



REPUBLIC OF KENYA



KENYA LAW
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**Rotich v Ethics and Anti-Corruption Commission (Cause 514 of 2016)
[2023] KEELRC 500 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 500 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 514 OF 2016
J RIKA, J
FEBRUARY 28, 2023**

BETWEEN

WELDON KIPTOO ROTICH CLAIMANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION RESPONDENT

JUDGMENT

1. The claimant filed his statement of claim on April 1, 2016.
2. He states he was employed by the respondent between August 2009 and July 2015. He worked as a Forensic Investigator 111 ICT. He earned a monthly salary of Kshs 194,457.
3. He was alleged to have accessed information from the respondent without authorization. He was arrested on June 15, 2015, and charged at the Chief Magistrate's Court Nairobi Criminal Case Number 1046 of 2015.
4. The respondent summarily dismissed him while the criminal case was ongoing, on July 7, 2015. It was over the same allegation, pending before the criminal court. He was not heard by the respondent. He had not been convicted in the criminal proceedings. He was dismissed on the spot. There was no letter to show cause, no investigations, or notice.
5. He prays for judgment against the respondent for: -
 - a. 1-month salary *in lieu* of notice at Kshs 194,457.
 - b. Gratuity at Kshs 391,830.
 - c. Outstanding annual leave of 53 days, at Kshs 307,899.
 - d. 12 months' salary in compensation for unfair termination at Kshs 2,333,484.



- e. Interest.
 - f. Costs.
 - g. Any other suitable relief.
6. The respondent filed its statement of response on June 28, 2016. It is admitted that the claimant was an employee of the respondent. He was an ICT expert. On or about June 10, 2015, he was found in possession of unauthorized computer information, belonging to the respondent. He had unauthorized access to a computer belonging to his colleague, John Kiilu. He was reasonably suspected of unauthorized divulgence of investigation information. He was charged by the Directorate of Criminal Investigation with the offence of unauthorized access to a computer data, contrary to section 83U of the *Kenya Information and Communication Act* of 2009, amended in 2013.
 7. He was summarily dismissed on July 7, 2015, pursuant to section 44 [g] of the *Employment Act*. The respondent denies it owes the claimant any of the items pleaded in the statement of claim.
 8. The claimant gave evidence, and closed his case on December 2, 2021. Director in-charge of training Pascal Mweu, Assistant Director at Integrity Academy Patrick Ashiruma Odinga, Junior ICT Officer Akinyi Nyarwanda, and Human Resource Assistant Director Elijoy Bundi, gave evidence for the respondent on July 29, 2022. Director of Ethics and Leadership, John Lolkoloi, gave evidence for the respondent on October 11, 2022 when the hearing closed. The cause was last mentioned in Court on December 9, 2022, when parties confirmed filing and exchange of their submissions.
 9. The claimant adopted his witness statement, original and supplementary documents, in his evidence-in-chief. He explained that he was entrusted with an induction course for new employees, by the respondent. He needed the course material, which was saved in his colleague's John Kiilu's computer. He was close to John, so he went, found his colleague's computer was open, and accessed the course material.
 10. The Director Mohamud and his Deputy Lolkoloi found the claimant at John's computer. They called the OCS from the respondent's police facility, and directed that the claimant is arrested for unauthorized access to John's computer. He was arrested, interdicted, and charged in court. He was not allowed to access the respondent subsequently. On July 7, 2015 he was issued the letter of termination. The criminal case went on. He was acquitted on November 24, 2020 on the ground that the offence he was charged with, was non-existent under the relevant statute. He restated that he was not heard at the workplace, before dismissal. There was no policy, which prohibited use of his colleague's computer.
 11. Cross-examined, the claimant told the court that he was on a contract of 4 years. His basic monthly salary was approximately Kshs 163,000. He worked for 4 years and 10 months. He was entitled to gratuity at the rate of 31% of his basic salary. In total, he would have earned gratuity of about Kshs 2 million. He was paid gratuity of Kshs 800,000 in 2011; Kshs 960,000 in 2013; and another Kshs 77,000 in the same year. In 2014, he was paid gratuity of Kshs 410,000. In total, he was paid Kshs 2.3 million. He conceded he had received full gratuity by the time of termination.
 12. His terms of service changed from contract to permanent and pensionable, and he was not entitled to further gratuity.
 13. Balance of annual leave was 23 days in 2014-2015.
 14. Kiilu was investigating Anglo-leasing scandal. Employees were not prohibited from sharing computers. Each Employee had login credentials. An employee could not login using another's details. The claimant was a forensic investigator, housed on the 1st floor. Kiilu was based at the 2nd floor. Kiilu was



- absent when the claimant was found at his computer. His computer was running on administrator credentials. It was not the claimant who logged in, using administrator credentials. The claimant had not put in 3 flash disks in Kiilu's computer. He had 1 disk to copy the induction material. DCI investigated, arrested and charged the claimant. He was not acquitted on a technicality.
15. Redirected, the claimant told the court that he had 54 pending annual leave days by the date of termination. There was no code of conduct, regulating sharing of computers. Kiilu testified in the criminal proceedings, agreeing that the employees used to share computers. The administrator was ICT department. The claimant was acquitted upon hearing of evidence.
 16. Mweu on relied his witness statement on record. The respondent was investigating anglo-leasing and chicken-gate scandals. There was information leakage, in June 2015. Information would find its way to media houses. The respondent's management decided to place its offices on high alert. Mweu found the claimant perusing Kiilu's documents, at Kiilu's computer. The 2 officers were in different department. All Investigators had their own computers. There were specific officers assigned high profile matters.
 17. Kiilu was away in America. The claimant accessed his computer using administrator password. The respondent took screenshots. The claimant was reading high profile cases handled by Kiilu. He had inserted a flash disk, intending to download the information. Request for training material would have been placed through the head of department. Pending cases in any event, were not used as training material.
 18. Cross-examined, Mweu told the court not all policies were recorded. He did not know what was the outcome in the criminal proceedings. Judgment dated November 24, 2020, indicates the claimant was charged with a non-existent offence and acquitted. Mweu did not know if an appeal was preferred against the acquittal decision. Redirected, Mweu emphasized that not all policies were in writing. There were guidelines issued by supervisors and Heads of Departments. Mweu allocated the computers to different Employees. He had given instructions that computers should not be shared. The claimant had no reason to climb up to the 2nd floor from his workstation on the 1st floor.
 19. Ashiruma adopted his witness statement on record. He explained that when one accesses a computer using administrator password, he has unlimited access. Ashiruma had administrator password, and did not login to Kiilu's computer. The administrator password was reserved for ICT Staff. The claimant was not in ICT officer. Ashiruma did not issue him administrator password. Cross-examined, Ashiruma told the court that the claimant breached password regulations. Regulations kept changing. Ashiruma did not know if the regulations were exhibited before the court.
 20. Nyawanda adopted her witness statement. She offered user support to officers. She had an administrator password. Peter Kiilu was not in the country at the time. There was an administrator logged in. Administrators have superior rights, and would access all records. Nyawanda did not offer support to Kiilu on the material day. Cross-examined, she told the court that she did not know if the claimant keyed in, on the material day. She was not able to tell who made access. It was irregular to login using another officer's computer. She was not aware of a written policy on computer use. Login was by an administrator.
 21. Elijoy relied on her witness statement. She confirmed that disciplinary action was taken against the claimant, for his irregular access of Kiilu's computer. The respondent relied on section 44 of the *Employment Act*, and its human resource policy. He was not entitled to additional gratuity, having transitioned from contractual to permanent and pensionable service. He had 23 outstanding days of annual leave. Termination was fair. The claimant was acquitted on legal technicality. Cross-examined, Elijoy confirmed that there was no written policy on sharing of computers. Disciplinary policy provides for letter to show cause. there was no such letter issued to the claimant. He was not heard or accorded



- an opportunity to defend himself by the respondent. He was acquitted. He was paid half salary from interdiction to the date of dismissal. He was issued his certificate of service. Redirected, Elijoy clarified that there was no written policy on sharing of computers, but officers had been assigned individual computers. Human resource policy allowed the respondent to dismiss the claimant, on being charged with a criminal offence.
22. Lolkoloi adopted his witness statement, and associated himself fully, with the evidence given by his colleagues from the respondent.
 23. He emphasized that the respondent investigates corruption and economic crimes. No officer should disclose information concerning a matter under active investigations. There were leakages to the press. It was confirmed that the claimant had logged in to Kiilu's computer using system administrator password. He accessed documents relating to anglo-leasing investigation. He was charged with a criminal case and acquitted on technicality.
 24. Lolkoloi told the court on cross-examination that the code of conduct did not specifically prohibit sharing of computers. Officers were required to maintain high standards of integrity. He was not charged with leakage of confidential information. He was not issued a letter to show cause, or heard. Lolkoloi did not know why the claimant was acquitted. The claimant was found to have a case to answer. It was not in the hands of the respondent to appeal against the decision to acquit the claimant, Lolkoloi stated on redirection
 25. The issues are whether the claimant's contract was terminated for valid reason or reasons; whether fair procedure was followed; and, whether he merits the remedies pleaded. The relevant law is contained in sections 41, 43, 44, 45, 47[5], 49 of the [Employment Act](#), and section 12 of the [Employment and Labour Relations Court Act](#).

The Court Finds: -

26. Reason[s]: The respondent commission is established under section 3 [1] of the [Ethics and Anti-Corruption \[EACC\] Act](#) 2011. It is mandated to investigate corruption and economic crimes. The claimant worked as a forensic investigator. At the time he was alleged to have been involved in wrongdoing leading to termination, the claimant had been deployed to the forensic lab, which was housed on the ground floor.
27. He was found by then assistant acting Director, Forensic Investigations Pascal Mweu, on June 11, 2015, sitting at the workstation used by another officer, John Kiilu. Kiilu was away in America, investigation anglo-leasing scandal. It is confirmed by the evidence of Mweu and Deputy Director of Forensic Investigations that the claimant was found sitting at Kiilu's workstation, and was perusing documents which he had not been authorized to access.
28. It must be recognized that the respondent had encountered instances of information on anglo-leasing being leaked to the media, and was on high alert internally, in finding out the sources of the leakage, and in preventing further leakage. There were other scandals under investigation, including the chicken-gate scandal.
29. The claimant's explanation, that he was at his colleague's computer, downloading induction course material for new employees, did not sit well with the respondent. The respondent explained that it did not use material for induction from pending cases. Anglo-leasing and chicken-gate files were pending. The claimant was supposed to go through his Head of Department, in obtaining induction material. The second explanation by the claimant was that employees were allowed to share computers. This explanation seems to have been endorsed by the criminal court in its judgment of November 24, 2020.



It was the evidence of most witnesses for the prosecution in the criminal proceedings, that officers frequently shared computers.

30. That is not say that the officers were allowed to share passwords, and the question which follows, is how the claimant accessed Kiilu's password, in order to view and probably download, in multiple flash disks, the documents which were in Kiilu's computer. Whether the documents were in the nature of innocent induction course material, or sensitive anglo-leasing and chicken-gate corruption files, the claimant would need Kiilu's password, to access the information.
31. His explanation on this did not cast him in the mould of an innocent officer, who went to Kiilu's workstation, to get some routine induction course material. Why did he opt to access the material, while Kiilu was away in America pursuing the anglo-leasing investigations? The witnesses for the respondents confirmed that administrator password, which confers superior rights on the user, were used in accessing Kiilu's account. The claimant stated that he found the computer open and running, but did not explain who opened the computer and left it running and for what purpose? It is not believable that the claimant, just chanced on Kiilu's computer open and running. He must have been involved, or knew how the computer was opened and left running, allowing him to access more than mere induction course material.
32. The claimant was arrested and charged by the DCI, with an offence which the trial court found, did not exist. The Chief Magistrate explains in her judgment that: -

“ At this juncture, I note that the purported law under which the accused is charged, does not exist. The accused is charged under section 83U [i] of the [Kenya Information and Communication Act, 2009](#), as amended in 2013, with the offence of unauthorized access to computer data.

The said section was repealed by section 26 of the [Kenya Information and Communication \[Amendment\] Act, 2013](#) [No 41A of 2013]. The same came into operation on January 2, 2014. It was replaced by section 83U. As it is section 83U [i] did not exist at the time the accused was charged.”
33. The Chief Magistrate basically acquitted the claimant on the ground that he was charged under a non-existent law. The trial court did not make findings on the substantive allegations made against the claimant on illegal access to information held by Kiilu. Acquittal was on legal technicality, and would not sustain the argument by the claimant, that it was proof that the respondent, did not have a valid and fair reason, to justify termination.
34. Even had the Chief Magistrate acquitted the claimant substantively, the decision would not bind the respondent to retain the claimant, because the claimant was not being tried by the Chief Magistrate's court for an employment offence.
35. Section 43 of the [Employment Act, 2007](#) states that, 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.
36. The claimant as observed above was stationed on ground floor, and had no investigative role, in the files that were in Kiilu's docket. Kiilu was on the floor above, and the claimant took the trouble to climb up, to gain access to his absent colleague's computer. It was a time of high alert at the respondent. Information on sensitive files was finding its way, to 3rd parties. Kiilu was away, and had not entrusted his password to the claimant. The respondent would have reason to genuinely believe, that the claimant was a probable source of information leakage.



37. The court would agree with the respondent, that termination was based on valid and fair reasons, and was justified in accordance with sections 43, 45 and 47[5] of the Employment Act, 2007.
38. Procedure: Elijoy told the court that the claimant was not issued a letter to show cause. Disciplinary policy required he is issued one. There was no disciplinary hearing preceding termination. Elijoy stated that the claimant was not accorded an opportunity to defend himself. Director Ethics and Leadership Lolkoloi, associated himself fully with the evidence of Elijoy, on these procedural defects. He confirmed that there was no letter to show cause and there was no disciplinary hearing. It is clear from this evidence, that procedure was flawed, and not consonant with the minimum statutory standards of procedural fairness, contemplated by sections 41 and 45 of the Employment Act. To this extent, termination was unfair.
39. Remedies: The claimant was dismissed for gross misconduct under section 44 [g] of the Employment Act, and clauses 9.16.1 [viii] and 9.20.7.2 of the EACC human resource manual. He is not entitled to notice, having been dismissed for an employment offence which warranted summary dismissal.
40. Gratuity under contract had been paid for the period the claimant worked under contract, as confirmed in his evidence on cross-examination. Once he was converted into permanent and pensionable terms, he ceased to be entitled to gratuity. The prayer for gratuity is declined.
41. The claimant conceded on cross-examination that he had outstanding leave of 53 days for year 2014-2015. He applied for 30 days, which left him with 23 days. He is allowed annual leave of 23 days, at Kshs 174,673.
42. Termination was based on valid reason, but flawed in the manner of its execution. The claimant was employed on September 14, 2009. He was summarily dismissed on July 7, 2015. He worked for slightly under 6 years. There is no evidence that his employment record was blemished, prior to the events leading to termination. He transitioned to permanent and pensionable terms, from contractual terms. The respondent did not doubt his performance. He, as confirmed by the court in discussing validity of reason, played a major role in circumstances leading to termination. The court grants him compensation for unfair termination, equivalent of his 6 months' salary at Kshs 1,166,742.
43. No order on the costs.
44. Interest granted at court rates, from the date of judgment, till payment is made in full.

In Sum It Is Ordered: -

- a. It is declared that termination was unfair, on account of flawed procedure.
- b. The respondent shall pay to the claimant, 23 days of annual leave at Kshs 174,673 and equivalent of 6 months' salary in compensation for unfair termination at Kshs 1,166,742 – total Kshs 1,341,415.
- c. No order on the costs.
- d. Interest allowed at the 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

