



**Oywa v Telecontact Limited (Cause 585 of 2018)  
[2023] KEELRC 1612 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1612 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 585 OF 2018**

**SC RUTTO, J  
JUNE 30, 2023**

**BETWEEN**

**BENJAMIN OYWA ..... CLAIMANT**

**AND**

**TELECONTACT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The instant suit was instituted by way of a Memorandum of Claim dated April 12, 2018 through which the claimant avers that he was employed by the respondent on November 1, 2014 as a Senior Agent. He rose through the ranks to hold the position of Operations Supervisor. According to the claimant, he was a diligent and loyal worker to the respondent hence he has termed his termination from employment as unfair, premature, unlawful and unjustified. Consequently, he seeks inter alia against the respondent, notice pay, compensatory damages, damages for the loss of income from the date of dismissal to retirement age, severance pay for 3 years worked and certificate of service.
2. In response to the Claim, the respondent avers that it terminated the claimant’s employment following a violation of its Standard Operating Procedures (SOPs) by processing an application and taking biometrics for premium lounge applicants without any payments being received. It further contends that the claimant was subjected to a fair hearing and a fair process was adopted in disciplining him. On this account, the respondent has asked the Court to dismiss the claimant’s claim with costs.
3. During the trial which took place on June 9, 2022 and February 14, 2023, both sides called oral evidence.

**Claimant’s case**

4. The claimant testified in support of his case and to start with, he relied on his witness statement which he asked the court to adopt as his evidence in chief. He further produced the documents filed together with his Claim as exhibits before court.



5. It was the claimant's evidence that on or about December 4, 2017 he received a letter dated December 4, 2017 with the title 'HR Questionnaire' informing him of primary investigations and asking him to answer why he had taken Biometrics for unpaid premium lounge applicants. He gave a detailed explanation as to the occurrences being questioned by the respondent and on or about 6<sup>th</sup> December, 2017, he received letter of suspension from the respondent indicating that he would be on a fully paid suspension from the 7<sup>th</sup> to 13<sup>th</sup> of December, 2017 to pave way for investigations. The said letter of suspension also informed him that there would be further communication from the respondent on December 14, 2017.
6. The claimant further stated in evidence that the respondent conducted a disciplinary hearing on December 14, 2017 upon which he received a letter on December 15, 2017 relieving him from his duties on grounds of fraud.
7. Terming the respondent's actions as unlawful and un-procedural, the claimant averred that he was never supplied with detailed reasons for his suspension contrary to the employment and labour laws specifically section 41 of the *Employment Act, 2007*. That further, during the disciplinary hearing, he was never accorded a chance to be accompanied with an employee of his choice which is also a violation of his labour rights. He further stated that no evidence was put to light from the investigations purportedly carried out by the respondent to prove that he had been involved in the fraud allegations.
8. According to the claimant, the respondent had beforehand made the decision of terminating his employment since the same decision was made without hesitation during the hearing by the panel members without consideration or any deliberation of his representations. He has further termed the letter of termination of employment on the basis of fraud as ambiguous and devoid of necessary detail.
9. The claimant stated in further evidence that the respondent failed to take into account that the Visa Application process was wrecked with many issues and problems that were tantamount in leading to errors such as taking biometrics for unpaid premium lounge applicants. That despite the technical issues being experienced by the respondent company and being the cause of such lapses like biometrics taking of unpaid premium lounge applicants which could have been caused by any of the employees working in the biometrics taking booth, the respondent without evidence or proof unlawfully terminated him.
10. Concluding his testimony in chief, the claimant stated that as a result of termination of employment he incurred a loss of income and earnings which subjected him to great difficulties. He asked the court to allow his claim as prayed.

### **Respondent's case**

11. The respondent called oral evidence through Mr. Fredrick Gitahi, its Operations Manager-East Africa, who testified as RW1. He started by adopting his witness statement, to constitute his evidence in chief. He also produced the bundle of documents filed on behalf of the respondent as exhibits before court.
12. RW1 told court that the respondent provides immigration and visa application services to various third parties at its offices in Nairobi Kenya.
13. It was his evidence that the claimant's employment contract provided that his employment could be terminated with immediate effect in case of violation of the law or grave misconduct on his part. He could also be suspended from work on full pay to facilitate investigations into any conduct.
14. RW1 stated in evidence that the claimant was responsible for ensuring that the respondent's Standard Operating Procedures were complied with by all staff working under him and in the event of any non-



- compliance and to report any incidents of non-compliance and malpractices. He was also responsible for quality control for all the staff members who were involved in processing of applications.
15. It was RW1's evidence that under the respondent's SOP, any applicant who applied for premium lounge services also known as Value Added Services ("VAS") would be required to pay for the premium services first, before the applicant's documents could be verified and the applicant's biometrics taken. Further, under the SOP, any applicants applying for premium lounge services or VAS services could only pay for these services through online payments or through credit card payments. Cash payments option was not one of the payment options available to any of the applicants at the respondent's office in Nairobi. At the end of every day, reports of all the applications made for each day ("daily manifests") would be received by the VAS supervisor in the back office together with payments made for purposes of quality control and confirmation of payments.
  16. It was his further testimony that on or about December 4, 2017, it came to the attention of the respondent that the claimant had violated the SOPs by processing applications and taking biometrics for premium lounge applicants without any payments being received. The respondent further established the said violation of the SOP by falling to confirm payment of charge for the premium/ VAS client before services were rendered was in furtherance of and/or aid of fraudulent actions whereby applicants would be compelled to pay cash for premium services, which cash was converted and/or stolen by staff involved.
  17. He further stated that had the claimant discharged his obligations diligently, the said fraudulent scheme would not have been effected and it would not have incurred the loss which it did.
  18. Upon discovery of the foregoing violations, the respondent wrote to the claimant on December 4, 2017 and requested him to explain. He gave an explanation in the respondent's HR questionnaire provided. In the meantime, the respondent sent the claimant on administrative suspension on full pay, to enable it complete investigations. The reasons for the suspension were clearly set out in the suspension letter contrary to the claimant's allegations. Upon conclusion of the investigations, the respondent invited the claimant to a disciplinary hearing on December 14, 2017 where he was given a hearing. He was also accorded a chance to call an employee of his choice but opted not to.
  19. The respondent considered the representations made by the claimant and taking into account his role and responsibilities, found him guilty of misconduct hence his employment was terminated. The respondent proceeded to pay the claimant's terminal dues in the sum of Ksh.253,497.00 to his bank account.

### **Submissions**

20. The claimant submitted that the allegation that he enrolled biometrics for premium lounge applicants without payments being received was unsubstantiated both during the so-called investigations by the respondent and in this court. That no particulars of fraud have been supplied before this court to persuade it that he participated or orchestrated or aided fraud.
21. It was the claimant's further submission that when he reported on December 14, 2017, he did not think he was going to sit through a disciplinary hearing based on an investigation report whose findings were foreign to him. He further argued that he was not served with an elaborate notice indicating that there would be a disciplinary hearing which would enable him prepare to defend himself. To this end, he placed reliance on the case of *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* (K) (2017) eKLR to support his position.
22. To this end, the court was urged to find that the claimant was unfairly and unlawfully dismissed from employment.



23. The respondent on the other hand submitted that undersection 43 of the *Employment Act*, an employer is deemed to have substantive justification for terminating a contract of service if it genuinely believed that the matters that informed the decision to terminate existed at the time when the decision was taken. On this issue, it referred the court to the case of *Kenya Revenue Authority v Reuwel Waitbaka Gitahi & 2 others* (2019) eKLR.
24. The respondent further submitted that section 44 (4)(g) of the *Employment Act* does not require the employer to have watertight evidence of the alleged criminal transgression for the ground to arise. That all that is required is for the employer to have justifiable and compelling grounds to suspect that the affected employee has engaged in acts that are criminal in nature and which affect the property or person of the employer. In further support of the respondent's argument, the case of *Thomas Sila Nzivo v Bamburi Cement Limited* (2014) eKLR was cited.
25. The respondent maintained that the claimant either neglected, ignored or intentionally failed to confirm payment of charges for the premium VAS clients before services were rendered to them and this furthered fraudulent actions by some of its staff who compelled visa applicants to pay for premium services.
26. It was the respondent's further submission that had the claimant discharged his obligations as required, the fraudulent scheme would not have been undertaken and it would not have incurred loss as it did. That the claimant's failure to identify the loopholes and escalating the same for action was indeed a fundamental breach of his employment contract and is suggestive of collusion with other staff members which resulted in loss of funds to the respondent.
27. The respondent further argued that the claimant's breach of his fiduciary duty to the company went against the company's policy whose aim is to promote and facilitate attainment of the company's objectives. It urged that as a result of the foregoing, it had valid and justifiable reasons to terminate the claimant following a finding of culpability implicating him on taking biometrics for unpaid premium lounge VAS and fraudulent activity caused by other employees.
28. With regards to fair process, the respondent maintained that it accorded the claimant an opportunity to be heard.

### **Analysis and determination**

29. I have considered the pleadings on record, the documentary evidence, oral testimonies rendered before court and the parties' rival submissions and to my mind, the issues falling for the court's determination are: -
  - i. Whether there was justifiable cause to terminate the services of the claimant;
  - ii. Whether the claimant was accorded procedural fairness; and
  - iii. Is the claimant entitled to the reliefs sought?

### **Justifiable cause?**

30. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. In addition, section 45 (2) of the Act provides that a termination of employment is unfair if the employer fails to prove-
  - a) that the reason for the termination is valid;
  - b) that the reason for the termination is a fair reason-



- i. related to the employees conduct, capacity or compatibility; or
    - ii. based on the operational requirements of the employer; and
  - c) that the employee was terminated in accordance with fair procedure.
31. Therefore, over and above proving existence of reasons to justify termination of an employee's services, an employer is required to prove that the said reasons were valid, fair and related to the employee's conduct, capacity or compatibility; or its operational requirements.
32. In the instant case, the claimant was terminated on grounds that he was part of a fraudulent scheme against the respondent. This is discernible from the claimant's letter of termination which reads in part: -
- “Reference is made to the ongoing investigation on allegations implicating you of taking biometrics for unpaid premium lounge VAS which is against company policy and linked you to a fraudulent activity caused by other employees. You have attended a hearing in regards to the same in the presence of the Human Resource representatives, security analyst as well as the Operations Manager.
- Results of the investigation implicate you of being part of a fraudulent scheme against applicant(s) and by extension to the company. Additionally, no escalation was done to your line manager to report the illegality which is against company policy....”
33. It is common ground that the disciplinary process against the claimant was commenced by way of a HR questionnaire through which he was required to give his explanation on the issue. The HR questionnaire reads in part:
- “Dear Benjamin
- On a basis of primary investigations, you've been found to have taken biometrics for unpaid premium lounge applicants. Please assist in explaining the details of this situation on the following answer part before Wednesday...”
34. What is notable from the letter of termination and the HR questionnaire is that the applicant or applicants whom the claimant had taken biometrics of, were not identified. Further to that, the date or dates when the claimant took the said biometrics without following the respondent's Standard Operating Procedures (SOPs) was not indicated. Additionally, from the letter of termination it is not possible to decipher whether the applicant was one or more. Indeed, the claimant's answer in the HR questionnaire is also quite general and does not speak to any particular instance.
35. It is also noteworthy that the respondent exhibited a copy of a statement of account in respect of an applicant by the name James Wachira Kiranga. The said statement of account did not feature during the point at which the claimant was being required to provide his explanation in the HR questionnaire. It is therefore not clear whether the said James Wachira Kiranga is the applicant the claimant was alleged to have taken biometrics of without following the SOPs. Indeed, the said statement of account was not correlated to the claimant's case in any way. As a matter of fact, even RW1 did not speak to the same.
36. Further, in his testimony before Court, RW1 did not give particulars of the allegations against the claimant, specifically the names of the applicant or applicants concerned and the dates when the claimant allegedly took biometrics of such applicants without following the SOPs.



37. I must say that the aforementioned particulars were so crucial in determining whether the claimant's termination was fair and valid. I say so because with such particulars supported by evidence, the respondent would have substantiated the allegations against the claimant and essentially proved that it had a valid and fair reason to terminate the claimant's employment based on his alleged conduct. This is moreso noting that the respondent was required to prove to the requisite standard that the claimant engaged in a fraudulent activity. Put another way, the respondent was required to prove the substance of the allegations against the claimant.
38. I must point out that failure of an employer to specify the particulars of an allegation against an employee is tantamount to failing to substantiate the said allegation. How is the Court to determine the fairness and validity of such reasons without these crucial elements?
39. The Court of Appeal in the case of *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR, found that the allegations against the employee were too general hence termed his termination as unfair. I fully adopt this position.
40. Nothing would have been easier than for the respondent to avail more particulars as regards the allegations against the claimant and more specifically, the identity of the applicant or applicants in question and the date when the claimant took the biometrics of the applicants' concerned, contrary to the respondent's SOPs.
41. In light of the foregoing, I cannot help but find that the respondent did not satisfy the requirements of section 43(1) read together with section 45(2) (a) and (b) of the Act and as such, it has not proved that there was substantive justification to warrant termination of the claimant.

#### **Procedural fairness?**

42. Under the Act, an employer is required to comply with the requirements of a fair process over and above proving that it had reasons to terminate an employee's services. Specifically, section 45 (2) (c) of the Act, requires an employer to comply with the provisions of fair process and prove that it accorded an employee procedural fairness.
43. More importantly, section 41 of the Act provides for the manner in which fair procedure is to be realized. It requires an employer to notify an employee of the intended termination and the reasons thereof, in a language he or she understands. The employee is entitled to have another employee or a shop floor union representative of his choice present during such explanation.
44. In the instant case, the claimant was initially required to respond to the allegations levelled against him through a HR questionnaire. He was subsequently suspended through a letter dated December 6, 2017 which reads in part:

“Reference is made on a recent primary investigation implicating you of taking a biometrics unpaid premium lounge services....you will be addressed on the December 14, 2017 to be given feedback on the investigations and advised on the way forward.”
45. As it came to be, the claimant appeared before a panel on December 14, 2017 on what turned out to be the disciplinary hearing of his case. It is following the said hearing that the claimant was terminated from employment.
46. From the record, there is no evidence that going in for the disciplinary hearing, the claimant was aware of what lay ahead of him. Noting that the disciplinary hearing was to culminate in his termination from employment, it was only fair that he be notified of the significance of the “address” as the respondent



called it, to allow him prepare psychologically. Afterall, the source of his livelihood was at stake. As was held by the Court of Appeal in the case of *Nebert Mandala Ombajo v Institute of Certified Public Accountants of Kenya (ICPAK)*, Nakuru Civil Appeal No. 62 of 2018: -

“Disciplinary proceedings are a grave matter for an employee as the consequences may be catastrophic to the employee’s life. In the case of the appellant, the complaints against him were serious, and there is no doubt that he needed sufficient time to prepare psychologically, and if need be, get the best advice that he could.”

47. One wonders why the respondent was mysterious about the disciplinary hearing. Why wasn’t the respondent clear in its communication from the word go that the claimant was going in for a disciplinary hearing hence notify him as much? Indeed, such information would ordinarily have been accompanied by the notification that the claimant was entitled to be accompanied by a fellow employee or a union representative.
48. In any event, the respondent would not have suffered any prejudice by informing the claimant of the import of the meeting of December 14, 2017. This way, he would have prepared himself sufficiently prior to the said hearing.
49. Therefore, in as much as the respondent appears to have initially complied with the procedural requirements under section 41 of the Act, it was marred by the manner in which the claimant was made aware of the disciplinary hearing of December 14, 2017. This was coupled by the fact that the allegations against the claimant were not specific as to allow him render a proper defence. In the end, the process was procedurally unfair against the claimant.
50. To this end, I cannot help but conclude that the process applied by the respondent in terminating the claimant’s employment was procedurally unfair hence unlawful.

## Reliefs

51. As the court has found that the termination of the claimant was not substantively and procedurally fair hence unfair and unlawful, the Court awards him compensatory damages equivalent to five months of his gross salary. In making this award, the court has also taken into account the length of the employment relationship.
52. The claim for notice pay is declined as it is notable that the same was paid to the claimant following his termination.
53. The claim with regards to severance pay is similarly declined as the same is only payable under section 40(1) (g) of the Act where termination of employment has occurred by way of redundancy which was not the case herein.
54. The claim for loss of income from the date of dismissal upto the date of retirement is also disallowed. In arriving at this finding, I am guided by the determination of the Court of Appeal in the case of *D K Njagi Marete v Teachers Service Commission* [2020] eKLR, where it was held as follows: -

“On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR (Civil Appeal No 25A of 2013) this court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement



after adopting with approval the sentiments of the (then) Industrial Court in *Engineer Francis N Gachuri v Energy Regulatory Commission* [2013] eKLR (Industrial Cause No 203 of 2011) which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word „permanent employment?.”

Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.”

## Orders

55. Against this background, Judgment is entered against the respondent and the Court makes the following award in favour of the claimant: -
- (a) A declaration that that the claimant’s dismissal was unfair and unlawful.
  - (b) Compensatory damages in the sum of Kshs 700,000.00 being equivalent to five (5) months of his gross salary.
  - (c) Interest on the amount in (b) at court rates from the date of Judgment until payment in full.
  - (d) The claimant shall also have the costs of the suit.
56. The claimant shall also be entitled to a Certificate of Service in line with section 51(1) of the Act. This shall issue within 30 days from the date of this Judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2023.**

.....  
**STELLA RUTTO**

**JUDGE**

**Appearance:**

**For the Claimant Mr. Okunga**

**For the Respondent Mr. Nyaburi**

**Court Assistant Abdimalik Hussein**

## ORDER

**In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure**



Act (Chapter 21 of the Laws of Kenya) **which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.**

**STELLA RUTTO**

**JUDGE**

