



**Kimeto v Kaka & 3 others (Cause 1375 of 2015)  
[2023] KEELRC 754 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 754 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1375 OF 2015  
MA ONYANGO, J  
MARCH 23, 2023**

**BETWEEN**

**JACKLINE CHEPKEMOI KIMETO ..... CLAIMANT**

**AND**

**SHAFI GREWAL KAKA ..... 1<sup>ST</sup> RESPONDENT**

**JULIE DABALY SCOTT ..... 2<sup>ND</sup> RESPONDENT**

**MOHAMMED WANYOIKE ..... 3<sup>RD</sup> RESPONDENT**

**FEMINA DAWOODIA ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Vide a Memorandum of Claim dated August 5, 2015 and filed in court on August 7, 2015, the Claimant seeks compensation against the Respondents for unlawful termination. The Respondents have been sued in their capacities as the office bearers of Kenya Association of Travel Agents which is the agency that had employed the Claimant herein.
2. The Respondents filed a Statement of Defence and Counterclaim on September 9, 2015, to which the Claimant responded vide a reply to defence and defence to counterclaim filed in court on October 2, 2015.
3. The matter was then set down for full trial where the Claimant testified on her own behalf whereas the respondents called the first Respondent's who testified as RW1, Phyllis Njoki Kamau, the Respondent accountant who testified as RW2 and one Agnes Njeri Mucuha, the Respondents Chief Executive Officer who testified as RW3 in furtherance of their case.
4. At the end of the trial, the court directed parties to file written submissions.



## The Claimant's Case

5. According to the Claimant, she was employed by Kenya Association of Travel Agents (KATA) with effect from November 1, 2012 to the position of a Chief Executive Officer at a starting salary of Kshs 300,000 per month and an additional allowance of Kshs 17,000 per month.
6. The Claimant states that although she was not provided with a job description, she proceeded to prepare her own work activity schedule which was tabled and approved by the Executive Committee at the beginning of every financial year as well as the 1<sup>st</sup> Respondent as chairman of KATA.
7. The Claimant further states that she was an industrious and diligent worker and that she requested for a salary review on July 3, 2014 which salary was consequently increased in August 2014 to Kshs 400,000.
8. It is the Claimant's case that sometimes in February 2014, she started suffering an onslaught of verbal attacks from the 2<sup>nd</sup> Respondent forcing the Claimant to lodge a formal complaint to the 1<sup>st</sup> Respondent which onslaught against her continued. That in November 2014 she was attacked by the Respondents after she sent an industry circular to KATA members before consulting them.
9. The Claimant avers that thereafter, she received a barrage of show cause and admonitory letters and emails from the 1<sup>st</sup> Respondent and that as such, the Claimant's working environment became difficult as she was now even required to seek the Respondent's approval to undertake activities that hitherto did not require approval such as sending industry circulars.
10. She stated that on January 29, 2015, she received a first warning letter alleging that she had flouted guidelines which were non-existent.
11. The Claimant states that she was further accused of having a lot of cash at hand and that she had misappropriated Kshs 189,000.
12. The Claimant contends that on March 20, 2015, she was called by the 1<sup>st</sup> Respondent to his office wherein he attempted to coerce her to resign because there were allegedly serious concerns against her conduct. That, when the Claimant requested for particulars of the said serious misconduct, none was given to her. that it is then that the chairman threatened her with dire consequences if she did not resign from the position.
13. The Claimant states that when she declined to resign and she sent on compulsory leave and informed that she would be summoned for a meeting in March 2015.
14. The Claimant maintained that on March 31, 2015, she was summoned to work for a meeting where she duly presented herself. At the meeting She was informed that the Executive committee had resolved to terminate her services.
15. According to the Claimant, the termination was out of bad faith and did not have any substantive justification.
16. The Claimant further claims that the termination failed to follow the rules of natural justice and the *Employment Act*. As a result she seeks following remedies:
  - i. A declaration that the termination of her employment contract was unfair and wrongful and thus illegal, null and void;
  - ii. Employment benefits of Kshs 984,000;



- iii. Reinstatement of the Claimant to her former position with no loss of benefits from the date of her termination.  
In Addition To (a) and (b) above but in the alternative to (c) above;
- iv. Payment to the Claimant of 12 months savings as compensation for wrongful termination amounting to Kshs 4,800,000;
- v. Certificate of Service.  
In Addition to any of the foregoing alternatives;
- vi. A declaration that the Claimant is entitled to legal fees as per paragraph 82 of the Statement of Claim
- vii. Interest on items (b) and (d) from the date of filing the suit.
- viii. Costs of this suit
- ix. Any other relief that this Honourable court may deem just to award.

### **The Respondent's case**

17. In their Statement of Response and Counterclaim dated 9<sup>th</sup> September 2015 and filed in court on the same day, the Respondents admitted that the Claimant was employed by Kenya Association of Travel Agents but maintained that the Claimant's job description was known to her from the inception of her contract and was later codified and transmitted to her via email which she did not acknowledge.
18. The Respondents further state that the Claimant was rude and unable to get along with KATA Board members and other employees and that her hostility towards her employer, its employees and its members had eroded the mutual confidence between the parties.
19. Additionally, the Respondents aver that they conducted an audit which revealed that the Respondents cash accounts for the year 2014 were missing Kshs 160,210 which the Claimant was unable to account for. The Respondents further aver that the Claimant misused a credit card issued to her for business expenditure by using this card for personal expenses.
20. The Respondents further aver that the Claimant was a non-performer and frequently absented herself from work.
21. The Respondents further aver that a committee was formed to look into the charges against the Claimant, that the Claimant was informed of the charges against her and that the Respondent received the Claimant's written responses ahead of their decision to terminate her employment.
22. According to the Respondents, the Claimant was informed of the charges against her and availed of an opportunity to respond, prior to the termination of her employment.
23. It was the Respondents' case that the Claimant was asked to clear with the Respondents in order that her final dues could be computed and paid to her but to date she has failed to do so.
24. By way of counterclaim and set off, the Respondent claims that throughout her contract of employment, the Claimant committed several breaches of her contract which caused loss and damage to the Respondent to a tune of Kshs 1,690,699 constituting of Kshs 160,210 being the Respondents' cash accounts for the year 2014 which the Claimant could not account for; misappropriation of Kshs 509,989 from the credit card given to her for business expenditure; and paying herself Kshs 612,000 cumulatively as an allowance at Ksh 17,000 per month.



25. The Respondent states that during the course of her employment, the Claimant obtained the following documents belonging to the Respondent which documents unlawfully remain in her custody;
  - a. The original file for a complaint by the Respondents to the competition Authority
  - b. The draft amendments to the Respondent organization's constitution; and
  - c. Signed copies of Board meeting minutes.
26. The Respondent's counterclaim against the Claimant is therefore;
  - a. A sum of Kshs 1,690,699 being damages for breach of contract;
  - b. Interest on (a) above at court rates until payment in full; and,
  - c. An order that the Claimant do within fourteen days of the order of the court, return the following documents to the Respondent;
    - i. The original file for a complaint by the Respondents to the Competition Authority
    - ii. The draft amendments to the Respondent organization constitution;
    - iii. Signed copies of Board meeting minutes.

### **Determination**

27. Having considered the pleadings, the evidence and submissions of the parties, the issues that arise for my determination are: -
  - a. Whether the termination of the Claimant from employment was unlawful and unfair
  - b. Whether due process was followed in terminating the Claimant's employment;
  - c. Whether the Claimant is entitled to the remedies sought;
  - d. Whether the Respondents have made out a proper counterclaim against the Claimant.
28. With respect to the first issue, it is now trite that in matters termination of employment, the court should consider and determine whether the reasons given by the employer for termination were valid and also, that there was procedural fairness.
29. The Respondent's evidence is that it terminated the Claimant's employment for reason that she was hostile towards her employer, its employees and its members which hostility eroded the mutual confidence between the parties; that after conducting an audit, the Respondents realised that Ksh 160,210 was missing from the KATA cash accounts for the year 2014 which the Claimant was unable to account for; that the Claimant misused a credit card given to her for business expenditure by using this card for personal expenses and that the Claimant engaged in unfair labour practices.
30. The question then that this court seeks to answer is whether the aforementioned reasons were valid and fair to warrant the termination of the Claimant's employment.
31. Section 45(2) of the [Employment Act](#) is to the effect that an employer should not terminate contract of employment of an employee except where there are valid and fair reasons.
32. The burden of proof in employment related claims as stipulated by Section 43 of the [Employment Act](#) is on the employer to prove the reason for the termination as valid in any legal proceedings.



33. Lord Denning in the case of *British Leyland UK Ltd v Swift* (1981) IRLR91 described the test of reasonableness in the following words: -

“The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps 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 employers may not have dismissed him.”

34. The 1<sup>st</sup> Respondent who testified as RW1 buttressed the Respondents position. He stated that the Claimant’s employment was terminated on the grounds that she frequently absented herself from work, misappropriated the Respondent’s finances, was a non performer and engaged in unfair labour practices.

35. On cross examination, RW1 conceded that the termination letter did not give the reason for termination and that, there was no documentation placed before the court proving that a disciplinary meeting was held.

36. The Claimant on the other hand testified that the Respondents did not provide any reason whatsoever for the termination of the Claimant’s employment and that, in the absence of valid reasons, the Claimant is entitled to the reliefs she is seeking.

37. The Claimant gave a chronology of events detailing how the Respondents frustrated her in the course of her employment as evidenced by the myriad of emails which formed part of her exhibits in court. RW1 in his testimony admitted that indeed the working relationship between the Claimant and the Respondents had become toxic such that they could not reconcile as a result of the charges that she was being accused of. The Claimant did not demonstrate that she did not contribute to the toxic relationship. Incompatibility is a ground for termination of employment relationship. The evidence before the Court shows that the Claimant and the Respondents were no longer able to work together and there was thus incompatibility between the Claimant and Respondent

38. I find that the reasons advanced by the Respondents for termination of the Claimant’s employment were valid as both the Claimant and the Respondents referred to the hostility between the Claimant and the Respondent’s officials and staff.

39. I therefore find that the Respondent was justified in terminating the Claimant from employment.

40. The next issue I need to address is whether there was procedural fairness in the termination of the Claimant from employment.

41. Section 41 of the *Employment Act* provides as follows:-

“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.”



42. In summary, import of the above provision of law is that the employer before terminating an employee from employment should;
- i. provide the employee with details of the accusations against the employee;
  - ii. allow the employee an opportunity to respond to the charges;
  - iii. allow the employee to be accompanied by a shop steward or co-employee of his choice during the process;
  - iv. finally provide the employee with a decision either terminating or saving the contract of service.
43. The Respondents witnesses in their testimony maintained that due process was followed before the Claimant was terminated from employment. According to RW1, the disciplinary hearing against the Claimant was done at board level and when the parties could not agree, the board decided to terminate the Claimant's employment. However, he admitted that there was no documentation in form of minutes to prove that indeed the Claimant was given an opportunity to present her case before her termination from employment.
44. The Claimant on her part maintained that she was not accorded any chance for a fair hearing as no charges against her were ever given to her nor was she given an opportunity to explain or defend herself.
45. In the case of *Gilbert Mariera Makori v Equity Bank Limited* [2016] eKLR , the court observed;
- “Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union. After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decision whether or not to dismiss or terminate the services of the employee.”
46. In the instant case, it is not in dispute that the Claimant was summoned to attend a meeting on 31<sup>st</sup> March 2015. However, no evidence has been tabled before court by the Respondents to prove that the said meeting was indeed a disciplinary hearing and that the provisions of section 41 of the *Employment Act* were met. In the absence of such evidence, the balance of probability tilts in favour of Claimant I find that she was not given a chance to defend herself in the said meeting and therefore the dismissal was not done in accordance with a fair procedure as required by section 45(2)(c) of the *Employment Act*.
47. What reliefs should then issue? In the Memorandum of Claim, the Claimant sought for the following orders
- i. A declaration that her termination was unfair and wrongful and thus illegal, null and void.
  - ii. Employment benefits of Kshs 984,000
  - iii. Reinstatement of the Claimant to her former position with no loss of benefits from the date of her termination
- In Addition To (a) and (b) above but in the alternative to (c) above;



- iv. Payment to the Claimant of 12 months compensation for wrongful termination amounting to Kshs 4,800,000
  - v. Certificate of Service
- In addition to any of the foregoing alternatives;
- vi. A declaration that the Claimant is entitled to legal fees as per paragraph 82 of the Statement of Claim
  - vii. Interest on items (b) and (d) from the date of filing the suit.
  - viii. Costs of this suit
  - ix. Any other relief that this Honourable court may deem just to award.
48. Having found that the Respondents were justified in terminating the employment of the Claimant, but did not comply with the procedural requirements, I award the Claimant 2 months' salary as compensation in the sum of Ksh 800,000/=.

The prayer for payment of Legal fees is declined as the Claimant was an employee of the Respondents who employed her with the knowledge that she was an advocate by profession. She was therefore expected to give professional legal advise to the Respondents in her capacity as the Chief Executive Officer. Further, there was no agreement that she would be paid fees for the legal services that she provided to the Respondent.

#### **The Respondent's Counterclaim**

49. As already stated above, the Respondents filed a counterclaim against the Claimant on the allegation that the Claimant made the Respondents pay Kshs 400,000 to settle the claim by Yvonne Kolla, could not account for Kshs 160,210, misappropriated of Kshs 509,989 and Kshs 612,000 alleged loss arising from the Claimant paying herself monthly allowances and Kshs 8,500 being the cost of repairing a laptop. These allegations were however not proved. As such, the counterclaim and is hereby dismissed with no orders for costs.

50. In the end, I enter judgment in favour of the Claimant in the following terms:

- a. Withheld monthly allowances for the period January to March 2015.....Kshs 51,000
- b. Unpaid 2 months' salary in lieu of notice.....Kshs 800,000
- c. 2 months' salary as compensation.....Ksh 800,000

**Total.....Kshs 1,651,000**

51. This amount will attract interest at court rates from the date of judgment until payment in full.

52. The Respondents to issue the Claimant with a certificate of service.

53. The Claimant will have the costs of the claim.

54. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 23RD DAY OF MARCH, 2023**

**MAUREEN ONYANGO**



**JUDGE**

