while Ogare was on sick leave. Employees who owed the Respondent, were through the activities carried out by the Claimant, recorded as being owed by the Respondent. Richard Kariuki gave strong evidence on the risk exposure the Claimant placed the Respondent in. Kariuki made reversals, resulting in Willis Ochieng' for example, being indebted to the Respondent, in the amount of Kshs 2.7 million, from 2015.
49. Seen against the Claimant's responsibility as Manager, Credit Control, the Claimant's conduct, placed the Respondent in a very strong position, on proof of valid reason or reasons to justify termination, under Section 43 of the Employment Act. The transactions were matters that the Respondent, at the time of termination, genuinely believed to exist and which caused the Respondent to terminate the services of the Claimant.
50. Remedies: The Respondent computed the Claimant's terminal dues, after the first letter of termination. He was offered salary for October at Kshs 137,800; November salary at Kshs 137,800; 5 days' salary for December 2016 at Kshs 22,226; and leave of 10.5 days, added up at Kshs 366,526. There is no evidence that this amount was received by the Claimant. An Appeal was successfully filed by the Claimant, which culminated in reinstatement and final release on May 10, 2017. Reinstatement restores the terms and conditions of service in full, and benefits dues in 2017, ought not to have been affected by the Respondent's odd attempt at reverting the date of termination to December 5, 2016. Termination was based on valid ground and notice pay is not awardable. The contract dated July 17, 2014 between the Parties, expressed salary paid to the Claimant to be a gross salary. House allowance in arrears is not merited.
51. Termination was fair, except on EDT, which does not warrant compensation for unfair termination, the Claimant having in large, caused the confusion revolving around the date he left employment.



52. The contract was actively in force, until May 10, 2017 when the Respondent communicated its termination.
53. The Court would award the Claimant salary for the period December 6, 2016 to May 10, 2017, worked up as follows: -
 - I. 25 days' salary for December 2016 at Kshs. 132,500.
 - II. January to April 2017 salary at Kshs 551,200.
 - III. 10 days' salary for May 2017 at Kshs 53,000.
54. The Respondent shall in addition pay the benefits accrued at the date of the first letter of termination, as tabulated at Kshs 366, 256.
55. No order on the costs.
56. Interest allowed at court rate, from the date of Judgment till payment in full.

IN SUM, IT IS ORDERED: -

- a. The Respondent shall pay to the Claimant salary for 25 days in December 2016 at Kshs 132,500; salary for January –April 2017 at Kshs 551,200; and salary for 10 days in May 2017 at Kshs 53,000.
- b. The Respondent shall in addition pay to the Claimant terminal benefits tabulated to December 5, 2016 at Kshs 366, 256.
- c. No order on the costs.
- d. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF FEBRUARY 2023.

James Rika

Judge

