



**Bongo v United Kenya Club (Cause 2318 of 2015)
[2023] KEELRC 1286 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1286 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 2318 OF 2015**

J RIKA, J

MAY 31, 2023

BETWEEN

BENJAMIN TEZI BONGO CLAIMANT

AND

UNITED KENYA CLUB RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 31st December 2015.
2. He states, he was first employed by the Respondent on 15th September 2007, as a General Manager, for 2 years. His contract was renewed for a period of 3 years, from January 2010. It was further renewed for 3 years from 8th April 2016. It was to expire in April 2016. His salary was reviewed to Kshs. 226,500.
3. He was sent on compulsory leave in November 2014 to allow for investigations into allegations of loss of revenue. Leave was extended to 25th May 2015, when the Claimant received a letter from the Respondent, containing 27 charges. He was required to respond to the letter to show cause, within 7 days.
4. He replied asking for certain documents. He asked to be allowed to avail certain witnesses. He asked for more time to prepare his response. The Board declined to supply the documents, explaining that other than the terms and conditions of service, the other documents were not relevant to the allegations made against the Claimant.
5. He was heard by the disciplinary committee on 10th June 2015. His contract was terminated on 12th June 2015. The Respondent explained that the Claimant had failed to satisfactorily answer to the charges against him. The Respondent undertook to pay to the Claimant all his terminal dues. None was paid.
6. He prays for Judgment as follows: -



- a. Declaration that termination was unfair and unlawful.
 - b. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 2,718, 000.
 - c. Annual leave of 45 days at Kshs. 339,750.
 - d. Entertainment allowance for the period November 2014 to June 2015 at Kshs. 120,000.
 - e. Gratuity in accordance with the contract at Kshs. 363,000.
 - f. Costs and Interest.
7. The Respondent filed its Statement of Response on 20th November 2019. It is conceded that the Claimant was employed by the Respondent. The documents and witnesses he requested for, were not relevant to the letter to show cause. His response was sufficient to enable the Respondent determine what further action to take. The matter was deliberated at every level of decision-making, and a fair outcome reached. The Respondent prays the Court to dismiss the Claim with costs.
 8. The Claimant gave evidence on 17th June 2021, 4th November 2021, 9th February 2022 and 3rd November 2022 when he closed his case. Accountant George Esuha Okee, gave evidence on 3rd November 2022, closing the hearing. The Claim was last mentioned in Court on 20th April 2023, when Parties confirmed filing and exchange of their Submissions.
 9. The Claimant relied on his Witness Statement and Documents on record, in his evidence. He retraced his employment history with the Respondent, relying on various contract documents on record. He was at first placed on compulsory leave, and reinstated by the Court. He was for the second time placed on compulsory leave, on different accusations.
 10. There were 27 charges against him. He was given 7 days only, to respond. He asked to be allowed to call certain witnesses. He was advised that these were not necessary. He did not have access to e-mails, audited accounts and minutes of the audit committee, which would have shown that the Respondent made profit, during the Claimant's tenure. He asked for extension of time to prepare for the hearing. It was denied. He received a letter terminating his contract, 2 days after the hearing. There were no criminal charges against the Claimant. He exercised prudent management.
 11. Cross-examined, the Claimant told the Court that his basic salary, house allowance and entertainment allowance was Kshs. 226, 250 monthly. The amount pleaded at Kshs. 250,000 is erroneous. Entertainment allowance was paid in cash. It was part of his gross earnings. It was paid to facilitate the Claimant discharge his role. He was not in business for the period of compulsory leave. It was not excluded under his contract, for the period he was on leave. He received entertainment allowance while on normal leave. The Respondent wrote explaining why entertainment allowance was stopped. It was stopped in November 2014. He was told that it was payable only when he was actively on duty.
 12. He was not given a fair hearing. He was accompanied by his Advocate to the hearing. He had received the letter to show cause, and made his response. Areas of his, and his Assistant Manager's failing, were stated. The Claimant gave his response. The Assistant Manager obtained advanced gratuity, without approval. The Board decided to terminate the Claimant's contract after hearing him.
 13. He was employed by Mombasa Sports Club, in March/ April 2016. He left the Club in October 2017. It was not on disciplinary grounds. His contract expired. He was employed by Nanyuki Club in January 2018. There were other 2 employment opportunities missed, on account of adverse reference from the Respondent.



14. The Respondent paid part of the Claimant's dues at Kshs. 699,000. He was not given a breakdown. He had 45 days of pending leave. He did not ask to be sent on compulsory leave.
15. Redirected, the Claimant told the Court that he received the letter to show cause. He gave his response and requested for more time, and for documents. He asked to be allowed to call certain witnesses who were members of the previous Board. The Respondent declined, and the Claimant was not able to respond satisfactorily. Entertainment allowance had always been paid, even during leave. Kshs. 699,000 paid by the Respondent was not the totality of the Claimant's dues.
16. George Esuha Okee relied on his Witness Statement and Documents exhibited by the Respondent. The Claimant was paid Kshs. 699,000 in terminal benefits.
17. Cross-examined, Okee told the Court that he is still serving as the Respondent's Accountant. He was employed in May 2016. He did not know the Claimant previously. Okee did not attend the disciplinary hearing. He was not aware that the Claimant's contract was renewed on account of good performance. Okee did not have a record of warning letters issued upon the Claimant. He did not know what the law required on termination. The Claimant responded to the letter to show cause. He asked for documents and opportunity to call witnesses. The Respondent wrote back, saying it was not necessary to have the documents and call witnesses. The witnesses he requested for were Board members, not involved in day-to-day management of the Respondent. He asked for 3 weeks to prepare for the hearing. He was allowed 2 weeks. This was not fair, according to the law. The Chairman to the Board signed the minutes of the disciplinary hearing. The Secretary did not. There was no General Manager at the time to ensure everybody signed. The minutes are valid. It is not true that the Board had a mind-set, going to the disciplinary hearing. Payment of terminal dues was made in accordance with the Statement of Claim.
18. Okee concluded his evidence with the concession that the Claimant is entitled to some of his prayers outlined in the Statement of Claim, but he was not able to say which ones in particular.
19. The issues are whether the Claimant's contract was terminated for valid reason[s]; whether procedure was fair; and whether he merits the prayers sought.

The Court Finds:-

20. It is not disputed that the Claimant was employed by the Respondent as its General Manager, on a 2-year contract on 15th September 2007; a 3-year contract beginning 2010; and a third contract of 3 years, commencing 8th April 2013 to expire in April 2016. The Respondent does not dispute that it terminated the Claimant's contract on 12th June 2015. Parties agree that the Claimant was paid a sum of Kshs. 699,000 on termination, whose details have not been supplied to the Court.
21. He did not serve to the end of his last contract. His contract was terminated on 12th June 2015, 10 months before the expiry date. The letter of termination is referenced, 'Notice to Show Cause Why Your Contract should not be Terminated.'
22. Validity of reason[s]. There were multiple accusations against the Claimant. 17 omnibus reasons, are listed in the letter of termination, in justifying the decision.
23. It was the finding of the Board that gratuity advances may well have been taken in the absence of the Claimant. He was wrong in holding that the advances were authorized by the relevant committees. It was necessary that they are authorized by the Board. The advance of Kshs. 250,000 in gratuity, to the Assistant Manager should have been approved by the Board. The Claimant was negligent because the amount was not recovered as a shortage of advance.



24. The Claimant confirmed that he authorized the signing for meals by the Assistant Manager, yet the contract did not allow for this. The Claimant allowed payment of entertainment allowance to the Assistant Manager. The contract did not allow this. He paid the Assistant Manager in cash, while it was a requirement to pay through the payroll. The Claimant refused to address himself to the e-mail from external auditors, which was a dereliction of duty as the General Manager. There were no records of casual employees kept by the Claimant, and he engaged casuals for longer period than is permitted by the law. Other accusations included that the Claimant had allowed a tenant to accumulate arrears of rent, and that he had failed to advise the Board on expiry of Board members' tenure.
25. The Board concluded that the Claimant had breached his contract of employment; he refused to answer questions to the Board to an extent which was deemed rude; his answers were evasive; he attempted to blame other officers; the answers betrayed the Claimant's lack of managerial skills and competence; he did not display leadership skills; although supplied with relevant documents, the Claimant did not have them at the hearing, which prompted the Board to supply its own documents to the Claimant; and lack of preparedness reminded the Board of the manner in which the Claimant had prepared past meetings, where the Board was left without relevant papers and documents for discussions.
26. With tremendous respect to the Board, there were no specific charges and findings readable from the letter of termination, to justify termination. The reasons or accusations are intractable. The letter of termination dwells on the conduct of the Claimant at the disciplinary hearing, rather than his conduct during his employment. The Board was concentrated on the Claimant's evasiveness, rudeness, shifting of blame, allegedly displayed by the Claimant, at the disciplinary hearing. Certain deductions were made from this conduct, displayed by the Claimant in the course of the disciplinary hearing. It was deduced that the Claimant lacked leadership qualities; he did not have skills to run the club; and because he did not have requisite documents at the hearing to defend himself, it was a betrayal of how he had always run the affairs of Board inefficiently, denying members necessary documents to enable them deliberate on their agenda.
27. Ironically, the Board had denied the Claimant certain documents in preparation for the hearing, but at the hearing the Board charged that the Claimant had not prepared himself with his documents, and kept asking to share documents held by the Board.
28. The unanimous decision to terminate the Claimant's contract seems to have been made on the perception of his conduct by the Board during the disciplinary hearing, rather than on the basis of clearly stated findings, stemming from clearly communicated charges, disclosing acts of gross misconduct.
29. In the end, any reasonable person would be hard-pressed to put a finger on the actual reason or reasons, justifying termination. The Court is not able to discern specifically what valid reason or reasons, the Respondent relied on, in terminating the Claimant's contract. The accusations and eventual reasons alluded to in the letter of termination were at large. There was no focus, just a mishmash of accusations and reasons.
30. The Respondent did not establish reason or reasons, to warrant termination of the Claimant's contract, in accordance with Section 43 and 45 of the *Employment Act*.
31. Procedure. The Respondent merged the show cause process with the disciplinary hearing. This did not assist in crystallization of the issues.
32. The Claimant was sent on compulsory leave on 19th November 2014. The period was extended to 31st December 2014. It was further extended to 2nd January 2015. There was further extension to



- 30th April 2015, then 31st May 2015. The Claimant was advised that investigations were going on, including investigations by the Directorate of Criminal Investigations, warranting perennial extension of compulsory leave.
33. On 25th May 2015, the letter to show cause, containing 27 charges, issued upon the Claimant. He was required to appear before the Board on 3rd June 2015, “to defend yourself against the allegations.” The letter to show cause served as notification of the disciplinary hearing. There was no room, for the Claimant to first respond to the letter to show cause, and for the Respondent to consider if the explanation given by the Claimant, was sufficient to avoid escalating the process to a disciplinary hearing.
 34. The direct invitation to the disciplinary hearing, through a letter to show cause, can only support the assertion by the Claimant, that the Respondent went to the disciplinary hearing, with a prejudiced mind.
 35. The Claimant nonetheless wrote a reply, on 29th May 2015, complaining that a notice of 7 days, to respond to 27 charges, was too short. He asked for at least 3 weeks to prepare. He also asked to be allowed to call witnesses who included past Chairman, Director and Chairman of Hospitality Committee, Director Human Resource Committee, and the Treasurer. He requested to have the company of his Advocate.
 36. He asked for several documents relevant to the charges.
 37. The request to call the witnesses was not necessary in responding to a letter to show cause, but was made necessary by the Respondent, once the letter to show cause was transformed into an invitation to the disciplinary hearing.
 38. The Board responded on 4th June 2015, stating that the documents requested for, save for the Terms and Conditions of Management and Supervisory Staff, were not relevant to the 27 charges. The request to call witnesses was denied, on the ground that the named persons, were members of the Board and not Management.
 39. The Court does not think, it was fair to charge an Employee with 27 allegations, and deny him the right to have documents and witnesses he felt were relevant to his defence. It was inappropriate for the Respondent to charge the Claimant with multiple allegations, and then limit him in responding to those allegations. It was not for the Respondent to conduct the Claimant’s defence. It was for the Respondent to supply the documents as requested, and facilitate the attendance of the listed witnesses. Part of the allegations communicated to the Claimant related to matters the Board had closely interacted with. It was imprudent for the Respondent to deny the Claimant the right to call past Board Members as his witnesses. The Respondent was not fair, in purporting to determine what documents or witnesses were relevant.
 40. The Respondent alluded to investigations carried out by DCI, but in the end, did not advise the Claimant on the findings of the DCI. Did the DCI reach the same findings as the Respondent? Why were no criminal proceedings preferred against the Claimant? Although the internal disciplinary process is different from the criminal process, the Respondent alluded to criminal investigations repeatedly, in communicating with the Claimant, and it was important in meeting the demands of procedural fairness, that the Respondent made full disclosure on the process and outcome of the criminal investigations.
 41. Ultimately, procedure was fundamentally flawed, and did not meet the threshold of minimum standards of fairness, under Section 41 and 45 of the [*Employment Act*](#).



42. Remedies. It is declared that termination was unfair.
43. The contract commencing 8th April 2013 did not provide for notice period of 3 months. Copies of this contract exhibited by both Parties, do not have notice period of 3 months, or other period. It is silent. The Claimant appears to base his claim for notice of 3 months, on clause 14 of the contract which commenced on 1st January 2010. That contract had already expired by the time the Claimant's contract was terminated. It was superseded by the contract of 8th April 2013, which did have not a clause on notice. The terms of an outgoing contract cannot be imported into the incoming contract, unless either contract document expressly, states so. The Claimant is awarded 1-month salary in lieu of notice as provided for by the *Employment Act*, at Kshs. 226, 250.
44. Termination, as concluded above was infirm, both in substance and procedure. The Claimant worked cumulatively for 8 years. His last contract was to expire on 7th April 2016. Termination took place on 12th June 2015. There were about 10 months to the end of the contract. The Claimant had served seamlessly, and his contract renewed severally. The Court has not found him to have contributed to the circumstances which led to termination of his contract. He expected to serve to the end of his contract. He mitigated loss of his employment, by securing similar work in Mombasa and Nanyuki. He is granted equivalent of 5 ½ months' salary in compensation for unfair termination, at Kshs. 1,244,375.
45. The Claimant did not give adequate evidence to support his prayer for 45 days of annual leave.
46. There was provision for entertainment allowance, in all the 3 contracts executed between the Parties. The last contract granted the Claimant entertainment allowance of Kshs. 15,000 monthly. The contract does not set conditions for its payment. There was no restriction indicated in the contract on its payment, when the Claimant was in any form of leave. It was part of his remuneration. It was invariable, and part of his monthly salary of Kshs. 226,250. He was still an Employee of the Respondent for the period of compulsory leave, 13th November 2014 to 12th June 2015. He merits and is awarded entertainment allowance over the period of 7 months, at Kshs. 105,000.
47. The contract granted the Claimant gratuity at 25% of the gross 3- year salary. He would receive 10% at the end of the 1st and 2nd years, and the balance on completion of the 3 years. He claims Kshs. 363,000 under gratuity clause. His gross salary over a period of 3 years was Kshs. 8,145,000, while gratuity at 25% of the gross salary, would yield Kshs. 2,036,250. The Claimant prays for Kshs. 363,000 which would presume that part of the gratuity had been received in the past 2 years of the contract. The Respondent did not dispute this benefit expressly, but it is noted that Okee told the Court that the Claimant is entitled to some prayers. He is granted gratuity as prayed, at Kshs. 363,000.
48. The amount received by the Claimant at Kshs. 699,000 shall be deducted from the total sum awarded herein.
49. Costs to the Claimant.
50. Interest is granted at court rate, from the date of Judgment, till payment in full.

In sum, it is ordered:-

- a. It is declared that termination was unfair.
- b. The Respondent shall pay to the Claimant: notice at Kshs. 226,250; compensation for unfair termination at Kshs. 1,244, 375; entertainment allowance at Kshs. 105,000; and gratuity at Kshs. 363,000 – total Kshs. 1,938,625.
- c. Less paid at Kshs. 699,000 – total payable –Kshs. 1,239,625.



d. Costs to the Claimant.

e. Interest granted at court rate, from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF MAY 2023.

JAMES RIKA

JUDGE

