



**Misigo v Athi River Water Services Board (Cause 1157 of 2017)
[2023] KEELRC 1283 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1283 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1157 OF 2017**

J RIKA, J

MAY 31, 2023

BETWEEN

GORDON KHENDI MISIGO CLAIMANT

AND

ATHI RIVER WATER SERVICES BOARD RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 21st June 2017. It was subsequently amended, through a Statement filed on 21st July 2017.
2. He pleads that he was employed by the Respondent State Corporation, as the Human Resource Manager on 4th June 2007. He rose through the ranks, becoming the Head of Corporate Services, earning a gross monthly salary of Kshs 435,000.
3. It was alleged in a meeting of the Finance, Human Resource and General Purpose [FHRGP] Committee, that confidential documents from the Respondent's CEO's files, had been used in a Petition filed by an Activist [not Artist as pleaded] and a 3rd Party. The meeting was to discuss how to stop future leakage.
4. The Claimant was asked to hand over the safe containing personnel files. The full Board convened on 13th April 2017, and resolved to suspend the Claimant. Suspension letter issued the same date. It was alleged that the Claimant released confidential personnel records to unauthorized external parties, and that his performance was dismal.
5. He wrote back seeking details, on 19th April 2017. The Respondent replied on the same day, raising additional and very serious allegations against the Claimant, which bordered on crime. He was asked to attend an enquiry hearing on 8th June 2017. He requested to attend accompanied by his Legal Counsel. The request was refused. He attended alone, during which new accusations were made.



6. On 10th July 2017, the Board unilaterally and irregularly resolved to summarily dismiss the Claimant, after being served with the Un-Amended Statement of Claim. Suspension was not lifted before summary dismissal. He was issued the letter of summary dismissal on 11th July 2017, after service of the Summons the previous day. Suspension and dismissal were malicious
7. He prays for declaration that suspension and summary dismissal were unfair and unlawful; reinstatement without loss of benefits; or special damages comprising salary and allowances for April to July 2017 at Kshs 2,089,500; salary and allowances for August 2017 to October 2018 at Kshs 8,162,750- total Kshs 10,252,250; damages for wrongful dismissal equivalent of 12 months' salary; costs; and interest.
8. The Respondent filed its Response to the Amended Statement of Claim, on 21st September 2017. It is conceded that the Claimant was employed by the Respondent. His contract was terminated by the Respondent's Board on 11th July 2017. He was informed about his right of appeal, exercisable 6 months from the date of termination. The Respondent strictly went by the law, as stated in the HR Manual.
9. The Claimant frustrated the handover process. He refused to complete the process of taking inventory of all the assets. He took away a laptop, which is official government property.
10. It is correct that he was suspended to give room for investigations. He was furnished with details of the allegations against him, through a letter dated 13th April 2017. He was advised to represent himself at the hearing, or to use a representative or expert of his choice. No fresh allegations were made at the hearing. There was no provision in the Manual for lifting of suspension before termination. The Manual is categorical that where an Employee is summarily dismissed, the Employee shall not be entitled to payment of benefits. The process was not driven by malice and was fair. The Respondent prays the Court to dismiss the Claim with costs.
11. The Claimant filed a Reply to the Statement of Response, on 28th September 2017. He reiterates his averments, while denying the correctness of the Respondent's Pleadings.
12. He gave evidence on 18th November 2021 and 21st June 2022, when he rested his case. Martha Wanjiku, Learned Legal Officer of the Respondent, gave evidence on 26th October 2022, closing the hearing.
13. The Claimant adopted his Witness Statement, Documents, and Supplementary Documents in his evidence. He restated his employment history with the Respondent, and his terms and conditions of service. He did not have disciplinary issues. He had been promoted severally.
14. Some confidential documents were said to have been leaked to 3rd parties. He was asked to transfer documents which were in his custody to the CEO, on 11th April 2017. The Board convened on 13th July 2017, and suspended the Claimant for 3 months. While on suspension, he received a letter from the Respondent alleging that he leaked an Employee's confidential information, and secondly, that his performance was below par. He wrote back on 19th April 2017, asking for details. The CEO did not favour the Claimant with a response.
15. Instead, the Claimant was encountered with fresh allegations. He was told that he had carted away Respondent's laptop, that he did not prepare an inventory when he left, and that he avoided search by KK Security Guards. These allegations were untrue and unrelated to the initial ones. He was authorized to have the laptop. He had not been asked to surrender the laptop. He prepared inventory, which was countersigned by the Human Resource Officer.
16. On 23rd May 2017, he was invited to an enquiry hearing. He was alleged to have disclosed confidential information. He was not the custodian of the documents. The custodian was the procurement



- department. He was after the enquiry, told that his contract had been terminated. Reasons for the decision were not stated. This was an outcome of the investigations. He had at the time already served the Summons and the Statement of Claim on the Respondent.
17. He was not paid salary for April to July 2017. He was not paid gratuity. He had accrued annual leave. He was not given a breakdown of any payment. His contract was for 3 years, to expire at the end of October 2018. He had 15 months of service left, at the time of termination. He seeks salary for the balance of the contract period. He prays the Court to allow the Claim.
 18. Cross-examined, the Claimant told the Court that he joined the Respondent on 4th June 2007. Cumulatively, he had served for about 25 years. He was familiar with the Human Resource Manual, which was revised in 2010.
 19. There was a Petition filed at the High Court in Nairobi, Petition Number 435 of 2016, Okiya Omtatah Okoiti v Athi River Water Services Board & 18 others. He exhibited the Affidavit filed by the Petitioner, in the Claim herein. He did not know why the Affidavit was in his record. He did not know what the issue in the Petition was. He did not get the Affidavit from the Petitioner. He got it from the Judiciary website.
 20. At paragraph 5 of his Statement of Claim, the Claimant referred to a Board meeting, where the Petition was discussed. He told the Court that this was not the same Petition, relating to the Affidavit sworn by the Petitioner at the High Court.
 21. The minutes of the enquiry meeting referred to Petition Number 3 of 2017, filed by Okoiti at the Employment and Labour Relations Court. The minutes indicate that confidential information was leaked. The letter related to appointment of the CEO. It was in a safe, in the Claimant's office. The second letter related to the terms and conditions of service of the CEO. The Claimant did not know if it was in the CEO's file. He did not know if the letter of appointment, went with the terms and conditions of service. A copy was kept by the Legal Department. The Board evaluation report on the CEO, would be kept by the Legal Department. Human Resource Department would have a copy to the letter of renewal of the CEO's contract. The enquiry meeting minutes, state that some folios, in the CEO's file went missing. The Claimant did not explain how the missing documents were in the hands of Petitioner, Okiya Omtatah Okoiti.
 22. The Claimant did not jump the fence at the workplace, in an attempt to escape the long arm of the law. Page 11 of the Claimant's documents exhibited in his Affidavit sworn on 20th June 2017, states that the Claimant jumped the fence. This, the Claimant told the Court, is not his document. He did not jump the fence.
 23. The Human Resource Manual, at page 84 provides for suspension without pay. An Employee may be suspended for 6 months, without pay. The Claimant seeks pay for the period under suspension, April to July 2017. According to the Claimant, the provision in the Human Resource Manual, allowing the Respondent to suspend an Employee for 6 months without pay, is unlawful. He was entitled to gratuity under his contract. House allowance for the period of suspension is permissible. Suspension letter did not say it was without pay.
 24. The allegations on enquiry hearing, were the same as the reasons stated in the letter of termination, in justifying termination. He seeks arrears of salary for the period 2017-2018. He was not an Employee at the time. The arrears cover the remainder of his contract period.



25. He received the notice to attend the enquiry hearing. He responded to all the allegations. He explained his position. He was informed about the outcome on 17th July 2017. Procedure is anchored in law and the *Employment Act*. The Claimant ceased being an Employee on 10th July 2017.
26. Redirected, the Claimant told the Court that he did not have disciplinary issues, prior to the allegations of 2017. He was not issued a letter to show cause. He was not called to any meeting before suspension. He replied to the allegations in the letter of suspension. He addressed all the issues. He was not evaluated on performance. He was served with the notice of enquiry hearing, after he served the Court Summons upon the Respondent. He never jumped the fence. He was not required to prepare an inventory. He was not interrogated by the Police. He has not received any dues to-date.
27. Martha Wanjiku relied on her Witness Statement, Documents and Supplementary Documents filed by the Respondent, in her evidence.
28. She told the Court that the Board met on 11th April 2017 and 13th April 2017. It was resolved that the Claimant is suspended, for disclosure of confidential information. He was the custodian of the confidential information. The documents included letters on terms of the contract for the CEO and letter on renewal of the CEO's contract. The Claimant was issued a letter of suspension. The reasons were given. He wrote back. He was asked to hand over his laptop and other documents in his custody, on 13th April 2017. He did not do so. He jumped over the fence with the laptop. The incident was reported to the Police as per OB number on record. The laptop was required for investigations on the allegations facing the Claimant. He was issued letter to show cause. The allegations against him were specified. His conduct amounted to gross misconduct. He was asked to explain his position within 7 days. He was invited to a disciplinary hearing. His procedural rights were explained. Hearing took place on 8th June 2017. The Claimant attended and defended himself. He did not deny that he was the custodian of the confidential information which leaked to 3rd Parties. The Disciplinary Committee forwarded its report to the Board. A decision was made to terminate the Claimant's contract. Reasons for the decision were stated. The Respondent acted in accordance with its Human Resource Manual. The Claimant leaked confidential information to Okiya Omtatah Okoiti, to aid in a Petition filed by Okoiti.
29. Cross-examined, Wanjiku told the Court that she was employed by the Respondent in May 2016. The Claimant was Head of Corporate Services. He also headed Human Resource. Human Resource Manager Carolyne was below the Claimant. Violet also was below the Claimant. The two ladies had access to personnel file. Wanjiku confirmed that there were allegations against the Claimant on leakage of confidential information. He was suspended, taken through a disciplinary hearing, and dismissed.
30. He was also accused of unsatisfactory performance. At the disciplinary hearing, there were Officers who stated that the Claimant asked them to photocopy confidential documents, and pass them over to Okoiti. Okoiti did not record a statement saying he received such documents. There were no appraisal forms relating to the Claimant's performance. Termination took place while the Claim was pending before the Court. Wanjiku did not know that the Police investigated the allegations against the Claimant and absolved him. KK Security Guards managed the gate. The Claimant refused to hand over his laptop and jumped over the fence. Wanjiku did not know how activist Okoiti obtains his information in pursuing litigation. She did not know if filing of the Claim herein, instigated the termination of the Claimant's contract.
31. The issues are whether termination was based on valid reason[s] [sections 43 and 45 of the *Employment Act*]; whether it was procedurally fair [sections 41 and 45 of the same law]; and whether the Claimant merits the remedies as pleaded.



The Court Finds: -

32. The Claimant was employed around 4th June 2007 by the Respondent, as its Human Resource Manager. He rose through the ranks, to become the Head of Corporate Services and Administration, earning a monthly salary of Kshs 435,000 as of the date of termination, 11th July 2017. He avers that there was, at the time of termination, a period of 15 months left to the end of his contract. He prays for among others, anticipatory salary and sundry benefits, over the 15 months left to the end of his contract.
33. Reason[s]. The letter recommending to the Board, that the Claimant is summarily dismissed, signed by Acting Chief Executive Engineer Michael Thuita, dated 11th July 2017, outlines the offences levelled against the Claimant, and the specific outcome on each count.
34. He was alleged to have disclosed confidential information pertaining to the Board's contract documents No AWSB/WASSIP-AF/W-2/2015 to external parties, contrary to clause 12.3 and 12.7 of the Human Resource Policy and Procedures Manual. The finding was that photocopies of the contract documents entrusted to the Claimant, were found by the Disciplinary Committee, to have appeared in the Petition filed by Okoiti.
35. A second count on disclosure of confidential information was that, the Claimant disclosed records under the CEO's file. It was the finding of the Disciplinary Committee that the Claimant, as the Custodian of safe key, was responsible for the release of CEO's file to external parties.
36. A third count was that the Claimant was involved in acts of insubordination and wilful neglect to perform official duties. He failed to act on the resolution of the Board. It was alleged that the Claimant was to ensure the former Legal and Compliance Manager was paid her notice, after recovery of the Respondent's property. The Legal Manager was discharged without full recovery to the Respondent. The performance- based allegations were not established. There was no evidence of appraisal of the Claimant's performance, placed before the Court.
37. The last charge and reason in justifying termination was that the Claimant engaged in discreditable conduct, likely to bring disrepute the Respondent. He was alleged and found to have escaped from the Respondent's premises at Africa Re Building on the evening of 13th April 2017, by jumping over the fence, to avoid search by KK Security Guards.
38. The evidence adduced by both Parties before this Court, does not support the charge and finding relating to the discharge of the former Legal and Compliance Manager. The Court does not recall mention of the Legal and Compliance Manager, in the evidence of the Claimant and that of Martha Wanjiku. This ground does not seem to feature in the pleadings filed by the Parties, and in the view of the Court, does not qualify as a valid reason to justify termination.
39. On disclosure of confidential records, the Claimant explained on cross-examination that he exhibited an Affidavit sworn by Petitioner Okoiti, in High Court Petition Number 435 of 2016. He however, was not able to explain why he exhibited the Affidavit. He did not know what the issues in the Affidavit were. He obtained the Affidavit from the Judiciary website.
40. This explanation was strange in the respectful view of the Court. Why would the Claimant place before the Court, an Affidavit whose contents he is not able to explain?
41. A casual reading of the Affidavit suggests the Petition 435 of 2016 at the High Court involved Okoiti and the Respondent's Board. There were allegations of confidential documents leaked to Okoiti, who argued in his Affidavit that the documents represented whistleblower evidence. The Claimant was not



however, able to show to the Court how the Affidavit and Petition No 435 of 2016 in general, related to his Claim.

42. He further told the Court on cross-examination that paragraph 5 of his Statement of Claim, states there was a Board meeting, convened to discuss a Petition filed before the Court. The Petition in question was not Petition 435 of 2016. The Petition in question was E&LRC Petition Number 3 of 2017 filed by Okoiti against the Respondent.
43. It was conceded in the cross-examination of the Claimant, that the minutes of the disciplinary enquiry, state that confidential documents were exhibited in Petition Number 3 of 2017. The documents included letter of appointment of the CEO. The Claimant conceded that the letter was in the CEO's file, which was housed in a safe, in the Claimant's office. There was another letter to the Board Chairman, relating to terms and conditions of service of the CEO. Folios in the hands of Petitioner Okoiti, were found to be missing from the CEO's files. The Claimant conceded on cross-examination that he did not explain how these files were accessed by Okoiti.
44. The Court would agree with the Respondent, that the Claimant was shown to have played a role in disclosure of the Respondent's confidential personnel files. His explanation under examination in chief, that he was not the custodian of the documents, and that the Procurement Department was the custodian, appears to the Court to be misleading, in light of his concession on cross-examination, that the CEO's file was in a safe in his office.
45. Disclosure of confidential information, particularly given that the Claimant was Head of Corporate Services, also responsible for Human Resources function, was clearly in breach of the cornerstone elements in an employer-employee relationship, of trust and confidence. The Claimant held a high office, entrusted with the safe custody, of the Respondent's confidentialities. The information related to the employment of the CEO. It was held in a safe, in the Claimant's office. It was shared with Okoiti. The Claimant breached the trust and confidence placed on him by the Respondent, by rendering a hand to 3rd Parties, who had hauled the Respondent to Court, over perceived governance shortcomings.
46. The Claimant was alleged, and found to have engaged in discreditable conduct. He jumped over the fence at the office premises. The Court found the Claimant's evidence on this allegation, like his evidence about confidential documents being held in the custody of the Procurement Department and not by him, rather unsettling. What did he say about jumping the fence? He said, on cross-examination, "I did not jump the fence. My bundle of documents, page 11, says I jumped over the fence. This is not my document. I did not jump over the fence."
47. The document in question was of course a document filed by the Claimant. It is his document. He cannot be heard to say, it is not my document. He filed the document, marked as 'GKM-3.' He says, "while there [office premises], I got information that firm instructions had been given for me not to be allowed to leave the premises, and Policemen had been summoned to come and arrest me, since I had not handed over my laptop. As a matter of self-help and to save myself from any imminent risk, and / or bodily harm, I decided to jump over the fence."
48. Why does the Claimant deny before the Court that he jumped over the fence? It was an act that would have caused the Respondent reputational damage. The Claimant jumped the fence as a fugitive. He was running away from the law. He was running away from Policemen and KK Security Guards. He was avoiding arrest and surrender of the laptop, which was required in investigating the allegations on disclosure of confidential documents. He set a very bad example for junior staff, by opting to jump over the fence, for whatever reasons. There was a gate, manned by KK Security Officers where rational Employees passed through, and submitted to entry and exit security checks. Why would a top Executive



jump over the fence and avoid arrest and security check? What the Claimant calls an act of self-help, was a distinctive act of gross misconduct.

49. The Court is satisfied that termination was substantively justified, under Section 43, 44[4] and 45 of the *Employment Act*, as well as clause 12.7 of the Respondent's Human Resource and Procedures Manual.
50. Procedure. The Claimant was suspended through a letter from the CEO, dated 13th April 2017. The allegations against him were outlined. He was suspended without monthly basic pay, but with house allowance. The Respondent invoked clause 12.8 of the Manual on this.
51. He wrote in person to the Respondent on 19th April 2017, seeking details of the allegations contained in the letter of suspension. He wrote a similar letter through his Advocate on the same date, 19th April 2017.
52. The Respondent did not reply directly to these letters. The Claimant states that he was not heard before suspension, but the Court does not think that he was required to be heard, before suspension.
53. The Respondent issued the Claimant a letter to show cause, dated 19th April 2017. This is the same date the Claimant and his Advocate wrote letters to the Respondent seeking details of the allegations in the letter of suspension. He does not seem to have replied to the letter to show cause.
54. The Respondent wrote to the Claimant on 22nd May 2017 informing him that he had not replied to the letter to show cause. He was granted an extension of 7 days to reply. He did not reply, and was therefore notified of enquiry [disciplinary hearing under the Manual] before the Board, on 8th June 2017. The hearing notice is dated 23rd May 2017. He was advised through a letter dated 2nd June 2017, of his right to be accompanied at the hearing by another Employee or a shop floor trade union representative. The Claimant wrote through his Advocate on 6th June 2017, informing the Respondent that the Claimant would attend the disciplinary hearing, on without-prejudice -basis.
55. The hearing was conducted on 8th June 2017, with the full participation of the Claimant.
56. The Board recommended termination of the Claimant's contract. The letter of termination dated 18th July 2017 issued. Effective dated was 11th July 2011 when the Board recommended termination. The letter advised the Claimant that he would be paid full salary, gratuity and leave days, subject to clearance.
57. The Court does not find fundamental departure in the procedure adopted by the Respondent, and the procedure prescribed by the Respondent's Human Resource Manual, and the *Employment Act*.
58. There were however infirmities, on payment of terminal dues, as discussed below.
59. Remedies. The Claimant exhibited his Employee Separation and Clearance Form. The Form is executed by the Claimant and relevant Functionaries of the Respondent, who included the Senior Human Resource Officer.
60. The Form indicates that the Claimant did not owe the Respondent any liability. The Senior Human Resource Officer indicated that the Claimant was owed salary and allowances for the period 12th June to 10th July 2017.
61. The CEO certified that the Claimant had been fully and satisfactorily cleared by the Board.
62. It is not clear to the Court why the Respondent offered to pay to the Claimant salary and allowances, confined to the period 12th June 2017 to 10th July 2017, while the advice had been that the Claimant



would not be paid basic salary for the period of suspension, in accordance with clause 12.8 of the Manual.

63. The CEO advised the Claimant that “you will be paid your full salary and other benefits due to you subject to clearance from the Board.” This advice conforms to Section 18 [4] of the *Employment Act*, which states that, “Where an Employee is summarily dismissed for lawful cause, the Employee shall on dismissal be paid all monies, allowances and benefits due to him up to the date of dismissal.”
64. The Claimant was still an Employee of the Respondent, until 11th July 2017 when his contract was terminated. His contract was still alive, until terminated. An Employee undergoing a disciplinary process does not cease to be an Employee. The contract of employment did not cease, until 11th July 2017. The Court would allow the prayer for basic salary for the period April to July 2017, at Kshs 1,340,000 as prayed.
65. The letter of dismissal promised that the Claimant would be paid unutilized leave days and gratuity, up to and including 10th July 2017. He tabulates gratuity at 31% of the basic salary for the 4 months, at Kshs 415,400. The Respondent did not give an alternative tabulation, while acknowledging this obligation. Likewise, the Claimant states he was owed 21 days of annual leave, tabulated at Kshs 234,500. There is no alternative sum in annual leave, advanced by the Respondent. The prayers for gratuity and annual leave are granted, at Kshs 415,400 and Kshs 234,500 respectively.
66. Prayers for other allowances have not been established and are declined.
67. The prayer for anticipated salaries and allowances for 15 months left in the Claimant’s contract, is declined. The Claimant was largely to blame for the circumstances that justified premature termination of his contract. His contract ended on 11th July 2017, and there was no obligation on the part of the Respondent, to pay him anything, beyond the date of termination.
68. There is no merit at all in the prayer for reinstatement. The Claimant jumped over the fence, and out of employment. He was the main cause of early termination of his contract of employment. He does not merit reinstatement or damages for unfair termination as pleaded. Termination was fair and lawful, save for payment of terminal benefits, a flaw the Court has corrected by granting terminal dues above.
69. Each Party to meet its own costs.
70. Interest allowed at court rate, from the date of Judgment till payment is satisfied in full.

In sum, it is ordered: -

- a. Termination was fair.
- b. The Respondent shall pay to the Claimant terminal dues as offered in the letter of termination, comprising withheld arrears of basic salary at Kshs 1,340,000; gratuity at Kshs 415,000; and 21 days of annual leave at Kshs 234,000 – total Kshs 1,989,000.
- c. Interest granted at court rate, from the date of Judgment till payment in full.
- d. No order on the costs.

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

JAMES RIKA
JUDGE

