



REPUBLIC OF KENYA



**Kiti v Biovision Africa Trust (Cause E425 of 2021)
[2023] KEELRC 916 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 916 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E425 OF 2021**

J RIKA, J

APRIL 20, 2023

BETWEEN

AGNES MWIKALI KITI CLAIMANT

AND

BIOVISION AFRICA TRUST RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on May 25, 2021.
2. She states, that she was employed by the Respondent as a Human Resource and Administration Officer, for the period between January 1, 2020 to December 31, 2022.
3. On April 22, 2021, her contract was unfairly and unlawfully terminated by the Respondent. She was not heard; she was not issued a letter to show cause why her contract should not be terminated; she was without evidence, said to have created a toxic working environment; and was denied terminal benefits. Her last salary was Kshs 235,758 monthly
4. She prays for Judgment against the Respondent for: -
 - a. Salary for the remainder of the contractual period, between April 2021 to December 31, 2022, at Kshs 4,950,931.
 - b. Pension amount at Kshs 215,050.
 - c. Accrued leave days at Kshs 207,146.
Total... Kshs 5,603,661.
 - d. Damages for wrongful termination.
 - e. Costs.



- f. Interest.
 - g. Any other suitable remedy.
5. The Respondent filed its Statement of Response dated June 16, 2021. It describes itself as a Non-Profit Charitable Organization. It concedes to have employed the Claimant, and to have terminated her contract. Termination was on account of breach of trust and confidence, which had resulted in dysfunctional working relationship at the Respondent. The Claimant was negligent and insubordinate. She acted contrary to the Respondent's Human Resources Policies and Procedures.
 6. Details of the above employment offences are that: she assigned herself funds in salary increment at the end of the year 2020, without following the Respondent's Financial Manual; she attempted to hire her daughter as an intern at the Respondent, without the daughter submitting a written application and a resume; she abdicated her responsibility by failing to shortlist candidates for the position of Communications and Fundraising Officer; she stormed out the funeral meeting of a colleague, when she disagreed with other Committee Members, and with the instructions given by the Executive Director; and, she occasioned irretrievable breakdown of relations between the other Staff and herself, disrupting productivity at the Respondent.
 7. She was given an opportunity to be heard. She stormed out of the meeting, held on April 22, 2021. The Respondent lost trust and confidence with the Claimant, and terminated her contract in accordance with its Human Resource Policies and Procedures Manual, clauses 8.2 and 9.1. She was paid terminal dues on May 21, 2021, comprising 3 months' salary in lieu of notice; Respondent's 3 months' pension contributions; leave days; and salary for days worked in the month of April. The Respondent is ready to release the sum of Kshs 213,346 to the Claimant, subject to her release of the Respondent's assets and unaccounted for imprest. The Claimant's contract did not provide for anticipated salaries, if termination was premature. The Respondent prays for dismissal of the Claim with costs.
 8. The Claimant filed a Reply to the Statement of Response, dated July 7, 2021. On April 22, 2021, she was summoned to the Respondent's Boardroom. She was handed a letter of termination, whose receipt, she was required to acknowledge. She declined, a refusal that the Respondent has christened as 'storming out of office.' Termination letter was ready by the time the Claimant was summoned. There was no hearing. No Disciplinary Committee was constituted in accordance with the Respondent's Human Resources Policies and Procedures. No notice to show cause or warning, preceded termination. The Claimant's daughter's internship had been discussed between the Executive Director and the Claimant. There was agreement, but when she reported, the Executive Director had a change of mind. The Claimant opted out of her colleague's burial, because she was herself bereaved. It was not in her docket to approve allocation of funds. She did not allocate to herself a salary increment.
 9. The dispute was referred for mediation, and Partial Settlement recorded on 7th September 2022. It was agreed that Certificate of Service is issued; the Respondent to pay to the Claimant a sum of Kshs 17,326; the dispute concerning the laptop held by the Claimant is marked as settled; payment of the above-stated amount shall mark the Claim as partially settled; and the issue of unlawful termination is referred to the Court for determination.
 10. On November 9, 2022, Parties agreed to have the remainder of the dispute, determined on the strength of their Pleadings and Documents, under Rule 21 of the [*Employment and Labour Relations Court \[Procedure\] Rules, 2016*](#).
 11. The Claim was last mentioned on January 31, 2023, when Parties confirmed filing and service of their Submissions.



12. The Court understands the mediation process to have settled all other claims, and implied counterclaims, save for the claim for anticipated salary and compensation for unfair and unlawful termination. The only issue outstanding from mediation therefore, centres around unfair and unlawful termination.

The court finds: -

13. There are 2 aspects to look at, in answering the question whether termination was unfair or unlawful. It is both a statutory and contractual enquiry. Was the Claimant's contract terminated in accordance with Sections 41, 43 and 45 of the *Employment Act*? Was it in accordance with the Respondent's Human Resources Policies and Procedures Manual, 2016? Did it satisfy substantive and procedural standards of fairness?
14. The Claimant was on a limited-term contract, beginning January 1, 2020, ending December 31, 2022. She was employed as a Human Resource and Administration Officer. Her last salary was Kshs 235,758 a month.
15. She did not serve to the end of her contract. On April 22, 2021, the Respondent terminated her contract. There were various reasons given by the Respondent in justifying the decision, in the letter of termination which include: -
- a. There were issues raised by the Respondent, concerning the Claimant's reliability, sense of Judgment and performance.
 - b. The issues had resulted in toxic working environment, with strained relations and negative impact on staff morale.
 - c. There was irretrievable breakdown in the relations between the Claimant and other Staff.
 - d. The Respondent had lost trust and confidence in the Claimant as the Human Resource and Administration Manager
16. Procedure. This appears to the Court to have been flawed from the beginning. There was no letter to show cause issued to the Claimant. There were no specific charges, read out to the Claimant, at a disciplinary forum. She was not required to defend herself at a disciplinary hearing, convened in accordance with the Respondent's Human Resource Policies and Procedures Manual.
17. The meeting held of April 22, 2021, involving the Executive Director Dr. David Amudavi, FCP Coordinator Fredrick Ochieng, the Claimant, Finance Manager Robertson Nyikul and Farmer Feedback Officer and BASA Welfare Representative, Charles Kimani, was not a disciplinary hearing. The agenda was indicated to be the decision on the employment of the Human Resource and Administration Officer. The Claimant is correct in her evidence, that she was called to a forum where a decision had already been made to terminate her contract. The minutes of the meeting state that the Board had carried its own independent investigations and corroborated facts, confirming that the Claimant fell short of professional integrity. It is not known when the Board carried out its own investigations, and what report the Board was corroborating.
18. The minutes, state that, "in view of the forgoing, the Executive Director reported that the Board had made a determination to terminate the employment contract of Agnes, in her position as the Human Resource and Administration Officer immediately."
19. There was no hearing. Termination was with immediate effect. Sections 41 and 45 of the *Employment Act* demand hearing of the Employee by the Employer, on any ground contemplated under the



- Employment Act*. Clause 8.4 of the Human Resource Policies and Procedures Manual, creates a Disciplinary Advisory Committee, which is charged with the responsibility of facilitating the hearing of Employees, before termination. No Disciplinary Committee was convened, and the responsibilities assigned to the Advisory Committee, were not discharged. There was no balanced and nonpartisan disciplinary panel selected
20. Clause 8.4 reflects the requirements of the Law under Section 41 of the *Employment Act*, requiring that the Employee is heard; and that he is accompanied to the hearing by a colleague he may wish to have. The Claimant was not heard and no report was prepared, on the outcome of the hearing. Clauses 8.4 and 8.5 provide for a right of appeal. This was not communicated to the Claimant at the meeting of April 22, 2021, or in the letter of termination of even date.
 21. The minutes and the letter of termination both make reference to Clauses 2.1 and 9.1 of the Human Resource Policies and Procedures Manual, which are on termination at the will of the Employer, but completely ignore clauses 8.4 and 8.5. Clause 9.1 which espouses immediate termination, but nonetheless recognizes the right of appeal.
 22. Procedure was unfair.
 23. Validity of Reason. The reasons leading to termination had been variously stated by the Executive Director, in a confidential e-mail to the Claimant, dated March 19, 2021. He raised concerns about the Claimant's disregard of policies and procedures; dereliction of duty and lack of commitment; failure to follow laid down procedures [repeated]; lack of cooperation and shoddy work; and lack of trust and confidence. On the latter, the Executive Director alluded to the presence of an anonymous letter which had been addressed to the Board Chairman, making some serious allegations about the Executive Director. The Executive Director, without evidence, alleged that the Claimant was privy to the contents of the anonymous letter.
 24. He required her to answer to the concerns, within 48 hours.
 25. The Claimant responded in detail. She denied that she had disregarded finance manual; the Executive Director had the mandate to approve reallocation of funds; she did not have the mandate to transfer funds from one project to another; she had consulted the Management Team and the Executive Director on recruitment of Fundraising and Communications Officer; the Claimant had consulted the Executive Director about her daughter's internship; the Executive Director had gone ahead and discussed a colleague's funeral with the BASA Chair and the Finance Manager, in the absence of the Claimant; the anonymous letter was dispersed in 2017 and another Employee, not the Claimant, had been accused of being the author; and lastly, the Claimant told the Executive Director that where an Employee is accused of an employment offence, the Human Resources Policies and Procedures Manual requires there is a verbal warning, written warning and suspension or dismissal [with documentation of previous warnings].
 26. The Claimant also wrote an e-mail to the Executive Director, dated March 21, 2021, complaining that 48 hours granted to respond to the concerns were too few; it was a Friday and she was to attend her father-in-law's burial within the same period; she had confided in the Executive Director that it had been alleged within her family, that she was aware about the cause of her father-in-law's death; she had confided about the loss of 2 close relatives in the last 2 months; she had problems with her spouse; and her daughter had mysterious disease, leading to endless hospital visits. These things weighed her down. She therefore found the accusations and requirement to respond within 48 hours very insensitive.
 27. The Executive Director wrote back on March 26, 2021 acknowledging the Claimant's own concerns, and communicating also, that he did not have malice in requiring the Claimant's response on short



notice. He indicated that the Board was examining his e-mail to the Claimant and her response. He wrote a second e-mail on March 29, 2021, clarifying to the Claimant that his communication was not a letter to show cause why disciplinary action should not issue against her. He assured that if disciplinary action was required, it would be taken in accordance with the Respondent's Human Resources Policies and Procedures Manual. He said the issues were still under consideration.

28. In the end however, no allegation was ever established, in accordance with the Human Resources Policies and Procedures Manual. The confidential conversation between the Claimant and the Executive Director was not, in accordance with the Executive Director, a disciplinary process. Of the issues the Executive Director had required the Claimant to explain, she gave a comprehensive explanation. The Court has not seen a record of outstanding issues, after the Executive Director's e-mail of March 29, 2021.
29. The minutes of the meeting held on April 22, 2021, do not disclose that the disciplinary process was initiated; what issues remained to be explained by the Claimant beyond what she had communicated to the Executive Director; and no explanation is given why such issues were not reduced to a letter to show cause, or specific disciplinary charges.
30. There was no support for the reasons stated in the letter of termination. Termination was not based on fair and valid reasons under Section 43 of the *Employment Act*, and was therefore unfair.
31. Remedies. As stated at the beginning, the dispute was partly-settled on mediation, and the only issue referred to the Court is whether termination was unfair and unlawful, and the remedy for the breach.
32. It is declared that termination was unfair under Sections 41, 43 and 45 of the *Employment Act*.
33. The Claimant had worked for 16 months. She had 20 months left to her limited-term contract. Expiry date was December 31, 2022. It was not established by the Respondent that the Claimant contributed to the reasons over which her contract was terminated prematurely. She expected to see her contract through, to December 31, 2022. She was offered terminal benefits including 3 months' salary in lieu of notice at Kshs 707, 275; days worked in April 2021 at Kshs 171,460; 20 days of outstanding annual leave at Kshs 214,326; and pension [Employer's contribution] at Kshs 79,086. The mediator resolved the claim by the Respondent, that the Claimant was withholding the Respondent's assets, and would not be paid until she released such assets. There is no counterclaim, and no reason therefore, why payment of terminal benefits should not be made, if it has not already been made. This should include Kshs 213,346 alleged to be estimate value of unreturned assets; and Kshs 11,913 in outstanding imprest.
34. The Respondent states, without refutation by the Claimant, that these terminal benefits were paid to the Claimant on May 21, 2021.
35. She is granted compensation for unfair termination, equivalent of 10 ½ months' salary at Kshs 2,475,459.
36. Costs to the Claimant.
37. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

In sum, it is ordered : -

- a. It is declared that termination was unfair.
- b. The Respondent shall pay to the Claimant equivalent of 10 ½ months' salary in compensation for unfair termination at Kshs 2,475,459.



c. Costs to the Claimant.

d. Interest granted at 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 20th April 2023.

James Rika

Judge

