



REPUBLIC OF KENYA



KENYA LAW
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**Ong’ondi v Independent Electoral and Boundaries Commission (Cause
1744 of 2014) [2023] KEELRC 1556 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1556 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1744 OF 2014
MA ONYANGO, J
JUNE 21, 2023

BETWEEN

DISMAS ONG’ONDI CLAIMANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

JUDGMENT

The Pleadings

The Claimant’s case

1. The Claimant filed a Memorandum of Claim on 7th October 2014 seeking for the following orders against the Respondent;
 - a. To provide information, if any, under Article 35 of *the Constitution* and Section 26 of the *Independent Electoral and Boundaries Commission Act*, 2011 regarding what meeting and based on what and whose complaint the Commission formed the intention to terminate the Claimant’s employment with the Respondent, such information being also relevant under the *Employment Act*.
 - b. To reinstate the Claimant as Director, Information, Communication and Technology with full pay and benefits and all perks of office with effect from 14th August 2014.
 - c. To deal with Claimant, as an employee, properly in accordance with the law and *the Constitution* of Kenya, 2010.
 - d. To stay the receipt and consideration of all and any applications for employment to the post of Director, Information, Communication and Technology as advertised in the local dailies on 3rd September, 2014, the vacancy not having been notified or at all to the requisite authorities



under the *Employment Act*,2007 and the holder of the office not having been notified of the vacancy at the time the advertisement was placed for publication.

- e. To pay damages to the Claimant for breach of his contract of employment and for violation of his rights to dignity, fair administrative action and fair labour relations under Articles 48,47 and 41 of *the Constitution* respectively.
 - f. Payment of 12 months' gross salary at Kshs 776,794 per month totaling Kshs 9,321,528
 - g. One month salary in lieu of notice Kshs. 776,794
 - h. Payment of withheld salary and allowances for August 2014 Kshs 364,525.57
 - i. Payment in lieu of accumulated leave for three years 2011-2013 and 20 days leave for 2014 at current basic salary rate of Kshs 497,794 per month totaling to Kshs 1,825,245
 - j. Costs of the claim
 - k. Such other reliefs as the court may deem fit.
2. Simultaneously, the Claimant filed a Notice of Motion under a Certificate of urgency seeking preservative orders of injunction restraining the Respondent from consideration of any application for the post of Director, Information, Communication and Technology.
 3. The Claimant avers that he was employed as the Director, Information, Communication and Technology, initially by the Interim Independent Electoral Commission that was established under the former constitution and that he transitioned to the Independent Electoral and Boundaries Commission under the 2010 Constitution.
 4. He avers that vide a letter dated 2nd September 2014 addressed to him by the Respondent's Acting Chief Executive Officer, the Respondent wrongfully, illegally and unfairly terminated his employment with effect from 2nd September 2014.
 5. It is averred that prior to that letter being issued, he had earlier on, on 14th August 2014 received a notice of intention to terminate employment from the Respondent wherein he was accused of a raft of wrongdoings and was given 14 days within which to show cause why his services should not be terminated. The claimant avers that he was immediately suspended from performing his duties as Director, Information, Communication and Technology.
 6. According to the Claimant, he responded vide a letter dated 25th August 2014, where he lamented that the allegations and accusations leveled against him were ambiguous, vague and unclear and he requested for any documentary evidence supporting any of the allegations. The claimant stated that in that response, he asked for extension of time within which to submit his comprehensive response and also pleaded that his suspension be lifted.
 7. It was the Claimant's case that he was hard pressed for time and information but he loyally complied with the show cause letter vide his detailed response dated 28th August 2014.
 8. He contended that he legitimately expected fair administrative action by the Respondent pursuant to Article 47 and 249 of *the Constitution* and that further, his terms and conditions of employment require that he is given at least one month's notice of intention to terminate his service which according to him was not adhered to.
 9. The Respondent filed a Response to Claim on the 6th November, 2014 which in sum blamed the Claimant for alleged failure of the 2013 General Elections and in particular the alleged failure of the



ICT component of the Elections. The Respondent denied that the Claimant was entitled to any of the remedies he seeks in the Claim and particularly pleaded that reinstatement or re-engagement of a "disgruntled" employee would likely spew bad blood with fellow employees based on the Claimant's alleged lack of ability to get along with fellow workers and a hired ICT consultant, Nyimbi Odera. The Respondent avers that it dealt with the Claimant in accordance with the employment contract and constitution and had provided the requisite information surrounding the termination of the Claimant's employment.

10. In addition, the Respondent filed a replying affidavit to the application filed by the Claimant together with the Claim in which the affiant, Ahmed Issack Hassan, the then chairman of the Respondent alleges that the Claimant did not have requisite qualifications for the position he held as his first degree was in Mathematics and not ICT. He added that despite the reservations and doubts, the Respondent decided to engage the Claimant, allegedly, to see his performance.
11. At the hearing the Claimant testified in support of his case and called Mr. Ronan Thomas Mc Dermott, a computer engineer from Ireland who testified in support of his case.
12. The Claimant testified that he has a professional background in ICT with over 20 years' experience working in several organizations both in public and private sector. He told the court that after the Respondent terminated his employment he took up consultancies on deployment of technology in elections across a number of countries. That he worked with UNDP in 2016 as a team leader in audit of BVR in Zambia, an international voter registration and technology expert in Afghanistan in 2017 and currently a computer security expert in Malawi under UNDP.
13. It was the Claimant's evidence that he worked diligently upon being appointed until the Respondent terminated his employment in September 2014 without any warning or notice.
14. The Claimant stated that he was served with a termination letter on 3rd September 2014 on grounds that he failed to provide leadership on voter registration during the 2013 General Elections and therefore did not have the capacity to implement ICT programs.
15. It was his testimony that he had before then been suspended from office vide a letter dated 14th August 2014, titled the "Notice of Intention to Terminate Employment" which letter required him to show cause why his employment should not be terminated. The letter also suspended him from performing his duties. The Claimant responded to the said letter on 25th August 2014.
16. The Claimant testified that in his response to the said show cause letter he denied the allegations leveled against him and explained what he had been doing listing his achievements. He cited several additional responsibilities assigned to him which included being appointed as acting CEO in early 2014 when the CEO was away attending a training in Israel; being appointed the chairperson of staff disciplinary committee and his appointment as the chairperson of Audit review task force.
17. He further testified that in May 2014, he was appraised and given an excellent performance rate card with a rating of 5/5 and awarded a 10% salary increment.
18. It was his evidence that the failures in the elections were because of the Respondent's failure to take the Claimant's professional advice on delays in procurement particularly of technology which forced the Commission to acquire these technologies too close to the election date, and the failure of the Commission to inform stakeholders of opportunities and risks of use of technology.
19. It was the Claimant's case that based on his achievements and the subsequent appraisals by the Respondent, the termination of his employment was not founded on any valid reason and the termination was unfair.



20. The Claimant maintained that he had legitimate expectation after leaving his previous employment where he was an ICT manager, that he would work with the Commission until he attained the retirement age of 60 years and if not, to be terminated as provided in his employment contract.
21. The Claimant was cross examined on 20th February 2020 by Mr. Karani, Counsel for the Respondent after adjourned of the suit severally. The Claimant stated that as the ICT Director, his duty was to ensure that the ICT systems were employed and working properly. He stated that the 2013 elections experienced challenges but denied that they were marred with irregularities. He contended that the challenges were as a result of the Commission's failure to heed to his professional advice.
22. In re-examination, CW1 stated the elections were highly dependent on ICT and that the Supreme Court upheld the elections as having complied with the *Elections Act, the Constitution* and the internal processes of the IEBC.
23. CW2, Ronan Thomas Mc Dermott testified that he is a computer engineer from Ireland and provided professional advice to Electoral Boundaries Commission and other agencies before the 2013 General Elections. He stated that he knows the Claimant by virtue of the two having worked together in IEBC in 2012 after CW2 was invited by UNDP to assist with ICT issues at IEBC. It was his evidence that the Claimant was his primary contact at IEBC and that he knew the Claimant as a very competent officer hence the allegations leveled against him are inaccurate.
24. CW2 testified that the Claimant was competent in the performance of his work. That in his assessment the Claimant was a performer.
25. The Respondent did not call any witnesses in support of its case. Its case was closed on the date fixed for hearing of the Respondent's case because the reasons given for failure to adjourn the case were in the court's view not justifiable in view of the age of the case and the fact that the witness was in court and was consulted when the date was taken.

Determination

26. From the voluminous pleadings on record, the evidence adduced in court and the submissions filed, the issues that arise for determination in this case are as follows: -
 - i. Whether the reasons for termination of the Claimant's employment was justified;
 - ii. Whether the due process was followed in the termination of the Claimant from service; and,
 - iii. Whether the reliefs sought are merited.

Reasons for termination

27. The process of termination of the Claimant's employment was commenced with the letter dated 14th August 2014 which is reproduced below:

Ref No. 2010000009

Mr Dismas Ong'ondi

Director/Information Communication Technology

Independent Electoral & Boundaries Commission

Anniversary Towers, 6th Floor

Nairobi



Dear Mr. Ong'ondi,

RE: Notice of Intention to Terminate Employment

Reference is made to your letter of employment dated 24th February 2010 employing you as Director, Information, Communication & Technology.

During your work in the Commission and specifically in the preparation for and execution of the general elections, you failed to provide leadership in the use of ICT in the election process and specifically in the voter registration, voter identification and results transmission. As you are fully aware, these failures seriously affected the integrity and reputation of the organization.

Even after the general elections, the Commission has noticed that you do not have the capacity to implement the Commission's programmes in technology as evidenced in the on-going voter registration exercise.

As a result of the foregoing, the Commission intends to terminate your services as the Director of ICT but before that is done, you are hereby given fourteen (14) days to show cause why your services should not be terminated.

Meanwhile you are hereby suspended from performance of your duties with immediate effect and you are directed to hand over your duties to the manager/system Administration, Mr Michael Ouma, under the supervision of the Director, Human Resources & Administration.

Yours faithfully,

Signed

Betty Sungura-N

AG. Chief Executive Officer/Commission Secretary

28. The reasons for the intended termination as given in the letter are that the Claimant "failed to provide leadership in the use of ICT in the election process and specifically in the voter registration, voter identification and results transmission"
29. The reasons given for the termination imply that the Claimant was incompetent in the performance of his work. In his response dated 25th August 2014 the Claimant lamented the grounds alluded to in the Respondents notice of termination were ambiguous, vague, unclear and too general such that it was impossible for him to respond effectively. He asked for better particulars and the deferment of his suspension and the period within which he was to respond to the show cause letter. His letter was not responded to and on 28th August 2014, responded substantively to the show cause letter.
30. On 3rd September the claimant was served with a letter of termination which is reproduced below:

Ref No. 20112000162

2nd September, 2014

Mr Dismas Ong'ondi

Box 66048-00800

Nairobi.

Email: dongndi@hotmail.com

Dear Mr. Ong'ondi,

Re: Termination Of Employment.



I refer to your responses dated 25th and 28th August 2014.

In its 106th plenary meeting held on 1st September 2014, the Commission considered fully your said responses and was not satisfied with the same.

This is therefore to convey to you the decision of the Commission to terminate your employment with effect from 2nd September 2014 in accordance with your terms and conditions of service.

You are required to surrender all Commission property that was issued to you during your tenure in office.

The Commission wishes you the best in your future endeavours.

Yours faithfully,

Signed

Betty Sungura-N

AG. Chief Executive Officer/commission Secretary

31. From the foregoing it is evident that the Claimant was given an opportunity to defend himself against the allegations against him. Section 41 of the *Employment Act* provides in mandatory terms that an employee must be given an opportunity to defend himself before termination of employment. The section provides:

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

32. On the first issue, it is now trite that before an employer terminates an employee from employment, that employer is bound by law to observe the provisions of Section 45(2) of the *Employment Act* which is to the effect that an employer should not terminate contract of employment of an employee except where there are valid and fair reasons.

33. The said provision of the law provides;

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer 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 employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.

34. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the Court of Appeal observed that-

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment



contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

35. In the case of *Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited* (2014) eKLR, the court observed;

“In the eventuality that an employee is to face summary dismissal or termination, section 41 of the *Employment Act* now dictates that there must be a hearing to give such an employee an opportunity to defend himself Section 41 of the Employment is coached in mandatory terms. where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing. The situation is dire, where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair.”

36. Having not been subjected to a disciplinary hearing, the termination of the Claimant’s employment was in contravention of the mandatory requirements of section 41 of the *Employment Act* and therefore unlawful.

37. Section 43 further requires that an employer proves that the reasons for termination are valid. The section provides:

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

38. From the notice of intention to terminate employment and the termination letter issued to the Claimant, it is evident that the reason for termination of the Claimant’s employment was poor performance.

39. In the case of *Jane Samba Mukala Vs. Oltukai Lodge Limited* [2010] KLR 225 the Court observed that–

“Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.”

40. In the case of *Abdi Halake Garamboda v Fidelity Security Services Limited* [2015] eKLR cited by the Claimant in his submissions the court observed:

“It is trite; the burden of proof in employment termination cases rests on the employer. Where the claimant is stated to be of poor performance. the grounds being that he Failed in the performance of his duties. then as set out in Jane Mkala case. cited above, it does not stop at the allegations but effort must be shown and demonstrated as to how such poor performance was identified and addressed. Where the claimant remained of good performance since his employment in 2008 to October, 2015 he cannot have so suddenly and quickly changed without notice of his controlling supervisor and CEO and Board to



a point that on 8th January, 2016 the board found the sudden urgency to invite him to an otherwise disciplinary hearing and leading to his contract termination."

41. In the instant case, the Respondent were obligated to prove the reasons given for termination of the Claimant's employment as stipulated by Section 43 of the Employment.
42. In his defense to the allegations of incompetence levelled against him by the Respondent, the Claimant tendered evidence of his achievements and appraisals that he received from the Respondent's top management during his tenure as the ICT Director. CW2 in his testimony also reiterated that the Claimant was competent after having worked with him in the Respondent's Commission.
43. The above evidence has not been rebutted by the Respondent. No evidence was adduced by the Respondent as it closed its case without calling any witness. It is therefore my finding that the Respondent has not established the validity of the reasons cited for the termination of the claimant employment.
44. termination as per Section 43 of *Employment Act* 2007 and as such, the claimant's termination was unfair and unjustified as per Section 45(2) of the *Employment Act* 2007.
45. The next issue that I need to address is with regard to procedural fairness. Although it is not in dispute that the Claimant was served with a show cause letter before he was terminated, which letter he actually gave a detailed response, it would appear that no disciplinary hearing was ever conducted to ascertain and verify reasons for his termination.
46. Section 41 of the *Employment Act* 2007 provides; -
 - " 41. Notification and hearing before termination on grounds of misconduct
 - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make".
47. The above provision of the law is coached in mandatory terms and provides the procedure that an employer must follow before terminating an employee from employment. In sum, an employer is required to issue an employee with a notice of the intention to terminate such employee's employment, and also, a hearing must be conducted for the said employee to defend themselves.
48. Having established that the Claimant was not taken through a disciplinary process as envisaged by Section 41 of the *Employment Act*, it is my finding that the termination of the Claimant's employment was unfair.



49. Lastly, after finding that the Claimant was unfairly terminated from employment, I need to address the issue of the reliefs the Claimant is seeking in his Statement of Claim.

Remedies

50. The prayers sought by the Claimant in prayers a, b, c, and d of the Statement of Claim cannot be granted as they have since been overtaken by events. Specifically, on the prayer for reinstatement of the Claimant to his position as the Director of ICT, it is trite that an order of reinstatement cannot issue where three years have lapsed since the termination of employment. On the prayer for re-engagement, because of the years that have passed and the position held by the Claimant, it may not be practical to send him back to the employer. In any event, as stated by the Claimant, he has moved on and is currently gainfully engaged in his professional work. I find no compelling reason to order re-engagement.
51. The Claimant has also prayed for damages for breach of his contract of employment and violation of his rights. I will not make any award under this head as the Claimant did not prove that over and above the termination of his employment he suffered some other wrong for which general damages are payable.

Compensation for unfair termination

52. Having found that the Claimant's termination was unfair, he is entitled to compensation. I have considered the provisions of Section 49(4) of the [Employment Act](#) and in my view that 10 months' salary will be reasonable and adequate compensation in the circumstances. I award the Claimant the same in the sum of Kshs 7,767,940 based on a gross salary of Kshs 776,794 as evidenced by the tabular representation of the Claimant's remuneration which forms the bundle of the Claimant's documents and which was not contested by the Respondent.

Salary in lieu of notice

53. Clause 16 of the Claimant's Employment Contract provided that either party can terminate the employment upon issuing one month's notice. The evidence before the court shows that the Claimant was not given one month's notice before termination of his employment. The notice given was a suspension cum show cause letter and in any event did not give a month's notice. In the circumstances, I find that the Claimant is entitled to payment of salary of Kshs. 776,794 in lieu of notice as provided for section 49(1) of the [Employment Act](#), 2007.

Withheld salary and allowances for August 2014.

54. The Claimant was suspended by letter dated 14th August 2014. The Respondent has not adduced any evidence to prove that the Claimant was paid salary for August 2014. The letter of suspension did not state whether the suspension was with or without pay. No mention is made about the prayer in the Respondents pleadings or documents filed in court either admitting or denying the same. I find that the Claimant is entitled to salary for August 2014 and award him the same at Kshs. 776,794.

Payment in lieu of accumulated leave for 3 years between 2011 to 2013 and 20 days for 2014

55. The Claimant in his pleadings averred that he had accumulated leave days as a result of the nature of work he was engaged in. From the Claimant's bundle of documents, there is an Internal Memo on deferral of leave dated 20th November 2013. The Claimant's employment contract provides for 30 days leave and an additional leave allowance of one-month basic salary in respect of each completed year. The Respondent being the custodian of all the employment records, did not tender evidence to rebut



the Claimant's assertion that he had accumulated leave days. I will therefore proceed and award the Claimant, accumulated leave days for 3 years between 2011 to 2013 and 20 days for 2014 totaling to Kshs. 1,825,245 as pleaded in the Statement of Claim.

56. In summary judgment is entered in favour of the Claimant against the Respondent in the sum of Kshs. 11,146,773.00.
57. The awards in respect of salary in lieu of notice, withheld salary for August 2014, and payment in lieu of leave which were due upon termination as provided in Section 18(4) of the Employment Act shall attract interest from the date of filing suit. The award of compensation shall attract interest from date of Judgment.
58. I also award the Claimant costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF JUNE, 2023.

MAUREEN ONYANGO

JUDGE

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NRB ELRC 1744 OF 2014 JUDGMENT

