



**Rono v Kenya Electricity Generating Company Limited & another (Cause 984 of 2017) [2023] KEELRC 1375 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1375 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 984 OF 2017**

**J RIKA, J  
MAY 31, 2023**

**BETWEEN**

**BENSON RONO ..... CLAIMANT**

**AND**

**KENYA ELECTRICITY GENERATING COMPANY LIMITED .... 1<sup>ST</sup>  
RESPONDENT**

**KENGEN STAFF RETIREMENT BENEFITS SCHEME ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 29<sup>th</sup> May 2017.
2. He was employed by the 1<sup>st</sup> Respondent as a Clerk, on 1<sup>st</sup> March 2000.
3. He earned a monthly gross salary of Kshs. 14,000.
4. He was employed on permanent and pensionable terms.
5. He was employed by the 2<sup>nd</sup> Respondent in February 2009.
6. On 24<sup>th</sup> April 2012, the 2<sup>nd</sup> Respondent entered into a property management agreement with Villacare Management Limited. The latter was to take care of the 2<sup>nd</sup> Respondent's apartments known as Kengen RBS Gardens, situate at Parklands, in Nairobi.
7. The Management Company made periodic reports to the 2<sup>nd</sup> Respondent's Board of Trustees. The Claimant's role as an Assistant Accountant, was to forward bank statements through e-mail, to the Management Company, Facility Manager, Accountant, and Receptionist, who would conduct rent reconciliation, and issue receipts to the Tenants.
8. Monthly meetings were held to accounts. The Claimant attended these meetings. During the meetings, the Trust Secretary cautioned the Facility Manager over collection of rent through cash payments.



- The agreement between the 2<sup>nd</sup> Respondent and the Management Company provided for cheque payments.
9. The management agreement came to an end on 30<sup>th</sup> September 2015. During the handover process, discrepancies were noted in the accounts. Rent that was supposed to have been deposited in the 2<sup>nd</sup> Respondent's account, was not traceable.
  10. UHY Auditors were engaged by the 2<sup>nd</sup> Respondent to investigate. The Audit faulted the Management Company for gross negligence. The Management Company denied any wrongdoing.
  11. The Claimant was sent on compulsory leave by the 2<sup>nd</sup> Respondent on 1<sup>st</sup> February 2016. He was required to respond to allegations contained in the letter, which he did. He was invited to disciplinary hearing to take place on 24<sup>th</sup> March 2016. He was suspended on 10<sup>th</sup> June 2016. His contract was terminated on 16<sup>th</sup> August 2016. He states that his last gross monthly salary was Kshs. 210,000.
  12. He prays for Judgment against the Respondents as follows: -
    - a. The sum total of all monies, allowances and benefits due to him, from the date the letter of suspension was sent.
    - b. General, aggravated, exemplary and/or special damages, whichever combination the Court may deem just and expedient.
    - c. Reinstatement pursuant to Section 49 [3] of the [Employment Act](#).
    - d. Costs.
    - e. Interest.
    - f. Any other suitable relief.
  13. The Respondents filed their Memorandum of Appearance on 9<sup>th</sup> June 2017, and the Statement of Response, on 23<sup>rd</sup> June 2017. It is agreed that the Claimant was employed by the 1<sup>st</sup> Respondent, and transferred to the 2<sup>nd</sup> Respondent. He was promoted as the Accounts Assistant as pleaded.
  14. His duties included: inputting and verifying data in the accounts ERP system; generating accurate, useful and timely reports for information and decision-making; maintaining safe custody, and ensuring proper access and retrieval of finance records; preparation of relevant vouchers as required with all reporting documents; receiving and verifying payment claims and supporting documents; enquiring compliance with organization policies and procedures on all accounting transactions; maintaining assets and resources in good condition; planning for the preparation and disbursement of petty cash; managing the collection of cash and cheques; reconciliation of clients' accounts and statements on monthly basis; checking invoices against supporting documents in preparation of payment; planning for debt collection as per targets and allocation of receipts from debtors; and, any other duties as may be assigned by the supervisor.
  15. It was his responsibility to reconcile bank statements, and afterwards, forward the bank statements to the Management Company, for issuance of receipts to tenants. He was to prepare a report upon reconciliation and transmit to his supervisor, in preparation for the monthly meetings.
  16. He failed to perform his duties, and presented defective and inaccurate reports to the 2<sup>nd</sup> Respondent. Rent was supposed to be collected by cheque, not cash. The Claimant failed to ensure compliance on this. This occasioned huge loss to the 2<sup>nd</sup> Respondent.



17. It is true that UHY conducted audit, on handing over by the Management Company. The audit uncovered a huge financial loss to the 2<sup>nd</sup> Respondent, amounting to Kshs. 166,102,388 between the years 2009 to 2015.
18. The audit implicated Employees of the Management Company. The 2<sup>nd</sup> Respondent instituted arbitration proceedings against the Management Company which were still going on at the time the Statement of Response herein, was filed.
19. The arbitration proceedings were independent from the disciplinary proceedings initiated against the Claimant.
20. He was sent of compulsory leave on 1<sup>st</sup> February 2016. He was issued notice to show cause on 10<sup>th</sup> March 2016. He responded on 10<sup>th</sup> March 2016. He was issued notice of disciplinary hearing, for 24<sup>th</sup> March 2016. He was heard on 24<sup>th</sup> March 2016. He was suspended on 10<sup>th</sup> June 2016, pending the outcome of the disciplinary hearing. He was found liable for gross negligence and abuse of office. Details of negligence and abuse of office were: failure to conduct bank reconciliation with regard to monthly rent receipts and amounts banked; failure to report discrepancies between expected rental income and bank statements; failure to report and account for losses incurred by the 2<sup>nd</sup> Respondent; failure to observe policy and regulations which forbade payment of rent by cash; failure to institute controls to safeguard pilferages; and failure to properly perform his assigned duties and responsibilities.
21. His contract was terminated on 16<sup>th</sup> August 2016. He was offered salary up to, and including 16<sup>th</sup> August 2016; 1-month salary in lieu of notice; 205 unpaid leave days; and benefits under Kengen Defined Contribution [DC] Scheme, payable upon clearance with the 2<sup>nd</sup> Respondent.
22. The Claimant was arrested and charged with the offence of stealing, following the loss sustained by the 2<sup>nd</sup> Respondent.
23. His contract was fairly and lawfully terminated. The Respondents pray for dismissal of the Claim with costs.
24. The Claimant filed a Reply to the Statement of Response. He reiterates the contents of his Statement of Claim, and denies allegations of negligence pleaded by the Respondents. He had no authority to supervise the Management Company. The Chief Executive Officer and the Property Officer were best suited to oversee the Management Company. UHY did not find that the 2<sup>nd</sup> Respondent lost money because of the Claimant's negligence. The Claimant's conduct did not warrant disciplinary action. The Police conducted shoddy investigations under pressure, resulting in the charging of the Claimant, in a criminal case that had not taken off by the time he filed this Claim.
25. The Claim herein was fixed for hearing and adjourned severally at the instance of the Parties. It was adjourned on 5<sup>th</sup> March 2021 on account of Respondent's Counsel bereavement; it was adjourned on 1<sup>st</sup> July 2021, to allow the Claimant's Counsel file additional documents, including a ruling from the criminal trial; it was adjourned on 22<sup>nd</sup> July 2021 over the same reason concerning additional documents; it was irregularly fixed for hearing on 16<sup>th</sup> December 2021, and taken out by the Court; on 29<sup>th</sup> March 2022 it could not take off because Claimant's Counsel had been taken ill; and, on 29<sup>th</sup> January 2023 it was the Respondent's Counsel who was unwell and hearing could not take off.
26. To expedite disposal of the Claim, the Court directed on 29<sup>th</sup> January 2023, that the Claimant proceeds under Rule 21 of the Employment and Labour Relations Court Procedure Rules, which allows the Court to determine Claims on documentation.



27. The issues are: whether the Claimant's contract was terminated following a fair procedure, based of valid reason[s]; and whether he merits the remedies sought.

### **The Court Finds -**

28. The Claimants employment history, and his terms and conditions of service, are not contested. He was employed first by the 1<sup>st</sup> Respondent on 1<sup>st</sup> July 2007 as a Clerk. He was employed by the 2<sup>nd</sup> Respondent as an Assistant Pensions Accountant, on 2<sup>nd</sup> February 2009. His contract was terminated by the 2<sup>nd</sup> Respondent on 16<sup>th</sup> August 2016, following a disciplinary hearing that took place on 24<sup>th</sup> March 2016. He was alleged to have failed to do reconciliation of the 2<sup>nd</sup> Respondent's accounts, in relation to rent income, from the 2<sup>nd</sup> Respondent's apartments. The 2<sup>nd</sup> Respondent was found to have lost a staggering sum of Kshs. 166,102, 388
29. Procedure. The Claimant was sent on compulsory leave on 1<sup>st</sup> February 2016 to facilitate investigations.
30. He was issued notice to show cause on 10<sup>th</sup> March 2016. There were 2 broad charges communicated the Claimant: that he failed to do bank reconciliations tying rent receipts to amounts banked; and failed to observe regulations that did not allow tenants to make cash payments.
31. He replied at length on the same date. He stated that the RBS Apartments Accountant, undertook rent receipt reconciliation. He did not fail to observe regulations. The mode of rent payment depended on individual tenancy agreements. He was remorseful that the 2<sup>nd</sup> Respondent may have incurred substantial loss. He blamed the Management Company for not doing its work, and failing to submit collected rent to the 2<sup>nd</sup> Respondent.
32. He was invited to appear before the disciplinary committee, through a letter dated 22<sup>nd</sup> March 2016. Hearing was scheduled for 24<sup>th</sup> March 2016.
33. The invitation does not disclose if the Claimant was advised to attend the hearing in the company of a colleague, or a trade union representative of his choice, in accordance with Section 41 of the [\*Employment Act\*](#).
34. The minutes of the meeting dated 24<sup>th</sup> March 2016 show a disciplinary committee of 4 persons oversaw the disciplinary proceedings. The minutes are sketchy. It is a one- page document. It does not capture the Claimant defending himself verbatim. The minutes do not depict a disciplinary hearing, with questions and answers. They are in the form of redacted version of a disciplinary report. Another Employee, Nelly Muregi, was heard alongside the Claimant according to this redacted report. There are no detailed minutes, disclosing what was alleged against the Claimant, what he stated in his response, and what the findings on each allegation was made. Disciplinary hearing should clearly disclose allegations against the Employee, and record the verbatim responses made.
35. The minutes do not show that the Claimant was accompanied by a colleague of his choice, or a trade union representative. There are no representations made by such a colleague or trade union representative on record.
36. He was suspended 3 months after the disciplinary hearing, ostensibly to allow the 2<sup>nd</sup> Respondent make a decision. Suspension was for 2 months, without pay. This suspension did not conform to clause 13.6 of the 2<sup>nd</sup> Respondent's Human Resource Policy Manual. The Claimant pleads that he was unfairly suspended. The Manual provides for suspension for a period not exceeding 2 months, where an Employee is suspected of theft, negligence, misconduct, or other offence being investigated, and it is considered that it is in the interest of the 2<sup>nd</sup> Respondent, that the Employee ceases to exercise the



functions of the office, and provided that proceedings which are being contemplated would be likely prejudiced, by the Employee's presence in the office.

37. The problem here is the 2<sup>nd</sup> Respondent, suspended the Claimant after the disciplinary hearing. It was 3 months after the disciplinary hearing. Suspension was not pending investigations. Investigations preceded the disciplinary hearing. The Claimant went on working for 3 months after the disciplinary hearing. Why was not a decision made close to the end of the disciplinary hearing? Why wait for 3 months and suspend him for 2 months, when there were no pending investigations? Suspension did not conform to clause 13.6 of the Human Resource Policy Manual.
38. On 16<sup>th</sup> August 2016, the 2<sup>nd</sup> Respondent terminated the Claimant's contract. He was offered salary up to 16<sup>th</sup> August 2016; 1- month salary in lieu of notice; and 205 annual leave days. He would also receive his pension dues.
39. Procedure can therefore be faulted on 3 grounds: The Claimant was not advised on his right to be accompanied to the disciplinary hearing by a colleagues or his choice, and was unaccompanied at the hearing; the minutes of the disciplinary hearing do not disclose what specifically the Claimant was asked, and what his response was, to questions asked by the panellists; and suspension came after the disciplinary hearing, rather before it, pending investigations. Clause 13.3 of the Human Resource Policy Manual requires that the Employee is given adequate opportunity to present his case. The minutes on record do not capture the Claimant making any representation. He pleads that the 2<sup>nd</sup> Respondent unfairly terminated his contract, without considering his evidence. Without recording what he said verbatim, in the minutes, it is difficult to disagree with him, that his evidence was not considered. He states that he was unfairly suspended. Clause 13.6 of the Human Resource Policy Manual would support his position.
40. The Court is persuaded that procedure did not meet the minimum standards of fairness, under the 2<sup>nd</sup> Respondent's Human Resource Policy Manual, and Section 41 and 45 of the *Employment Act*, 2007. Procedure was unfair.
41. Validity of Reasons. Although the Claimant was an Assistant Accountant, there was a Management Company engaged by the 2<sup>nd</sup> Respondent, to manage its Apartments at Parklands.
42. The 2<sup>nd</sup> Respondent does not appear to have identified the Claimant's job description properly, under the Property Management Agreement.
43. The Internal Audit Report prepared by UHY, who were appointed by the 2<sup>nd</sup> Respondent as the Internal Auditors in August 2014, has a summary of responsibility concerning the loss suffered by the 2<sup>nd</sup> Respondent, in regard to rent income from the apartments. The summary does not seem to lay blame at the Claimant's doorstep.
44. The summary states: -
  - I. The Property Officer should have been confirming the occupancy on a regular basis, and as a minimum, twice a week.
  - II. The Trust Secretary and Finance Officer should have insisted on getting reports from the system. The system we gather, was procured by the Scheme and so it had the right and responsibility of accessing the system to ensure accuracy and completeness of report presented. Section 3.8 of the Management Agreement stipulates a Manager had a responsibility, " to ensure that proper books of accounts are maintained at all reasonable times, on behalf of the Client and that such records and books of accounts are at all reasonable times, available for inspection by the Official Auditors of the Client."



- III. The Finance Officer should also have been reconciling the rent deposits and receipts as per the bank [statements?] and what was posted into the system.
- IV. The Secretariat should have ensured that no tenancy agreements were signed by Villacare exclusively. The Head of the Secretariat should have been the one responsible for signing of tenancy agreements.
- V. The Secretariat should have insisted on getting proper and adequate monthly report and schedules relating to new tenants, deposit paid, list of occupied and vacant houses and the token allocation, prepayment and debtors' bank reconciliation, security deposit refunds, inventory listing, among others.
- VI. The Secretariat should have noted that some tenants were paying through cash, in contravention of the Scheme's policy and these funds were not received in the bank statements and also not reflected in the reports presented by Villacare.
45. The position taken by the Claimant that loss of rental income was attributable to the manner in which the 2<sup>nd</sup> Respondent's property was managed by the Management Company, rather than the Claimant's negligence, resonates. If tenancy agreements were executed by the Management Company exclusively, how would the Claimant be blamed if the tenancy agreement provided for payment of rent by cash? If the Finance Officer failed to reconcile the rent deposits and receipts as per bank statements and what was posted in the system, why should the Claimant, an Accounts Assistant take responsibility?
46. The Court thinks that the 2<sup>nd</sup> Respondent engaged the Management Company, without clearly instructing the Claimant what role he would discharge, and how he would discharge that role, under the management agreement. He told the Court, and the Court thinks correctly, that he could not supervise the Management Company. The Internal Auditors engaged by the 2<sup>nd</sup> Respondent do not mention the Accounts Assistant anywhere in their Report and appear to lay the blame elsewhere.
47. The 2<sup>nd</sup> Respondent pursued arbitral proceedings against the Management Company as it should. It does not appear, to have had valid reason[s] to justify termination of the Claimant's contract. The loss of rent income could hardly be blamed on the Claimant, and the Auditors did not blame the Claimant. There was a Management Company at the premises, which was given broad responsibilities, including exclusive right to execute tenancy agreements, by the 2<sup>nd</sup> Respondent.
48. The 2<sup>nd</sup> Respondent pursued criminal prosecution of the Claimant in Chief Magistrate's Court at Milimani, CR. Case Number 706 of 2016. Certified copy of Ruling and Judgment from that Court indicates that the Claimant was acquitted on 18<sup>th</sup> June 2021 the Court having found that there was no prima facie case against the Claimant. The 2<sup>nd</sup> Respondent undertook a disciplinary process, and although not bound by the criminal process, the fact that the Criminal Court, like UHY Auditors, did not place blame on the Claimant for loss of the 2<sup>nd</sup> Respondent's rental income of Kshs. 166, 102, 388, gives added weight to the Claimant's protestation that his contract was terminated without valid reason[s].
49. Termination was not based on valid reason[s], under Section 43 and 45 of the *Employment Act*, 2007.
50. Remedies. The prayer for reinstatement is not practicable, reasonable or legal, termination having taken place on 16<sup>th</sup> August 2016, 7 years ago. Section 12 [3] [v] of the *Employment and Labour Relations Court Act* limits the remedy of reinstatement to 3 years, from the date of termination.
51. The Claimant was offered salary up to and including the date of termination, 16<sup>th</sup> August 2016. He claims under prayer 32 [i] remuneration due from the date of suspension, which would be the period



between 10<sup>th</sup> June 2016 to 16<sup>th</sup> August 2016. He has not pleaded specific figure. The 2<sup>nd</sup> Respondent shall pay to the Claimant remuneration due, during the period of suspension.

52. Prayer 32[ii] is rather ambiguous, asking the Court to avail general, aggravated, exemplary and/or special damages, whichever combination the Court may deem just and expedient. A litigant should not make generalized prayers, and leave the Court to grant whichever combination. Specific damages must be pleaded and established, and are not an alternative to general, aggravated, exemplary damages. The Claimant ought to have simply pleaded for compensation as an alternative to reinstatement. He worked for the 1<sup>st</sup> Respondent from 1<sup>st</sup> July 2007 to 1<sup>st</sup> February 2009 when he was employed by the 2<sup>nd</sup> Respondent. He pleads at paragraph 4 of his Statement of Claim that he was employed by the 1<sup>st</sup> Respondent on or around 1<sup>st</sup> March 2000. His earliest letter of employment on record is dated 1<sup>st</sup> July 2007. He worked for the 2<sup>nd</sup> Respondent from February 2009 to August 2016, a period of 7 years. He had a warning letter issued 3<sup>rd</sup> September 2015, which was within the validity period, by the time of termination. He was on permanent and pensionable terms, expecting to retire at the age of 60 years, under clause 14.4 of the 2<sup>nd</sup> Respondent's Human Resource Policy Manual. He did not contribute to the circumstances leading to termination of his contract. He merits and is allowed 7 months' gross salary at the monthly rate applicable as of 16<sup>th</sup> August 2016.
53. The 2<sup>nd</sup> Respondent shall pay to the Claimant other items offered in the letter of termination, if these items have not already been paid, including 1-month salary in lieu of notice and 205 days of annual leave. The Claimant shall also be paid benefits under the Kengen Defined Contribution [DC] Scheme, if not already paid.
54. The Claimant did not explain in his Pleadings and Submissions why he joined the 1<sup>st</sup> Respondent to the Claim. He was not an Employee of the 1<sup>st</sup> Respondent from 1<sup>st</sup> February 2009. The Respondents are different legal entities. The 1<sup>st</sup> Respondent did not have a contract with him; did not take disciplinary action against him; and did not terminate his contract on 16<sup>th</sup> August 2016. His association with the 1<sup>st</sup> Respondent ended on 1<sup>st</sup> February 2009. The Claim against the 1<sup>st</sup> Respondent is dismissed with costs.
55. No order on the costs between the Claimant and the 2<sup>nd</sup> Respondent.
56. Interest allowed at court rate, from the date of Judgment till payment in full.

**It is Ordered: -**

- a. Termination was unfair.
- b. The 2<sup>nd</sup> Respondent shall pay to the Claimant remuneration due for the period of suspension, 10<sup>th</sup> June 2016 to 16<sup>th</sup> August 2016.
- c. The 2<sup>nd</sup> Respondent shall pay to the Claimant compensation for unfair termination, equivalent of 7 months' gross salary.
- d. The 2<sup>nd</sup> Respondent shall pay to the Claimant other items offered in the letter of termination if not already paid, including 1-month salary in lieu of notice and 205 outstanding annual leave days.
- e. The Claimant shall be paid benefits under the Kengen Defined Contribution [DC] Benefits, Scheme, if not already paid, as offered in the letter of termination.
- f. The Claim against the 1<sup>st</sup> Respondent is dismissed with costs to be paid by the Claimant, to the 1<sup>st</sup> Respondent.
- g. No order on the costs, between the Claimant and the 2<sup>nd</sup> Respondent.



h. Interest allowed at court rate from the date of Judgment.

Dated, signed and released to the Parties via e-mail at Nairobi, under Practice Direction No. 6 [2] of the Electronic Case Management Practice Directions, 2020, this 31<sup>st</sup> day of May, 2023.

James Rika

Judge



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