



Sokoro & another v Kenya Wildlife Service (Employment and Labour Relations Cause 1470 & 1471 of 2018 (Consolidated)) [2023] KEELRC 954 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 954 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS
CAUSE 1470 & 1471 OF 2018 (CONSOLIDATED)**

B ONGAYA, J

APRIL 27, 2023

BETWEEN

JAMES MOGAKA SOKORO 1ST CLAIMANT

FRANCIS WANDOGHO MWAITA 2ND CLAIMANT

AND

KENYA WILDLIFE SERVICE RESPONDENT

JUDGMENT

1. The claimants filed separate suits through Ongoto & Company Advocates against the respondent and which were consolidated. The respective memorandums of claims were filed on October 25, 2018 and each claimant prayed for judgment against the respondent for:
 - a. A declaration that the meeting held on November 24, 2017 by Chair Board of Trustees, Chair Board Finance Committee, Chair Board Audit Committee, Ag Director General and Chief Operating Officer in which the claimant was interdicted was contrary to the respondent's Human Capital Policy and Procedures Manual; section 41, 43 and 45 of the *Employment Act*, 2007 and Articles 10, 41, 47, 50, 73 & 236 of the *Constitution* of Kenya, 2010 and therefore unconstitutional, null and void.
 - b. An order setting aside the termination letter dated February 23, 2018 and any other disciplinary process by the respondent.
 - c. An order directing the respondent to reinstate the claimant to his employment in the position he held prior to his interdiction and termination of his services and payment of withheld salaries and allowances.
 - d. General damages for termination of employment.



- e. General damages for violation of claimant's constitutional rights.
 - f. Service gratuity.
 - g. Notice pay.
 - h. Compensating damages for 12 months.
 - i. Costs of the suit.
2. The 1st claimant was employed by the respondent from May, 1996 as an internal auditor and as at February 23, 2018 he had been promoted to the position of Acting Head of Finance Department at Kshs 251,508.00 per month. The 2nd claimant was employed by the respondent from May 1, 2003 as a permanent and pensionable employee. His initial temporary employment had been in 2001 as a corporate planner and as at February 23, 2018 he had been promoted to the position of Acting Deputy Director Finance & Administration (DDF&A) at Kshs 372,340.00 per month and plus acting allowance making Kshs 450,000.00 per month.
 3. Each claimant received the letter of termination of employment dated February 23, 2019. The reasons for termination were sated as being guilty of gross negligence of duty and violation of policies and procedures stated as follows:
 - a. Unprocedural drawing of imprest above the set limit of Kshs 500,000.00.
 - b. Irregular switching-off of the service's Safari card revenue collection system.
 - c. Irregular withdrawal of Kshs 135,339,108.52 endowment funds from deposit into operations account.
 - d. Annual Financial Accounts Statement for Financial Year 2016 to 2017 not prepared as per the set standards.
 - e. Introduction of unaccountable documents; park entry payment from PEBP contrary to the applicable policies and procedures (against 2nd claimant only).
 4. The steps leading to the termination of employment of the claimants were as follows. On November 24, 2017 the 2nd claimant was summoned and he met the Board Chair Dr Richard Leakey; Chair of Board Finance Committee Peter Kinyanjui; Chair of Board Audit Committee Brian Heath; Chief Operating Officer COO Nehemiah Botich, Ag Director General Julius Kimani and Ag Human Capital Valentine Kanani. Allegations of violation of policies and negligence of duty were levelled against the claimants. Each claimant subsequently received an interdiction letter dated November 24, 2017 setting out the particulars of the allegations. The 1st claimant replied to the interdiction letter. Each claimant received a formal letter to show cause dated January 30, 2018 setting out the allegations and the particulars thereof. Each replied in writing by respective letters dated February 4, 2018. On February 13, 2018, each received a letter to appear before the disciplinary panel of the management for 1st claimant and disciplinary panel of the Board for 2nd claimant on February 15, 2018. Each attended and presented the defence. Subsequently, each received a letter of termination of employment dated February 23, 2018 and each appealed by the letter dated March 1, 2018. The respondent's Board of Trustees dismissed the appeals on October 28, 2018 and conveyed the decision to each claimant by the letter dated October 4, 2018.
 5. The claimants' case is that the entire process of interdiction, discipline and eventual termination of services was flawed from the start, was vindictive, actuated by malice and the termination decision predetermined. The 1st claimants stated as follows:



- a. The interdiction was an ambush without prior notice and was devoid of due process. It was imposed by the same Board members including the Board Chairperson who ultimately terminated the claimants. Brian Heath who was present at the stage the interdiction was imposed was as well present chairing the Ad-hoc Board Committee for Appeal and a stranger from the Ministry of Tourism whose tenure as Board member had expired on February 17, 2018 attended at the Ad-hoc Board Committee for Appeal on April 16, 2018. Further, the claimants were not called upon to present his appeal and the deliberations of the appeal were not conveyed them.
 - b. The 2nd claimant alleges that the disciplinary panel of the Board found him innocent but the Chief Operating Officer and the Board Chairperson are the ones who insisted that his employment be terminated. The panel had met on February 15, 2018 in circumstances that its tenure was lapsing on February 16, 2018 and the new Board dismissed the 2nd claimant's appeal by the letter dated October 4, 2018 without being given an opportunity to be heard.
6. The respondent filed the memorandum of reply to the claimants' cases on December 11, 2018 and through Lutta & Company Advocates. The respondent admitted that the claimants were its employees as pleaded for them but the 2nd claimant was not entitled to Kshs 450,000.00 per month because he earned responsibility allowance and was not entitled or qualified to earn acting allowance as was alleged for him. The respondent admitted that the claimants were terminated on February 23, 2018 and that the termination was not unfair. The respondent further pleaded as follows:
- a. The 2nd claimant failed to seek approval for imprest drawn of Kshs 779,200.00 and failed to inform his superiors about his absence from office for 11 days as was required.
 - b. Particulars of the allegations against the claimants were enumerated. The letters to show cause were dated January 30, 2018. They were given an opportunity to defend themselves but they were found not innocent. Thus, they were terminated for good reason. The appeal panel had no prescribed manner of being constituted and there were no established grounds for the termination to be set aside by the appeal panel.
 - c. It was pleaded that the reasons for termination of the claimants were valid and fair. Further, the claimants were accorded a fair chance to defend themselves, each was found culpable and the employment contract terminated.
 - d. Even if there were procedural deviations, the claimants failed to exculpate.
 - e. The respondent pleaded that the suits be dismissed with costs.
7. The 1st and 2nd claimants testified as CW1 and CW2 to support their respective cases. The respondent witness No 1 (RW1) was the Auditor, Watson Karagathu; No 2 (RW2) Tom Kipkosgei Boit, the Safari Card System Manager; and No 3 (RW3) was Elizabeth N Mwangi, Senior Assistant Director, Human Resource. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.
8. There is no dispute that the respondent employed the claimants in the positions as pleaded for each claimant. The parties were in contracts of service accordingly and which were terminated. The termination was not in dispute per the parties' pleadings.
9. The 1st issue in dispute is whether the reasons for termination were valid and fair as envisaged in sections 43 and 45 of the *Employment Act*, 2007. The Court has considered the claimants' pleadings, testimonies and submissions. The Court returns as follows:



- a. On the allegation of unprocedural drawing of imprest above the set limit of Kshs 500,000.00, the testimony by RW1 was that on January 19, 2022 the 1st claimant irregularly approved an allowance form purportedly as Deputy Director while he did not hold that rank. Further, the 2nd claimant flouted circular Ref No KWS/223 of June 9, 2014 because while being the senior most officer he failed to apply for and receive the imprest. The circular stated that where a trip involves more than one employee an imprest will be granted to only one person being the senior most in the trip. The claimants testified that the circular had not been drawn to their attention. However, the Court has considered their respective ranks and role in the respondent's organisation and finds no good reason to support the claimants' testimony that they were ignorant about such a crucial circular that governed their service delivery in the finance department. As submitted for the respondent, that reason for termination is found to have existed as at termination per section 43 of the Act and was a fair reason as it related to the claimant's conduct, capacity, compatibility and the respondent's operational requirements per section 45 of the Act.
- b. On irregular switching-off of the service's Safari card revenue collection system, the Court finds that the evidence is that the claimants were culpable as alleged. The testimony by RW2 was that the contract for maintenance of the Safari Card System was ending on December 31, 2016 and consequential to that lapse, the maintenance contract was not renewed but that did not affect the subsistence of the concluded Safari Card System with the supplier. RW2 therefore testified that the lapsing of the maintenance contract did not affect continued use of the Safari Card System beyond December 31, 2016 as only maintenance services would not be available but the respondent's designated officers would continue operating the system. In the circumstances, the Director General (DG) instructed that the Safari Card System be transferred from ICT Department to the Finance Department so that despite want of system maintenance, someone would monitor values of the individual Safari Cards with a view of refunding customers who did not want to use the cards as necessary. RW2 further testified that the claimants completed the relevant form requesting the disablement of the Safari Card System by signing the form duly exhibited which RW2 signed upon the claimants' written approval. RW2 further testified that the claimants, (contrary to DG's instructions that the Safari Card System moves to the Finance Department with all its officers from ICT Department), deployed one Lucas Oluoch as the sole system back-office user and the audit of the logs showed that the said Lucas Oluoch had on May 28, 2017 deleted from the system the following user rights, thus, super user all access; staff card manager –access to POI on staff cards; SMBO limited access, POIPOS-Park accountant, Reports user HQ; and Report user POIPOS. RW2 further stated in his witness statement that the consequence was that it became impossible for any staff to carry out any Safari Card function and only the System developer one Expand Technologies Limited could unblock the system to enable user access. The customers could not be refunded from the Safari Card System. CW2 testified that the DG instructed that the Safari Card System be closed and the system remained in place but with the loading function stopped. CW2 gave no explanation on why the staff were not deployed to the Finance Department from ICT per the DG's instruction. On a balance of probability, the respondent has established per section 43, 45 and 47 of the Act that as at termination, the claimants failed to fully carry out the DG's instructions on closure of the Safari Card System particularly on deployment of ICT officers to Finance Department as the System was being transferred.
- c. On irregular withdrawal of Kshs 135,339,108.52 endowment funds from deposit into operations account, the evidence was that indeed the amount was so withdrawn without approval and into operations account. The amount was retired to the respondent's operating



account from investment at Co-operative Ban by way of a fixed deposit and an interest of Kshs 5,339,108.52 had remained in the respondent's operating account at Cooperative Bank instead of being deposited in the endowment and donations account. The claimants admitted to the allegation but urged that no losses had been incurred in that regard.

- d. On Annual Financial Accounts Statement for Financial Year 2016 to 2017 not prepared as per the set standards, the evidence was that indeed the PS National Treasury had written the letter dated November 13, 2017 and the allegation was included in the letter to show cause dated January 30, 2017. The disciplinary panel found the claimants as exculpated because the PS Treasury had issued similar letters to Ministries and Departments as it did not amount to gross negligence. The Court therefore returns that the allegation has not been established as existing as at the time of termination per section 43 and 45 of the Act and it could not amount to a fair reason for termination.
 - e. On introduction of unaccountable documents; park entry payment from PEBP contrary to the applicable policies and procedures no submissions were made on behalf of the respondent. For the claimants, it was submitted that it was not one of the charges in the show cause letter and the 2nd claimant had not been called upon to defend himself. The Court upholds that submission and that allegation cannot be found as valid or fair reason for the termination of the 2nd claimant.
 - f. The Court finds that the reasons for termination were valid and fair to the extent of the findings already made in this judgment. As submitted for the respondent, it was sufficient that any of the reasons for termination, even only one, is shown to have existed as per the holding in *Etyang Godfrey Odumegu –Versus- Robinson Investment Limited [2017]eKLR*. The Court therefore returns that the termination was not unfair in substance or upon merits.
10. The 2nd issue is whether the termination was unprocedural. On procedural fairness, it is that the claimants were interdicted, they received show-cause letters, they attended disciplinary hearing, appealed against the termination and appeals were determined upholding the terminations. It is urged for the claimants that the interdiction was unfair because it was without prior due hearing. For the respondent it is submitted that the interdiction was such a preliminary inquiry not requiring due process prior to being imposed. The Court agrees with the submission made for the respondent. Such preliminary inquiries are provided for in paragraph S.6 (i) of the respondent's Human Capital Policy and Procedures Manual (Revised December, 2014). Paragraph S.10 (a) of the Manual provides that an employee may be interdiction where misconduct which is likely to lead to dismissal is reported. The interdiction is on half salary and full allowances and other benefits. There is no provision for strict due process prior to interdiction and which in the design of the Manual is a preliminary step to facilitate the due process of the in disciplinary case as may have been levelled. As was held in *Humphrey Makokha Nyongesa & Another –Versus- Communications Authority of Kenya & 2 Others [2018] eKLR*, interdiction was not a hearing but only paved way for investigations so that rules of natural justice did not apply at that stage. Thus, the hearing on November 24, 2017 prior to imposition of the interdiction did not call for a prior notification as was urged for the claimants.
11. It was submitted for the claimants that the investigations were carried out by an officer junior to the claimants contrary to section 69(4) (c) of the *Public Service Commission Act, 2017* which provides that no penalty shall be imposed against a public officer unless the allegations have been investigated by a public officer or officers who are senior to the officer subject of the proceedings. For the respondent, it is submitted that for the 1st claimant the disciplinary panel consisted of Acting Deputy Director Strategy & Change one Edwin Wanyonyi of Job Grade 2 and Assistant Director Abdi Dot. For the 2nd



claimant, the panel consisted of Acting Director General one Julius Kimani. The submission for the respondent is not challenged taking into account the evidence on the panels. The Court returns that the respondent substantially complied with the provision that an officer senior to the one subjected to disciplinary proceedings investigates the case. As submitted for the respondent, the claimants did not object to the composition of the panels at the disciplinary hearing and any defect therein was condoned or acquiesced as was held in *Justus Kyalo Mutunga –Versus- Labh Singh Harnam [2012] eKLR* upholding *Dosbi Enterprises Limited –Versus- Oriental Steel Fabricators & Builders Nairobi (Milimani) HCMA No 627 of 2001*.

12. It is urged for the claimants that the appeal was determined without their being heard. The Manual does not prescribe oral hearings upon appealing to the Board of Trustees. The Court finds that the claimants have not established a basis that they ought to have been heard *viva voce* at the appeal stage. As submitted for the respondent it was sufficient that the appeal is heard and determined.
13. The 2nd claimant lamented that the disciplinary committee recommended a severe reprimand but the board imposed a termination. The Court considers that there is no established basis that the recommendation was binding and that it was sufficient that the reasons for termination had been shown as valid and fair per sections 43 and 45 of the Act and the punishment to be imposed turned upon the exercise of discretion by the decision maker. Unless the exercise of the discretion is shown to have been not proportionate or manifestly unfair in one or other material respects, the Court would have no basis to interfere.
14. The Court has considered the claimants' lamentation that the Board members jumped into the matter prematurely at the hearing prior to the interdiction. Some of the same Board members were then involved in the disciplinary hearing for the 2nd claimant and then in imposing the termination and later determining the appeals. The Court returns that in a sense, it was procedurally unfair and the claimants were correct in inferring that their disciplinary case had been predetermined by the Board. While that procedural lapse is overridden by the validity and fairness of the reasons for the termination as to disentitle the claimants to compensation for unfair termination on account of that procedural lapse, that lapse mitigates the award of costs to the extent that as will be awarded later in this judgment, parties will bear own costs of the proceedings.
15. The 3rd issue is whether the claimants are entitled to any of the remedies as prayed for. The Court returns as follows:
 - a. The claimants prayed for a declaration that the meeting held on November 24, 2017 by Chair Board of Trustees, Chair Board Finance Committee, Chair Board Audit Committee, Ag. Director General and Chief Operating Officer in which the claimant was interdicted was contrary to the respondent's Human Capital Policy and Procedures Manual; section 41, 43 and 45 of the *Employment Act*, 2007 and Articles 10, 41, 47, 50, 73 & 236 of the *Constitution* of Kenya, 2010 and therefore unconstitutional, null and void. The Court has found that there was no need of a notice prior to that meeting and then the interdiction as rules of natural justice did not apply at that stage. The prayer will therefore fail.
 - b. The Court has found that the procedure leading to the termination was substantially fair and any found irregularity was excusable as being overridden by the established valid and fair reasons for termination. By reason of the fair and valid reasons there is no established justification for an order setting aside the termination letters dated February 23, 2018 or any other disciplinary process by the respondent.
 - c. The claimants prayed for an order directing the respondent to reinstate the claimant to his employment in the position he held prior to his interdiction and termination of his services and



payment of withheld salaries and allowances. As submitted for the respondent, under section 12(3) (vii) of the [Employment and Labour Relations Court Act](#) No 20 of 2011, reinstatement is available within 3 years of the termination but which time of limitation has since lapsed. In any event, the Court has found that the reasons for termination were valid and fair and there is no established basis for reinstatement.

- d. The Court has found that in view of the valid and fair reasons for termination as shown to have existed, the claimants fully contributed to the termination. They are not entitled compensatory damages for termination of employment under section 49 of the Act or otherwise.
- e. The claimants have prayed for general damages for violation of claimant's constitutional rights. The claimants alleged but did not establish violation of Articles 47, 50(1) and 236 of the [Constitution](#). The prayer is declined as unjustified. While making that finding, the Court returns that the claimants stretched their claim and submissions to cover alleged constitutional violations in circumstances whereby the dispute was essentially about alleged unfair termination of a contract of service and nothing more. The allegations pleading constitutional violations were remotely introduced clearly outside the cause of action and looking at the facts of the case, it is to be discouraged of litigants.
- f. There is no justification made in the prayers for service gratuity and as submitted for the respondent, it is not available per paragraph T 19 (3) of the Manual in the circumstances that NSSF was payable with respect to the claimants' service.
- g. The respondent has admitted that the claimants are entitled as offered in the letters of termination thus:
 - i. 2-months' payment in lieu of notice 1st Claimant Kshs 503,016.00 and 2nd Claimant Kshs 744,680.00.
 - ii. Payment of unutilised leave days as at February 23, 2018.
 - iii. Payment of benefits under KWS Staff Superannuation scheme as per the Scheme Rules and the [Retirement Benefits Act](#) or Regulations.
- h. As the respondent has made no counterclaim, the claimants to formally clear with the respondent to pave way for the payments above.
 - i. For reasons already and earlier stated in this judgment, each party to bear own costs of the suit.

In conclusion the suit is determined and judgment entered for the parties with orders:

1. Subject to formal clearance, the respondent to comply and pay the claimants per the terms of the letter of termination thus:
 - i. 2-months' payment in lieu of notice 1st Claimant Kshs 503,016.00 and 2nd Claimant Kshs 744,680.00.
 - ii. Payment of unutilised leave days as at February 23, 2018.
 - iii. Payment of benefits under KWS Staff Superannuation scheme as per the Scheme Rules and the [Retirement Benefits Act](#) or Regulations.



2. The clearance in order (1) above be concluded in 7 days and the amount due paid by June 2, 2023, failing interest at court rates to be payable thereon from the date of filing the suit till full payment.
3. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 27TH APRIL, 2023.

**BYRAM ONGAYA
PRINCIPAL JUDGE**

