



**Sijenyi v M.P Shah Hospital (Cause 976 of 2017)
[2023] KEELRC 2019 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2019 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 976 OF 2017
SC RUTTO, J
JULY 31, 2023**

BETWEEN

REBAH ASILA SIJENYI CLAIMANT

AND

M.P SHAH HOSPITAL RESPONDENT

JUDGMENT

1. The Claimant instituted the suit herein vide a Memorandum of Claim dated April 26, 2017 in which she avers that she was employed by the Respondent on October 4, 2011, as a Marketing Manager on permanent and pensionable terms. The Claimant further avers that she started from scratch and oversaw the growth of the Marketing Department to great proportions. According to the Claimant, her relationship with the Respondent was positive until 2016 when she showed interest in joining the hospital's staff trade union. She was issued with a show cause letter on November 15, 2016 and two days upon submitting her response to the Human Resource Department, the Respondent terminated her employment without giving written reasons for her termination. The Claimant has termed her termination as unlawful and consequently, seeks against the Respondent compensatory damages, damages for constitutional breach, notice pay and leave pay.
2. The claim did not go unopposed. The Respondent through its Memorandum of Response dated June 19, 2017, avers that the Claimant became negligent in her performance and was served with a number of warning letters. The Respondent further denied the Claimant's assertions that the employment relationship soured when she showed interest in joining the trade union. The Respondent further states that the Claimant is a hoodwinker as the letter of termination gave the reasons for termination. The Respondent further contends that it complied with the employment law and procedures hence is not liable to the Claimant. On account of the foregoing, the Respondent has asked the Court to dismiss the Claimant's Claim with costs.
3. The matter proceeded for hearing on March 9, 2023, during which both sides called oral evidence.



Claimant's case

4. The Claimant testified in support of her case and to start with, she adopted her witness statement to constitute her evidence in chief. She proceeded to produce the bundle of documents filed together with her Claim as exhibits before Court.
5. It was the Claimant's evidence that on November 15, 2016 the Respondent issued her with a letter raising various allegations including misuse of hospital property and accusing her of failing to carry out her duties as expected.
6. The Respondent demanded that she replies and show cause as to why disciplinary action should not be taken against her the following day, being November 16, 2016. She complied despite the notice being too short.
7. On November 18, 2016, two days after forwarding her response to the Human Resource Department, the Respondent terminated her employment. The dismissal came as a surprise to her as she had addressed each and every allegation raised by the Respondent.
8. The Claimant termed her termination as unlawful as the Respondent didn't follow due process. She further contended that the Respondent did not investigate the allegations it raised in the notice to show cause. That further, the Respondent did not subject her to a disciplinary process where they would have challenged and given her an opportunity to respond to each and every allegation raised.
9. She further states that by failing to follow due process, her termination was not based on the allegations raised by the Respondent in its letter to show cause. That she concluded that the only reason for her dismissal was based on her interest to join the trade union.

Respondent's case

10. On its part, the Respondent called oral evidence through Mr. Willie Njuguna Nduaci, who testified as RW1. He identified himself as the Respondent's Human Resource Manager. He started off by adopting the Respondent's Response, witness statement and bundle of documents to constitute his evidence in chief.
11. It was RW1's evidence that the Claimant has tried to mislead the Court that it is only because she wanted to join a trade union that her employment was terminated. He contends that there were other transgressions and wrong doings that were set out in the letter of November 15, 2016.
12. RW1 further stated that it had been noticed that the Claimant's attitude to her colleagues and her work had deteriorated, her punctuality was wanting and there was negligence in performance of her duties such as in the build up to a Symposium (in August, 2016) when much more was expected of her as the Organizing Secretary of the activities than there was. That there was also misuse of office equipment for personal rather than for official purposes.
13. According to RW1, the working relationship had soured. He cited the Claimant's response of November 16, 2016 in which she stated that the letter to show cause was not a surprise to her.
14. He believes that in the circumstances in which the employer found itself with the Claimant, it was entitled to act under Section 36 of the [Employment Act](#). He further believes that the Respondent followed the law meticulously.
15. He reiterated that the reason for the Claimant's dismissal was not because she had joined a trade Union. If so, she would have pointed this out in her letter of November 16, 2016. He stated that the letter of



November 9, 2016 from the Union did not reach the Respondent's Chief Executive Officer (CEO) before he had issued his letter of November 18, 2016.

16. RW1 maintained that the Claimant's termination was not unfair and that it followed procedure.
17. It was his further evidence that the Claimant collected and acknowledged receipt of all her dues on January 13, 2017. She collected her remuneration 4 months before she lodged her Claim.

Submissions

18. The Claimant submitted that she was not subjected to any appropriate disciplinary process for the alleged breach of the Hospital Policy in terms of Section 41 of the *Employment Act*, 2007 and therefore her termination was wrongful, unfair and unlawful. She maintained that for a termination of employment to be lawful as per the dictum in *Walter Ogal Anuro vs Teachers Service Commission* (2013) eKLR, it has to pass the fairness test.
19. It was the Claimant's further submission that the Respondent had not proved that there was a valid and fair reason for her termination. That the employment laws did not envision a fair termination to one that is done within such a short notice.
20. The Claimant further maintained that despite the short notice period, she adequately addressed each issue raised in the show cause letter but her response was rubbished by the Respondent who failed to honour the same and opted to terminate her instead.
21. It was the Claimant's further submission that Section 41 of the *Employment Act* contemplates inviting an employee to a hearing before terminating them. In her case, she maintains that she was not given a chance to be heard, be represented by a representative of her choice or to explain and defend her case. That further, there was no disciplinary hearing ever conducted to accord her the chance to be heard and defend herself.
22. Placing reliance on the authorities of *Kenfreight (E.A) Limited vs Benson K. Nguti* (2016) eKLR and *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* (2014) eKLR, it was the Claimant's further submission that it is trite that failure to accord her a hearing as provided under Section 41 of the *Employment Act* renders her termination unfair.
23. The Claimant further contended that whereas the Respondent's witness testified that its policy allowed for an appeal, the same was not communicated through the termination letter issued to her hence she was not allowed the option of appeal.
24. The Respondent did not file written submissions as the same were missing on the Court's physical record and were not traceable on the online portal.

Analysis and Determination

25. Arising from the pleadings, the evidence on record as well as the Claimant's submissions, it is apparent that the Court is being called to determine the following issues:
 - a. Whether the Respondent has proved that there was a justifiable cause to terminate the Claimant's employment;
 - b. Whether the Claimant's termination was in line with fair procedure?
 - c. Is the Claimant entitled to the reliefs sought?



Justifiable Cause?

26. In order to establish fair termination under the *Employment Act* (Act), an employer is required to prove the reasons leading to an employee's termination. It does not end there. In terms of Section 45(2) (a) and (b) such reasons ought to be fair, valid and related to an employee's conduct, capacity or compatibility; or based on the employer's operational requirements. This is also known as substantive justification. Worthy to note is that the burden of proof in this instance, lies with the employer.
27. In the instant case, the reasons for the Claimant's termination from employment are discernable from her letter of termination which is partly couched:

“Dear Rebah

RE: Contract Termination Letter

This refers to the issues brought to the attention of the HR Department regarding your conduct and for which you were requested to respond to through a show cause letter dated November 15, 2016; the issues were:

During symposium planning meetings in August, it came out that the responsibilities given to you were not done as per the team's expectations, the ownership was completely missing and therefore the other team members took ownership instead and went ahead with the implementation. You have not been meeting all other timelines as given to you by the CEO. Your attitude towards work and your colleagues is poor and despite several discussions about it no remarkable improvement has been seen. You do not attend scheduled meetings on time even after being severally talked to about it by the CEO. In the last 3 months, you have made 118 calls through the office line to the number (redacted) on checking your personal file in Human Resource Department, this number is declared as that of your husband Mr. Gerald Sijenyi. In the last three months, you have made 45 calls to the number (redacted) through the office line which from our initial investigations shows belongs to your sister. Despite being informed about your arrival and departure times not being in line with the hospital working hours, you continue to come in later and leave the premises with no approval from the CEO. You have on several occasions registered wrong timings of your arrival and departure from work with the Human Resource Department.

These actions amount to misuse of hospital property and abuse of your office by conducting your personal business using facilities allocated to you to do official work. As a Manager, you are aware of Hospital policies in regard to use of hospital property. They also amount to insubordination and disregard of Hospital policies considering you are aware of the Hospital working hours but have continued to fail to adhere to the same. All these are in breach of the Hospital core values and policies, your employment contract and the *Employment Act*, 2007.

These issues have been discussed with you by the Human Resource Department, the Chief Executive Officer and the Board Chairman. There has however been no improvement or change from you. Consequently, the Hospital has decided to terminate your employment contract with the Hospital with immediate effect.....”

28. As can be discerned from the Claimant's letter of termination, the reasons for her termination ranged from her performance of duty, attendance to work, attitude towards work and her colleagues as well as her conduct at work.



29. What is notable is that most if not all the allegations levelled against the Claimant are quite vague, general and lacking in particulars. Why do I say so? For instance, the Claimant was accused of not attending scheduled meetings on time and arriving at work and departing against the Hospital working hours. Be that as it may, the dates or instances when this occurred were not provided. In addition, the Claimant was accused of failing to meet timelines and having a poor attitude towards work and her colleagues. Again, no particulars were given. In this regard, I cannot help but question who are these colleagues and in what way was the Claimant's attitude poor towards them? Further, when and in what way did the Claimant fail to meet timelines given by the Respondent's CEO?
30. It is also worth noting that besides stating the reasons for an employee's termination, it is crucial for an employer to substantiate the allegations in question.
31. 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 in that case were too general hence termed his termination as unfair. The learned Judges rendered themselves thus:
- “As also rightly found by the learned trial Judge, no evidence was placed before court to show that the Respondent had been issued with a charge (s) of the specific allegations that he was required to answer during the hearing. Going in for the hearing, it is discernable from the record that the Respondent only knew in general terms, the allegations he was to face and counter. That coupled with the fact that he had no knowledge of the audit findings, he had no fair chance to advance his defence. In the circumstances, therefore it cannot be said that the termination process was fair.” Emphasis mine
32. I fully align myself with the above determination. Nothing would have been easier than for the Respondent to avail more particulars as regards the allegations against the Claimant and more specifically, the dates when she was alleged to have failed to adhere to the working hours, meet timelines and attend scheduled meetings on time.
33. Over and above, the Respondent was required to prove the substance of the allegations against the Claimant. Essentially, there was need to prove by way of evidence, the allegations leveled against the Claimant, for instance, attendance or log in records as the case maybe. In this regard, the Respondent failed to tender evidence to prove the Claimant's lateness.
34. Further to the foregoing, there was no evidence that she had not adhered to timelines and that she failed to deliver on her responsibilities during the symposium. Similarly, there was no evidence that she had failed to meet assigned timelines.
35. All in all, the Respondent did not present any documentary evidence to substantiate the charges against the Claimant. What the Respondent did was to merely prefer the allegations against the Claimant and leave it that. Put another way, the allegations against the Claimant were not corroborated through evidence presented in whatever form or manner.
36. From the record, the Claimant tendered a comprehensive response to the allegations raised in the notice to show cause. It is noteworthy that the Respondent did not discount the Claimant's response by way of evidence. With regards to the symposium planning meetings, the Claimant stated that she fulfilled every single responsibility given to her and gave feedback to the committee, which feedback was recorded in the minutes. She further stated that she gave a detailed report on all her accomplished responsibilities to the committee and that the report was tabled during the committee's meeting on June 2, 2016. This position was not discounted by the Respondent. Indeed, one wonders how the Respondent resolved that her responses were not satisfactory hence the reason for terminating her



employment? On what evidence was the Respondent acting on in determining that her responses were unsatisfactory?

37. As stated herein, the burden was on the Respondent to prove the reasons for the Claimant's termination from employment. How else could it discharge this responsibility without evidence? Needless to say, the Respondent failed to discharge its evidential burden.
38. In light of the foregoing, it is this Court's finding that the Respondent has failed to satisfy the requirements of Section 43(1) read together with Section 45(2) (a) (b) of the Act and as such, it has not proved that there was a justifiable cause to warrant termination of the Claimant's employment.

Procedural fairness?

39. Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. What constitutes fair procedure is spelt out under Section 41(1) of the Act. 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. The employee is also entitled to be accompanied by a fellow employee or a shop floor union representative of own choice in making such a representation.
40. In the instant case, it is not in contest that the Claimant was issued with a notice to show cause through which she was notified of the allegations raised against her. It is also not in contest that she responded to the said allegations through a written explanation. What is not clear and evident from the record is whether the Claimant was invited to appear for a disciplinary hearing to answer to the allegations leveled against her. The question thus is whether the Claimant's written response to the notice to show cause sufficed?
41. In the case of Postal Corporation of Kenya v Andrew K Tanui [2019] eKLR the learned Judges of the Court of Appeal stated as follows:

“Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the Kenya Revenue Authority case where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under Section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with... The Respondent faced serious indictments which could torpedo his entire career and destroy his future. In our view, this was a matter in which oral hearing was necessary, but none was held.”
42. In the instant case, the Claimant was alleged to have committed several acts and omissions which were quite grave and indeed, the same could be categorized as amounting to gross misconduct under Section 44(4) of the Act, hence grounds for summary dismissal. As such, and given the possibility that the Claimant's livelihood was at stake, it was only prudent that the Respondent grants her an oral hearing to ventilate her case within the terms of Section 41.
43. The fairness of a disciplinary process cannot be over emphasized. A disciplinary process which has the likelihood of depriving the employee of his livelihood must by all means be seen to be fair.



44. By failing to accord the Claimant an oral hearing, the Respondent failed to act in consonance with the statutory requirements of procedural fairness. This was not in accord with justice and equity as envisaged under the Act. This is further taking into account that the Claimant tendered a comprehensive response refuting all the allegations levelled against her. It was therefore imperative that an oral hearing be conducted so as to allow for further interrogation of the said allegations against the Claimant's responses.
45. Against this background, I arrive at the inevitable conclusion that the dismissal of the Claimant was procedurally unfair hence unlawful.
46. In total sum, I find that there was no substantive justification to warrant the Claimant's termination, and that she was not accorded procedural fairness prior to her termination. This fell short of the requirements stipulated under Section 45 of the Act hence her termination was unfair and unlawful in all respects.

Reliefs

47. Having found that the Claimant's termination was unfair and unlawful, the Court awards her compensatory damages equivalent to six (6) months of her gross salary. This award has taken into consideration the length of the employment relationship and the fact that the Respondent failed to prove substantive justification and that it applied a fair process in effecting the Claimant's termination.
48. The claim for notice pay and unpaid leave is declined as it is evident that the Claimant was paid the same as part of her terminal dues following her termination. As a matter of fact, the Claimant admitted during cross examination that she received the said payments hence her outstanding claim was for compensation.

Orders

49. It is against this background that I enter Judgment in favour of the Claimant against the Respondent as follows:
 - a. The Claimant is awarded compensatory damages in the sum of Kshs 1,601,160.00 being equivalent to 6 months of her gross salary.
 - b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.
 - c. The Claimant shall also have 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 Ms. Kittony instructed by Mr. Nyasimi

For the Respondent Mr. Mwenesi

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

