



**Keiza v Rift Valley Railways (K) Limited & another (Cause
565 of 2015) [2023] KEELRC 2018 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2018 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 565 OF 2015**

SC RUTTO, J

JULY 31, 2023

BETWEEN

VIOLET YAKAMA KEIZA CLAIMANT

AND

RIFT VALLEY RAILWAYS (K) LIMITED 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

JUDGMENT

1. Through an amended Memorandum of Claim dated May 20, 2021, the Claimant avers that she was offered employment by the 2nd Respondent as a Clerk at the Procurement Department. Her services were later transferred to the 1st Respondent through a letter of transfer of services dated October 30, 2006. She avers that she worked for the Respondents until August 30, 2012, when she was terminated from her employment on allegations that she had been involved in a fraudulent transaction involving LPO No 9850. According to the Claimant, there was no valid reason for the Respondent's draconian action of dismissing her from employment. She further avers that she used to contribute towards the retirement fund provident section with the Respondents during her employment but was not given the lump sum amount after her termination. It is on account of the foregoing that she claims against the Respondents the sum of Kshs 793,728.00 being notice pay, compensatory damages, lumpsum pay, severance pay, golden handshake and transport allowance.
2. In its Response dated June 9, 2015, the 1st Respondent, avers that the Claimant's contract of employment was terminated for gross misconduct namely, withholding vital information and failing to cooperate with the 1st Respondent or authorities (police) during investigations. The 1st Respondent further contends that the Claimant's contract was legally and procedurally terminated in accordance with the provisions of the *Employment Act*. Consequently, it has asked the Court to dismiss the Claimant's cause with costs.



3. On its part, the 2nd Respondent avers that the Claimant was advised of her transfer to the 1st Respondent on October 30, 2006. Thereafter, she remained in the services of the 1st Respondent until August 30, 2012, when she was dismissed from her employment. The 2nd Respondent contends that it has fulfilled its responsibility to compensate the Claimant for the services rendered in the period between February 17, 1986 and October 31, 2006.
4. On May 10, 2022, the Court allowed the Application by the 1st Respondent's Counsel on record to cease acting. Therefore moving forward, the 1st Respondent stood unrepresented and did not participate in the subsequent proceedings including the main hearing.

Claimant's Case

5. During the hearing of the Claimant's case which proceeded on March 1, 2023, she testified in support of her case and at the outset, sought to rely on her witness statement to constitute her evidence in chief. She further produced her initial bundle of documents and further list and bundle of documents as her exhibits before Court.
6. It was his testimony that her services were transferred to the Rift Valley Railways (K) Limited through a letter of transfer of services dated October 30, 2006. She was issued with a letter of confirmation of appointment by the 1st Respondent dated July 11, 2007 confirming her into employment. She worked for the Respondents with due diligence and faithfulness until on or about August 30, 2012 when her services were terminated on allegations that she had allegedly been involved in a fraudulent transaction in respect of LPO No 9850.
7. She averred that prior to her termination, the 2nd Respondent (sic) served her with a letter dated August 22, 2012 listing allegations laid against her and in the same letter, she was required to submit her written response to the allegations within 72 hours.
8. She believes that there was no valid reason for the Respondent's draconian action of dismissing her from employment since she had fully explained the circumstances surrounding the alleged forged LPO in issue. She further stated that her dismissal was not procedurally done in accordance with the provisions of the law.
9. The Claimant further stated that she had worked for the Respondents for quite some time and had a clean record of employment. She averred that the Respondents terminated her employment without giving her any notice or a letter to show cause contrary to the provisions of Section 41 of the [Employment Act](#), 2007 and the principles of natural justice.

2nd Respondent's Case

10. The 2nd Respondent tendered evidence through Mr. Richard Koskei who testified as RW1. He identified himself as a Senior Human Resource Assistant at the 2nd Respondent Corporation. At the outset, he sought to rely on his witness statement as well as the bundle of documents filed on behalf of the 2nd Respondent, to constitute his evidence in chief.
11. RW1 testified that on October 30, 2006, the Claimant was advised of her transfer to the 1st Respondent and subsequently, offered new employment with new terms of service by the 1st Respondent with effect from November 1, 2006. Thereafter, the Claimant remained in the service of the 1st Respondent upto August 30, 2012 when she was dismissed. Therefore, in the period between November 1, 2006 to August 30, 2012, the Claimant was working for the 1st Respondent which is a limited company.



12. With regards to the payment of the Claimant's terminal dues, he stated that the relationship between the 1st Respondent and the 2nd Respondent was governed by an Agreement providing for the Concession of Kenya Railway Freight and Passenger Services dated January 23, 2006.
13. It was his further evidence that by mutual agreement of the parties, the said Agreement was terminated on July 31, 2017 under Clause M8 as read together with Clause M.9 of the same. That a Court Order was issued to this effect on July 31, 2017 *vide* Nairobi HC Comm No 136 Of 2017- [Rift Valley Railways \(Kenya\) Limited Vs Kenya Railways Corporation & Another.](#)
14. RW1 further averred that at Clause D 2, the Agreement provides that "the Concessionaire shall be fully responsible for paying the emoluments of all its employees and for expenses associated therewith and KRC shall not incur any liability for any such employee-related payment or occurrence."
15. Further, Clause 9 of the KCA states that: "Employment contracts entered into by the Concessionaire shall be her own responsibility."
16. Further making reference to Clause D 3.1, 3.2 and 3.3 of the Agreement, RW1 stated that the same provided that, any transferred employee whose services are terminated by RVR for whatever reason, will be paid normal retirement dues for the services rendered to the 2nd Respondent, by the Kenya Railways Staff Retirement Benefits Scheme on advice by the 2nd Respondent. In that regard, the payment due to the Claimant was computed accordingly making it a gross amount of Kshs 372,620.00 and net of Kshs 326,827.00 which amount was paid to her in 2013 through her Bank.
17. That with regards to pension, the Claimant was introduced to the Pension payroll with effect from February 1, 2013 with a monthly pension of Kshs 4,657.75. This monthly pension has progressed through annual increments to the Claimant's currently monthly pension of Kshs 8,542.36.
18. He further stated that there were Clearance Certificates issued by the 1st Respondent, the 2nd Respondent and the Kenya Railways Staff Retirement Benefits Scheme together with the last salary pay slip for the Claimant for the month of October, 2006 confirming settlement.
19. In RW1's view, the 2nd Respondent has fulfilled its responsibility to compensate the Claimant for the services she rendered to the Corporation in the period between February 17, 1986 and October 31, 2006 and further she is fully settled as relates to the 2nd Respondent.
20. As stated herein, the 1st Respondent did not participate in the main hearing.

Submissions

21. It was submitted on behalf of the Claimant that the Respondents did not have a justifiable reason to terminate her employment. She maintained that the Respondents, in their defence have failed to prove that they had a valid reason to terminate her as no communication of its intention to terminate her services was ever made to her. The Claimant further submitted that no procedure was followed before termination of her services hence she urged the Court to find as such and grant her the orders sought.
22. On its part, the 2nd Respondent submitted that it has not been denied that from November 1, 2006, the Claimant was transferred from its service to the 1st Respondent where she served until her dismissal.
23. The 2nd Respondent further urged that the Claimant's terminal dues were duly and fully settled in 2013 and therefore, no claim can lie against it in that regard. It was further submitted that any further complaints and claims as raised in this matter, lie with the 1st Respondent and the 2nd Respondent has been wrongly enjoined in these proceedings hence the should be struck out with costs. The 2nd



Respondent cited the case of *Mesback Auta Ongeru vs Nyamache Tea Factory Limited* (2019) eKLR in support of its submissions.

Analysis and determination

24. I have considered the issues raised in the pleadings, the evidence on record as well as the rival submissions and the following issues stand out for determination: -
- a. Who was the Claimant's employer at the time of her termination?
 - b. Whether the Claimant's termination from employment was unfair and unlawful?
 - c. Is the Claimant entitled to the reliefs sought?

Who was the Claimant's employer at the point of her termination?

25. The Claimant has cited both Respondents for unfair termination without assigning any specific responsibility to either of them. On its part, the 2nd Respondent disowned the Claimant from the word go and averred that her services were transferred to the 1st Respondent and she was advised as much on October 30, 2006. Disputing liability, the 2nd Respondent contended that it is the 1st Respondent that terminated the Claimant's services.
26. In support of its position, the 2nd Respondent exhibited a copy of the Claimant's letter of appointment dated October 25, 2006, issued to her by the 1st Respondent. The said letter of appointment contains fresh terms of engagement between the Claimant and the 1st Respondent. This signifies a new contract of employment with the 1st Respondent to the exclusion of the 2nd Respondent.
27. Further, it is noteworthy that the Claimant's letter of summary dismissal was issued by the 1st Respondent. Indeed, the record reveals that it is the 1st Respondent that undertook the process leading upto the Claimant's dismissal from employment.
28. The foregoing is confirmation that the Claimant was an employee of the 1st Respondent at the time she left employment and the 2nd Respondent had no role to play with regards to her termination.
29. Having found as such, I now move to determine whether the Claimant's termination by the 1st Respondent was unfair and unlawful.

Unfair and unlawful termination?

30. The Claimant has alleged that there was no valid reason for her termination from employment and that she was not given notice to show cause why she should not be terminated from employment.
31. Pursuant to the *Employment Act*, 2007, an employer is required to prove that an employee's termination was not only fair substantively but also procedurally. Essentially, this is the standard for determining whether an employee's termination was fair or not. In this regard, Sections 41, 43 and 45 of the *Employment Act*, are key and I will proceed to consider them hereinunder.
32. Substantive justification entails proof of the reasons which resulted in an employee's termination. In this regard, Section 43(1) of the *Employment Act*, requires an employer to prove the reason or reasons for the termination, and where it fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.



33. Under Section 45 (2) (a) and (b) of the *Employment Act* termination of an employee is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
34. With regards the limb of procedural fairness, the same is to be found under Section 45(2) (c) of the *Employment Act*. Basically, for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the *Employment Act* sets out the specific requirements of a fair hearing. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.
35. In the instant case, the Claimant's termination from employment was effected through a letter dated August 30, 2012. It is discernible that the grounds leading to the Claimant's termination were related to LPO No 9850. In this regard, the Claimant was accused of failing to cooperate with the police and record a statement in relation to ongoing investigations touching on the said LPO. The 1st Respondent proceeded to invoke Section 44(4) (c) of the *Employment Act* as well as its Code of Conduct and dismissed the Claimant from its employment.
36. As stated herein, the 1st Respondent did not participate in the hearing hence it lost the opportunity to produce in evidence, the documents annexed to its Response. Coupled with the foregoing, the 1st Respondent's failure to call oral evidence fundamentally impaired its case since the averments contained in its Memorandum of Response could not be tested in cross examination.
37. On this issue, I will follow the determination of the Court of Appeal in the case of *Kenneth Nyaga Mwigie vs. Austin Kiguta & 2 others* [2015] eKLR where it was held that a document "marked for identification", is of very little, if any, evidential value until it is formally produced.
38. In this case, the 1st Respondent's documents, were neither marked for identification nor formally produced as exhibits before Court. As such, they were of no evidential value to the 1st Respondent and did not aid in proving that it had a fair and valid reason to terminate the Claimant. Put differently, the substance of the allegations against the Claimant was not proved.
39. In the same breath, the 1st Respondent failed to produce evidence to prove that it subjected the Claimant to a fair process as contemplated under Section 41 of the *Employment Act*.
40. The long and short of it is that the 1st Respondent did not discharge its legal burden under Sections 41, 43 and 45 of the *Employment Act* hence the Claimant's termination from employment was neither fair nor lawful.

Reliefs

41. Having found that the Claimant's termination by the 1st Respondent was unfair and unlawful, the Court awards her one (1) months' salary in lieu of notice and compensatory damages equivalent of six (6) months of her gross salary. This award takes into account the length of the employment relationship between the parties.
42. With regards to the Claim for lumpsum payment, the 2nd Respondent was able to prove to this Court that the same was computed and paid to the Claimant through her Equity Bank account. Similarly, the 2nd Respondent proved that the Claimant is presently drawing monthly pension. To this end, the claim to that extent collapses.



43. The claim with regards to severance pay is similarly declined as the same is only payable under Section 40 (1) (g) of the Employment Act in instances where employment has been severed by way of redundancy which was not the case herein.
44. In the same manner, the Claim with regards to golden handshake and transport allowance is declined as it is clear that payment of the said allowances was not applicable to the Claimant. I say so because the Notice of Retrenchment providing for the same is dated April 8, 2008 and at the time, the Claimant was in the service of the 1st Respondent. As it is, the record bears that she was dismissed from employment on August 30, 2012. Logically, she could not have been covered by the said Retrenchment Notice.

Orders

45. In the end, I enter Judgment in favour of the Claimant against the 1st Respondent in the following manner:
- a. A declaration that the Claimant's termination from employment was unlawful and unfair;
 - b. The Claimant is awarded one month's salary in lieu of notice being the sum of Kshs 41,483.00.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 248,898.00 which sum is equivalent to six months of her gross salary.
 - d. The total award is Kshs 290,381.00.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
46. The 1st Respondent shall bear the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of July, 2023

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Nyabena

For the Respondent Ms. Kavaji

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 15th March 2020 and subsequent directions of 21st 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

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