



REPUBLIC OF KENYA



**KENYA LAW**  
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**Olonde v County Assemblies' Forum & another (Cause 2363 of 2017)  
[2023] KEELRC 616 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 616 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2363 OF 2017  
AN MWAURE, J  
MARCH 7, 2023**

**BETWEEN**

**DENNIS ODHIAMBO OLONDE ..... CLAIMANT**

**AND**

**COUNTY ASSEMBLIES' FORUM ..... 1<sup>ST</sup> RESPONDENT**

**GLADYS SISINA, CHIEF EXECUTIVE OFFICER, COUNTY ASSEMBLIES  
FORUM ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant filed the memorandum of claim dated the October 9, 2017 on the November 29, 2017. He is claiming unlawful, unreasonable and unfair dismissal from the County Assemblies Forum.

**Claimant's Case**

2. Claimant avers that he was first recruited by the respondent to work at the respondent's secretariat in Nairobi as the finance and administration officer as an independent contractor *vide* a letter dated October 1, 2014. The claimant's contract was to run from October 1, 2014 to December 31, 2014.
3. He was then offered another contract as accounts administration officer as from January 1, 2015 to December 30, 2015 and thereafter he was given a one-year renewable contract with effect from March 1, 2016. The terms of the appointment included a basic salary of ksh 61,000, house allowance of ksh 24, 000 and other allowances of ksh 8,000, per month.
4. The claimant says that the respondent through letter dated the May 27, 2016 sent a letter suspending the claimant from duty pending disciplinary investigation for alleged insubordination for one month, with effect from May 30, 2016 to June 30, 2016. Under the terms of the letter of suspension, the claimant was required, *inter alia*, not to attend the place of work and was to continue receiving his



normal salary and benefits, except for any payment or benefits that depend on him being physically present at work or performing services.

5. The claimant states that the respondent issued another letter of suspension from duty pending disciplinary investigation on July 4, 2016. In the said letter, the respondent stated that investigations into the allegations was ongoing and thus allegedly extended the suspension for a further period of up to 30 days. During this period, the claimant was entitled to half pay, all other terms of suspension were as per the letter of May 27, 2016.
6. The claimant says that on the January 13, 2017, he received a letter of termination of contract effective the January 13, 2017 and he was informed that his dues would be directly deposited into his account.
7. It is said that the respondent accused the claimant of acts and omissions intended to portray the claimant as not executing his duties as required whereas the claimant executed his duties diligently. He says the allegations against him were unsubstantiated and not existent.
8. The 2<sup>nd</sup> respondent dishonestly claimed that the claimant had withheld the payment to the acting CEO, whereas it was the 2<sup>nd</sup> respondent who instructed the claimant to withhold the cheques until she had confirmed with the treasury and so the 2<sup>nd</sup> respondent falsely accused the claimant of sitting on EC's resolutions from 4<sup>th</sup> March to April 19<sup>th</sup> while fully aware that the contracts subject of the resolution was only backdated to start from March. The respondent unfairly accused the claimant for travelling to Mombasa without authorisation whereas it was the 2<sup>nd</sup> respondent who instructed the claimant to book tickets to Mombasa for the 1<sup>st</sup> respondent staff including the claimant. The 2<sup>nd</sup> respondent unfairly accused the claimant of failing to file KRA tax returns knowing fully that this was untrue as the claimant had filed all the returns and that he used the taxi with authorisation. It is also said that the 2<sup>nd</sup> respondent did not provide the claimant with the list of accusations before the executive committee meeting on the October 10, 2016 to prepare for his disciplinary hearing.
9. The claimant claimed the respondents in terminating the claimant they contravened sections 47 (1), 50 of the constitution and section 41, 43, 45 and 51 of the Employment Act.
10. The claimant seeks the following:-
  - a. A declaration that claimant's termination through letter dated January 13, 2017 was predetermined, predicated upon the blatant breach of procedure and based on no evidence.
  - b. A declaration that the claimant's termination is unlawful, illegal, and unfair.
  - c. Full payment of the claimant's salary during the period that he was serving up to the period of March 1, 2017 and other compensation as follows;
    - i. Salary from May 2017 to February 2018 (939, 990)
    - ii. Payment for one month's salary *in lieu* of notice 93,990
  - d. Compensation for salary equivalent to 12 months' pay for unfair and illegal termination.  
93,990 x 12 months = 1,127,880/=
  - e. Payment for leave not taken for 21 days
  - f. Full payment with interest at court rates from the period of August 2014 up to the time he is reinstated.
  - g. Punitive /exemplary damages for malice.



- h. Any such other relief that the Honourable court may deem fit to grant.
- i. The costs of the claim.

### **Respondent's Case**

11. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's filed the memorandum of claim dated the August 12, 2020. They aver that at all material times the claimant was involved in unethical and unconscionable practices which led to lawful and justifiable termination of his contract of employment. They say that on or about May, 2016 the 1<sup>st</sup> respondent's executive committee received various complaints that the claimant was engaged in numerous acts of insubordination and wilful disobedience of orders in blatant breach of his employment contract and the respondent's human resource manual.
12. It is averred that by letter dated the May 27, 2016 the 1<sup>st</sup> respondent issued claimant a suspension letter which was lawfully extended for a further thirty-day period *vide* the 1<sup>st</sup> respondent's letter dated July 4, 2016 to enable the conclusion of the said investigations into the matter.
13. The respondent state that the investigations revealed that the claimant was indeed culpable of various instances of insubordination and consequently, the claimant was invited for a disciplinary hearing before the 1<sup>st</sup> respondent's finance and administration sub committee on the July 22, 2019 to show cause why disciplinary action should not be taken against him. The claimant, however, did not appear before the aforesaid finance and administration sub-committee and demanded to appear before the 1<sup>st</sup> respondent's executive committee to answer the said charges.
14. Subsequently in a bid to ensure that the claimant was afforded a right to be heard in consonance with the rules of natural justice, the Constitution of Kenya, Employment Act, 2007 and the respondent's human resource manual, the 1<sup>st</sup> respondent invited the claimant to attend further disciplinary hearing before its executive committee on the October 10, 2019 when the said executive committee was convened. The date here should be 2016 not 2019 as written in the response.
15. The 1<sup>st</sup> respondent avers that the claimant duly attended the disciplinary hearing held on the aforesaid date wherein the charges against the claimant were read to him and he was afforded an opportunity to defend himself. The 1<sup>st</sup> respondent upon considering the evidence before it and the claimant's representations, found the claimant liable of the accusations against him and resolved to terminate his contract of employment. The 1<sup>st</sup> respondent consequently terminated the claimant's contract of employment *vide* its letter dated January 13, 2017 on grounds of insubordination and wilful disobedience of instructions.

### **Claimant's Evidence At The Hearing**

16. The claimant, Dennis Odhiambo Olonde adopted the witness statement dated the October 9, 2017 as his evidence in chief and documents as contained in the list dated the October 9, 2017. In cross examination, he said that he got the suspension letter and was called for a disciplinary hearing. He said he did not appear before the finance committee as it is mandated to give guidance on the finances.
17. He said there is an email dated the April 25, 2016 reminding him of the things he had not completed and were long overdue. He said that he did not have good working relationship with the CEO. He said that he was taken through accusations and was supposed to respond to the same immediately and was supposed to defend himself whilst having no documents to help him to defend himself. He also said that he was not told the allegations against him but were read at the hearing. He said he received ksh 215,937 =/ as terminal dues from the respondent. In re exam, he said that he was not asked to be



accompanied by a colleague or shop steward. Further he says the work environment was very hostile as the CEO was acting with secretary and wanted the county finance and himself tried in order to protect himself.

### **Respondent's Evidence At The Hearing In Court**

18. Respondent witness, Austin Munene gave sworn testimony. He said he is the legislative officer of the County Assemblies Forum. He adopted his witness statement as amended and dated the June 16, 2022 and filed on the July 16, 2022. He also adopted the documents in the list dated the November 18, 2021 and filed on the November 26, 2021 as well as the supplementary list of documents dated the June 16, 2022 as exhibits in the case.
19. On cross examination he said that the claimant had several complaints but no warnings had been given him and there were no performance evaluations. He further said the proceedings were held in October 2016 and claimant gave an oral response and he was asked to respond in writing. He explained that the human resource manual provides that the proceedings take place before an employee is suspended from employment. The employee receives a written warning and a written explanation of violation then the 2<sup>nd</sup> and 3<sup>rd</sup> warnings are issued. He said that summary dismissal can be given without any warning. He also said that the claimant had been informed of his charges via emails and was aware of the allegations against him.

### **Claimant's Submissions.**

20. The claimant submitted that the respondent breached their own HR manual on disciplinary procedures. The claimant was not accorded the benefit of the first warning, or otherwise. He was condemned largely on the first allegation. The suspension and termination were predetermined after the first meeting in Mombasa by the executive committee. The actions which the respondent took later were mere formalities that were also unprocedural, unfair, illegal and unconstitutional. The claimant's fate was sealed on the May 23, 2016 in Mombasa.
21. The claimant also submitted that the termination was unfair and unlawful and that the evidence tendered were the threads of emails between pages 44 and 47 of the memorandum of claim. The persons that alleged the conduct of the claimant was insubordinate did not come to testify in court even after she had been sued and claimed to make an application to strike out her name in vain. In the emails exhibited in court there was no proof of insubordination.
22. The claimant argued that even though he was called for a hearing he was not afforded ample time to prepare for his defence or to allow him be accompanied by a fellow employee. The respondent failed to communicate effectively of the charges facing the claimant. He was only made aware of his accusations during the hearing by an incompetently constituted committee, and further was not allowed an opportunity to appeal.
23. Further claimant submits that the respondent failed to consider the impeccable conduct of the claimant. There was no record of the claimant being cited for any form of misconduct in the past. The respondent had never conducted any performance evaluation ever since the claimant was employed which is another violation of the HR manual.
24. The claimant relied on the Court of Appeal's decision in *Standard Group Limited v Jenny Luesby* 2018 eKLR where the Court of Appeal said that:

“With respect, we think the trial court was on a firm ground in such finding. As stated above, the procedure under section 41 of the Act is mandatory. Apart from a mere assertion that



there was an attempt made on the November 14, 2013 in a meeting with the HR director and respondent in CEO's office, where the incident was discussed and the respondent is said to have apologized, there was nothing to show that the requirements of section 41 have been complied with. It follows that the Act of summarily dismissing the respondent without giving her the opportunity to be heard amounted to unfair termination as defined in section 45 of the Employment Act. The burden was on the appellant to prove 'that the employment was terminated in accordance with fair procedure. See *Ken freight EA Limited v Benson K Nguti* 2016 eKLR.

25. I did not find submissions for the respondent in the file and CTS.

### Issues For Determination

- a. Whether termination of the claimant was substantively and procedurally unfair
  - b. The remedies, if any, the claimant is entitled to.
26. Section 47 (5) of the *Employment Act*, 2007 requires of the claimant to ex facie bring out a case of unfair termination of employment to which the respondent shall adduce evidence in justification.
27. 45 (4) (b) of the *Employment Act*, 2007 provides that
- “Termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employee.”
28. In *Walter Ogal Anuro v Teachers Service Commission* 2013 eKLR the court held that:
- “for termination to pass the fairness test, there must be both substantive justification and procedural fairness and that substantive fairness has got to do with the establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
29. In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken.
30. On the application of section 47(5), the court in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR. held that:
- “The interpretation given to the section by courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination. In *Josephine M Ndungu & others v Plan International Inc* [2019] eKLR, “under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”



31. In the Court of Appeal decision in the case of *Ken freight (EA) Limited v Benson K Nguti* [2016] eKLR, held that: -

It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure ...”

32. Having considered the pleadings and evidence adduced and submission the court concludes that the reasons given to the claimant for termination of his employment was what respondent referred “insubordinate behaviour”. The claimant received the first letter suspending him from duty on May 27, 2016 on allegation of unacceptable and in particular insubordination behaviour. He was suspended for one month and he got another suspension letter on July 4, 2016 with an added 30 days.

In the letter he is not specifically advised on incidents of insubordination and the people he was disrespectful to. The insubordinate behaviour does also not come out clearly in the emails exchanged with the claimant and Gladys Sisina in pages 38 to 57 spanning March 2016 to May 2017 and they seem to be normal communication at work place. The respondent has actually not demonstrated from those documents the insubordination neither in their evidence in court nor in their response.

33. The claimant if anything is the one who informed the court that he had a toxic relationship with one Gladys Sisina chief executive officer whom he named as the 2<sup>nd</sup> respondent in this case.
34. The respondent however in their response said the claimant was non-suited against the 2<sup>nd</sup> respondent and undertook to have her struck off but no such application was filed in court.
35. When it comes to the claimant's termination letter dated January 15, 2017 he was informed that his termination was because of wilful disobedience of instructions and insubordination towards his immediate supervisor.
36. The letter written by the claimant exhibit 57-107 of the claimant's documents list the accusations or charges against the claimant at the disciplinary meeting held in relation to the claimant on October 10, 2016. Claimant avers in that write up that he did to know the exact accusations against him at the time in order to know the right approach to handle the same. He says he had only been supplied emails print outs by the acting chief executive officer without clear information.
37. The court did not see extracts of the minutes of the disciplinary meeting held on October 10, 2016 and so is not privy to the reasons given to the claimant as pertains to his termination of employment. It is advisable for an employer to generate minutes of a disciplinary hearing and get the parties including the employee who is being disciplined to confirm the minutes are correct and sign them. This provides transparency to the disciplinary proceedings.
38. In the case of *Walter Ogal Onuro v Teachers Service Commission* 955 of 2011 the court stated that “TSC had a genuine reason for terminating the claimant's employment as required under section 43 of the *Employment Act* in the circumstances. However upon analysis of both the investigation and the disciplinary process TSC had failed the test of procedural fairness in that it did not take its investigations full circle. TSC should have done more in the light of the



seriousness of the allegations against the claimant and the resultant consequences but it took the easy option and placed both the claimant and the impostor on the same chopping block.”

39. The court therefore held that the termination of the claimant by way of summary dismissal was unfair for want of due procedure.....”

40. Further there are numerous authorities that make it clear that procedures in the Employment Act concerning the termination of employment are mandatory and employer has no choice but to follow the same.

41. In the case of Kenfreight E.A Limited v Benson K Nguti 2016 eKLR Civil Appeal 31 of 2015 the Appeal Court held:

Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to an employee in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any considered by an employer before the decision to terminate his contract of service is taken.”

42. Further in the *Kenfreight case* above the court held that termination is to be considered unfair if the employer fails to demonstrate that the reason for termination is fair and valid, that the reason related to the employees conduct capacity and compatibility or is based on the operational requirements of the employer. The court noted that the employer must prove the termination was in accordance to fair procedure. The court also noted that section 43 specifically places burden to prove termination was fair on the employer.

43. In consonance to section 41 of the Employment Act the court also held that an employer is duty bound to explain to an employee in a language he understands the reason or reasons to which the employer is considering termination of the contract in the presence of another employee or a union official.

44. In this case the court has already stated that the reasons given by the employer to the employee are mere general statements and are neither specified nor clarified. The words like “insubordinate” needs to be established to who and what exactly he did to qualify for such a serious transgression.

45. Section 44 (e) provides that:

an employee can be dismissed for given misconduct *inter alia* “ if he knowingly fails or refused to obey a lawful and proper command which it was within the scope of his duty to obey issued by his employer or a person placed in authority over him by his employer”

46. The court finds that the respondent failed to give specific and supported reasons as to why the claimant needed to be summarily dismissed. The court finds there will be no need to allude to the process of disciplinary procedure as per respondent’s manual as clearly there is room for summary dismissal for gross misconduct under section 44 of employment act even without warnings. This however must satisfy the requirements of the employment laws especially on substantive justification or giving a valid reason and procedural fairness provided in mandatory terms under section 41 of the Employment Act 2007.



47. From the foregoing and applying the above to the case at hand the court's findings are that the respondent did not prove it had valid grounds to terminate the claimant's employment and it did not follow the mandatory procedure in the disciplinary hearing mandated under section 41 of the *Employment Act*. The court declares the claimant's termination from his employment illegal and unlawful and holds 1<sup>st</sup> respondent liable for claimant's compensation but there is no case against the second respondent being an employee of the 1<sup>st</sup> respondent.

### **Remedies**

1. Prayer 1 is unclear i.e salary from May 2017 to February 2016 it is not clear what this claim is all about and so is not capable of being granted.
2. Payment of one month salary *in lieu* of notice Kshs 93,990/-
3. Payment as compensation for unfair and illegal termination the court will award 4 months equivalent of salary Kshs 375,960/-
4. Payment for leave not taken of 21 days is awarded as respondent did not present evidence that the claimant was given leave or payment *in lieu* of leave Kshs 65,793/-
5. The other prayers for punitive and exemplary damages are declined as compensation in prayer 2 is sufficient.
6. Claimant is awarded costs and interest at court rates from date of judgment till full payment.  
The final award is Kshs 535,743/-

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

