



**Kariuki v Aga Khan University Hospital (Cause 293 of 2019)  
[2023] KEELRC 732 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 732 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 293 OF 2019  
L NDOLO, J  
MARCH 23, 2023**

**BETWEEN**

**PRISCILLA KARIRA KARIUKI ..... CLAIMANT**

**AND**

**THE AGA KHAN UNIVERSITY HOSPITAL ..... RESPONDENT**

**JUDGMENT**

1. By her Statement of Claim dated 15<sup>th</sup> April 2019 and filed in Court on 7<sup>th</sup> May 2019, the claimant lays a claim of unlawful and unfair termination of employment, against the Respondent. She seeks the following reliefs:
  - a. A declaration that the termination of her employment vide letter dated 15<sup>th</sup> November 2018 was discriminatory and unfair;
  - b. Damages for discrimination at the work place;
  - c. Compensation for unfair termination in the sum of Kshs. 1,188,816.00;
  - d. Statement and refund of pension contribution;
  - e. Costs and interest.
2. In response to the claim, the Respondent filed a Memorandum of Reply dated 11<sup>th</sup> November 2019. The matter went to full trial where the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Lauren Omollo. Thereafter, the parties filed written submissions.

**The Claimant's Case**

3. The Claimant states that she was employed by the Respondent on 1<sup>st</sup> July 2007 in the position of Nursing Administrator in the Nursing Division. She rose through the ranks to the position of Officer-



Operations, Outreach Administration Department, Outreach Division as at 1<sup>st</sup> April 2014. At the time of separation, the Claimant earned a monthly salary of Kshs. 99, 068.

4. On 25<sup>th</sup> October 2018, the Claimant was issued with a show cause letter on allegations of improper practices; particulars being that on 11<sup>th</sup> May 2018, she used the Respondent's contracted motor vehicle to engage in personal activities at a bar and restaurant. She was placed on suspension pending investigations.
5. The Claimant was subsequently invited to a disciplinary hearing on 30<sup>th</sup> October, 2018 and was dismissed by letter dated 15<sup>th</sup> November 2018.
6. The Claimant's case is that the charges levelled against her were untrue and unfounded. She contends that there was no justifiable reason for the termination of her employment, which she terms as discriminatory and unfair contrary to the provisions of Sections 5 and 45 of the *Employment Act*, 2007. She points out that no reason was given by the Respondent for the disparate treatment accorded to her colleague David Macharia over the same incident.
7. The Claimant claims to have had a clean employment record with the Respondent.

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

8. In its Memorandum of Reply dated 11<sup>th</sup> November 2019 and filed in court on 12<sup>th</sup> November 2019, the Respondent admits having engaged the Claimant in the manner described in the Statement of Claim.
9. The Respondent maintains that the Claimant's employment was terminated for a valid reason and in compliance with due procedure.
10. The Respondent denies the Claimant's averment that she had a clean employment record and points out that she was issued with a letter of reprimand on 27<sup>th</sup> July 2015, following the loss of laboratory centrifuge valued at Kshs. 38,640 which was under her care.
11. The Respondent claims to have received an anonymous email on 21<sup>st</sup> September 2018 on alleged misuse of vehicles assigned to the Outreach Division, misappropriation of petty cash and use of abusive language towards junior members of staff.
12. As a result, the Claimant was suspended from duty to pave way for investigations. She was subsequently invited to show cause why disciplinary action should not be taken against her, vide the Respondent's letter dated 25<sup>th</sup> October 2018.
13. The Respondent states that the Claimant was subjected to a disciplinary hearing prior to the decision to terminate her services.
14. The Respondent adds that the Claimant was paid all her terminal dues totalling Kshs. 158,357.30. The Claimant was further issued with a clearance certificate and a certificate of service on 28<sup>th</sup> December 2018.
15. The Respondent avers that the Claimant gave instructions vide email dated 8<sup>th</sup> February 2019, authorising her husband to collect her pension benefits from Jubilee Insurance. The Claimant's husband collected a cheque for Kshs. 858,030.77 from Diamond Trust Bank, being the Claimant's pension benefits.
16. The Respondent maintains that the Claimant is not entitled to any of the reliefs sought and urges the Court to dismiss the entire claim with costs.



## Findings and Determination

17. There are three (3) issues for determination in this case:
- a. Whether the termination of the Claimant's employment was lawful and fair;
  - b. Whether the Claimant has made out a case of discrimination;
  - c. Whether the Claimant is entitled to the remedies sought.

## The Termination

18. The Claimant's employment was terminated by letter dated 15<sup>th</sup> November 2018 stating:

“Dear Ms. Kariuki,

RE: TERMINATION OF YOUR CONTRACT OF EMPLOYMENT

We write to confirm the outcome of your Disciplinary Hearing held on Wednesday, 31<sup>st</sup> October, 2018 on alleged improper and unprofessional practices as outlined in the show cause letter dated 25<sup>th</sup> October, 2018.

The Hearing was attended by yourself, Director Projects and Operations, Safety and Health Manager, 3 Managers from Security, Outreach Operations Manager, 2 HR Representatives and an Independent Manager. We refer to the Show Cause letter dated 25<sup>th</sup> October 2018, your subsequent response dated and received on 29<sup>th</sup> October 2018 and your own testimony during the disciplinary hearing.

From the hearing, it was evident that your actions on 11<sup>th</sup> May 2018 amounted to gross misconduct, by misuse of company contracted vehicle to engage in personal good times at a bar and restaurant in Bypass.

In light of the above, the Committee has lost faith in you as a member of staff based on the evidence presented to it during the hearing and being that the person (sic) you hold is one of trust, the Committee has recommended that your contract of employment be terminated.

Accordingly, having considered all the matters arising at the Disciplinary Hearing, the Disciplinary Committee's recommendation and pursuant to the terms and conditions of your contract of employment, its Management's decision to terminate your contract of employment.

On presentation of a duly signed clearance form to the Financial Controller, the following payments will be made to you, less any monies owed to the Institution:

Salary up to 15<sup>th</sup> November, 2018  
One month's pay in lieu of notice period  
Encashment of leave days as at 15<sup>th</sup> November 2018  
Refund of your Pension contribution as per the rules of the scheme

As part of the clearance process, you are required to undergo a post-employment medical examination. Your appointment has been booked for 16<sup>th</sup> November, 2018 at 10.00 am. Kindly confirm your availability with the Human Resources Office on receipt of this letter. Take note that you have 7 days from the date of receipt of this letter to appeal against the termination.

Yours Sincerely



(signed)

Sammy Chepkwony

Regional Director, Human Resources, EA”

19. According to this letter, the Claimant’s employment was terminated on allegations of misuse of the Respondent’s contracted motor vehicle on 11<sup>th</sup> May 2018. There is evidence on record that on the material day, the Claimant and her superior, David Macharia, were among employees of the Respondent who had attended a burial in Murang’a. By virtue of his seniority, Macharia would have been the person in charge of the motor vehicle during the trip.
20. It is not in contest that the group of employees made a stopover on their way back to Nairobi. It is this stopover that raised issue with the Respondent and which eventually led to the termination of the Claimant’s employment. According to the Claimant, the stopover was for lunch but the Respondent maintained that the employees were on a drinking spree. Witnesses called by the Respondent at the disciplinary hearing gave conflicting accounts regarding the time when the party ended their stopover.
21. The question for determination by the Court is whether the Respondent’s action against the Claimant was within the ‘range of reasonable responses test’. This test was defined by Lord Denning in *British Leyland UK Ltd v Swift* [1981] IRLR 91 in the following terms:

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other 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.”
22. The Claimant complains that the disciplinary action taken against her was sharply disparate from the one imposed on Macharia. In the submissions filed on behalf of the Respondent, reference was made to a number of persuasive decisions where it was held that disparate treatment of employees is not necessarily an unreasonable conduct on the part of the employer (see *Hadjianou v Coral Casinos Ltd* [1981] IRLR 352; *MBNA Ltd v Jones* [2015] UKEAT/0120/15; *Levens Solicitors v Dalleyhe* [2006] UKEAT 0330-06-2311; and *Enterprise Liverpool PLC v Bauress and Ealey* [2006] IRLR 352 ).
23. I have looked at these decisions and find that in all of them, the transactions leading to the disparate disciplinary actions were different or where the transaction was the same, there was some clear distinction that was applied to treat the employees disparately.
24. In the present case, the transaction leading to the disparate disciplinary actions was the same and the Court did not find any justification for the disparity. I therefore find and hold that the Respondent’s action against the Claimant was unreasonable in the circumstances.
25. In the result, I find and hold that the termination of the Claimant’s employment was substantively unfair and therefore award her eight (8) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s long service, moderated by her adverse employment record. I have further considered the Respondent’s unlawful conduct in the termination transaction.
26. The claim for damages for discrimination was not proved and is disallowed.



27. The Claimant's pension benefits were duly paid and the claim thereon is therefore without basis and is dismissed.
28. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 792,544 being eight (8) months' salary in compensation for unfair termination of employment.
29. This amount will attract interest at court rates from the date of judgment until payment in full.
30. The Claimant will also have the costs of the case.
31. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF MARCH 2023**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Mr. Mungai for the Claimant**

**Mr. Kiragu for the Respondent**

