



**Obondi v Kenya National Union of Nurses & another (Cause
1974 of 2017) [2023] KEELRC 1954 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1954 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1974 OF 2017**

JK GAKERI, J

JULY 26, 2023

BETWEEN

EVELYNE ADHIAMBO OBONDI CLAIMANT

AND

KENYA NATIONAL UNION OF NURSES 1ST RESPONDENT

SECRETARY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 4th October, 2017 alleging that she was unlawfully terminated from employment by the Respondent.
2. The Claimant avers that she was employed by the Respondent vide letter dated 30th September, 2013 on permanent and pensionable terms as the Deputy Industrial Relations Officer, Kisumu and confirmed on 2nd April, 2014 at Kshs.35,000/= per month.
3. That the Claimant served the Respondent diligently and was later promoted to the Office of Industrial Relations Officer and transferred to Nairobi until termination on 19th October, 2015 by which time her gross monthly salary had risen to Kshs.47,000/=.
4. That she was suspended by the Respondent's General Secretary on 21st September, 2015 allegedly for being absent from duty on Sunday 20th September, 2015 and responded vide letter dated 28th September, 2015 setting out the reasons for her absence.
5. The Claimant avers that she had no previous warning or notice of misconduct.
6. That she was entitled to at least half months' salary during suspension but was paid $\frac{1}{3}$.



7. That the Disciplinary Committee chaired by one Mr. John Biiy heard and found her not culpable and recommended reinstatement but the 2nd Respondent dismissed her from employment by letter dated 19th October, 2015.
8. The Claimant prays for;
 - i. A declaration that her dismissal from employment was unlawful, unfair and unreasonable.
 - ii. Damages for 12 months Kshs.564,000.00.
 - iii. Accrued leave days Kshs.39,165.00
 - iv. Withheld salary for September Kshs.31,333.00
 - v. Salary for October Kshs.47,000.00Total Kshs.681,000/=

Respondent's case

9. In its Replying Affidavit in response to the claim sworn on 16th January, 2018 by the 2nd Respondent and filed on 9th June, 2018, the affiant states that the re-deployment of the Claimant to Nairobi was not a promotion but an option for contemplated retrenchment owing to the Claimant's non-performance and she had pleaded for a second chance.
10. That the Claimant did not provide a sick-off issued by a qualified medical practitioner and had received verbal warnings.
11. The affiant deposes that the Claimant obtained minutes illegally through theft as they were confidential and was not supposed to obtain them.
12. The affiant further states that the Claimant was paid all her dues including leave.
13. The Respondent prayed for dismissal of the suit with costs.

Claimant's evidence

14. On cross-examination, the Claimant testified that she was given a copy of the minutes of the disciplinary hearing by the Chair of the Committee, one John Biiy with no forwarding letter.
15. The witness admitted that she signed the payment voucher dated 14th December, 2015 being salary for September, October and three months notice.
16. That she had presented a receipt and laboratory test results from the Mama Lucy Hospital.
17. That the Chief Executive Officer of the Respondent was her supervisor.
18. The Claimant admitted having failed to attend a court mater assigned to her and the General Secretary attended to it.
19. The Claimant denied that the minutes were doctored or that she had absconded duty.
20. On re-examination, the witness testified that the minutes were on the Respondent's letter head and had a record of the attendees whom she named.
21. It was her testimony that she had the right to a copy of the minutes and no other copy had been provided.



22. That the Respondent had filed a notice of motion to have the minutes expunged from the record but did not prosecute the same to conclusion.
23. That the Claimant work week was 8 hours per day Monday to Friday and had no notice to attend work on Sunday.
24. The witness confirmed payment of 3 months' notice, accrued leave days and unpaid salaries and abandoned the respective prayers.

Respondent's evidence

25. On cross-examination, the witness confirmed that he had no documentary evidence on the alleged poor performance of the Claimant and had not provided copies of alternative minutes of the disciplinary hearing.
26. On re-examination, the witness testified that the Claimant was supposed to be in the office on Sunday in cases of emergencies.
27. The witness admitted that the union received the Claimant's documents issued by Mama Lucy Hospital.
28. That he constituted the disciplinary committee and its recommendations were supposed to be presented to him for discussion.
29. That having employed the Claimant, he determined whether she was terminated or remained in employment as per the Constitution of the Respondent.
30. It was her testimony that the signatories to the minutes were unnamed and the minutes were doctored.

Claimant's submissions

31. Counsel isolated two issues for determination on whether termination of employment was fair and entitlement to the reliefs sought.
32. On termination, reliance was made on the provisions of Section 45 of the Employment Act, 2007 to urge the requirements of a fair termination of employment.
33. The Court of Appeal decision in Standard Group Ltd v Jenny Luesby was cited to underscore the essence of a hearing, as was the decision in Fredrick Odhiambo v Kenya Safari Lodges & Hotels Ltd (2015) eKLR.
34. Counsel further cited the provisions of Article 47 and 50(1) of the Constitution of Kenya, 2010 and Section 4 of the Fair Administrative Action Act on the right to be heard.
35. Finally, reliance was made on the Supreme Court decision in Gladys Boss Shollei v Judicial Service Commission KESCS (KLR).
36. On remedies, counsel urged the court to award maximum compensation to ameliorate the suffering the Respondent exposed the Claimant to.

Respondent's submissions

37. The Respondent's counsel identified similar issues for determination.
38. On termination, counsel submitted that the Claimant, while aware that she was supposed in Nairobi over the weekend to complete pending tasks relating to a Collective Bargaining Agreement scheduled



for 21st September, 2015, disappeared to Kisumu and did not inform the Chief Industrial Relations Officer and Office Assistant on opening of the office and showed no remorse, the fact that she was handling sensitive and serious exercise notwithstanding.

39. Counsel submitted that the Claimant exhibited laxity in her work and had not shown any improvement.
40. Counsel submitted that the disciplinary committee recommended that she be warned and not terminated from employment.
41. That filing of receipts in July 2022 after filing the suit in 2017 amounted to mischief.
42. Counsel submitted that the Claimant's conduct had fundamentally breached her contractual obligations.
43. That the Claimant refused to follow instructions severally.
44. Counsel urged that the Claimant had committed gross misconduct according to the Respondent's employee manual and termination of employment was lawful under Section 44(4)(c) and (d) of the [Employment Act, 2007](#).
45. Reliance was also made on the Court of Appeal decision in *Kenya Revenue Authority V Maginga Salim Murgani* to urge that a hearing need not be oral in order to pass as fair. That exchange of letters were sufficient.
46. The provisions of Section 41 of the [Employment Act](#) were also relied upon.
47. In sum, counsel submitted that termination of the Claimant's employment was justifiable and procedurally fair.

Findings and determination

48. The issues for determination are;
 - i. Whether termination of the Claimant's employment was fair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
49. On the 1st issue, while the Claimant submitted that termination of his employment was unfair and unjustified, the Respondent submitted that it had a valid reason to terminate her employment and conducted it in accordance with a fair procedure.
50. As correctly submitted by both counsels, the provisions of Sections 41, 43, 45 of the [Employment Act](#) and others prescribe the architecture of fair termination of employment with the basic attributes being valid and fair reason and fair procedure.
51. Legions of decisions have underscored the obligation of the employer to establish a substantive justification for the termination and fair procedure.
52. The Court of Appeal decision in [Naima Khamis v Oxford University Press \(E.A\) Ltd](#) (2017) eKLR and the sentiments of Ndolo J. in [Walter Ogal Anuro v Teachers Service Commission](#) (2013) eKLR are spot on on these requirements.

Reasons for termination

53. While the Respondent's counsel submitted that the Claimant committed gross misconduct by inter alia refusing to follow instructions, absence from office on a Sunday and non-availment of sick off from



- a medical practitioner, the Claimant relied on the recommendation of the Disciplinary Committee that she ought not to be dismissed but be given a strong warning.
54. The termination letter dated 19th October, 2015 stated inter alia;
- a. Your sick off was not granted by a Medical Officer.
 - b. You were supposed to report on duty on 4th September, 2015 but you failed without any explanation to date. Your representation could not therefore be corroborated with what was contained in your defense against the suspension.
55. The suspension letter accused the Claimant of having left for Kisumu during the Nyeri strike and all employees were deemed to be on duty. Secondly, the Claimant failed to report to the office on 20th September, 2015 as instructed.
56. The Claimant admitted that she did not report to the office on Sunday 20th September, 2015 and did not provide a sick off signed by a Medical Officer but provided laboratory results and receipt as evidence of having been attended to at the Mama Lucy Hospital.
57. Evidently, the Claimant was absent from the work place without leave.
58. As regards being away on the 20th September, 2015 which was a Sunday, the Respondent adduced no documentary evidence to show that indeed the Claimant was required and had agreed to work on that day.
59. While the Respondent adduced no evidence of the Claimant's work week, the Claimant testified she worked for 8 hours from Monday to Friday, thus Sunday was not a working day.
60. The absence of evidence to the contrary leads to the inference that the Claimant had no obligation to report to work on Sunday 20th September, 2015.
61. Regarding the allegations on laxity or poor performance, and failure to follow instructions from the seniors, the Respondent adduced no credible evidence other than one instance where the Claimant failed to attend to a court matter and the Supervisor had to step in.
62. The Claimant testified that she had informed the Secretary to notify the Supervisor about her unavailability.
63. Although the Claimant led no evidence of the communication, the Respondent tendered none to controvert the Claimant's claim.
64. Notwithstanding the fact that the grounds relied upon by the Respondent to terminate the Claimant's employment exhibit traces of lack of unenthusiasm in the manner in which the Claimant discharged her duties, the court is not persuaded that the Respondent has discharged the burden of proof imposed by the provisions of Section 43(1) and 45(2) of the Employment Act, 2007.

Procedure

65. It requires no gainsaying that for a termination of employment or dismissal to pass muster, it must have been conducted in accordance with a fair procedure.
66. The provisions of Section 41 of the Employment Act, 2007 prescribe the mandatory process to be complied which encompasses notice, explanation of the grounds on which termination of employment is being contemplated, entitlement to a representative of the employee's choice or shop floor representative, right to make representation, hearing and consideration of the representations.



67. (See *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR and *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR).
68. In the instant case, evidence reveal that the Claimant was invited for a disciplinary hearing by letter dated 6th October, 2015. The hearing was slated for 14th October, 2015 at 9.00 am and the Claimant testified that she attended the meeting, was heard and a copy of the minutes was provided.
69. The issue as to how the minutes were obtained was controversial in that while the Claimant testified that she was given a copy by the Chairperson of the meeting, one Mr. John Biiy, the Respondent's witness testified that although he constituted the Disciplinary Committee, the minutes produced by the Claimant were doctored for the simple reason that the signatories were not named.
70. He also testified that the minutes were confidential and wondered how the Claimant accessed copy on record.
71. According to the Respondent's witness, the Claimant had no right to a copy of the minutes.
72. Puzzlingly, RWI adduced no evidence to prove that the minutes on record were not a true record of what transpired at the meeting or that the recommendation of the Disciplinary Committee was different.
73. The copy of the minutes on record are on the Respondent's letter head, list of members present and an agenda.
74. The minutes are signed by persons designated as Chairman and Secretary.
75. According to the minutes, the Committee found the Claimant remorseful and apologetic and being her first offence it recommended that she be warned in writing and resume duty.
76. RWI confirmed on cross-examination that he had no evidence of different minutes and failed to demonstrate how the minutes produced by the Claimant were interfered with as alleged.
77. Finally, although RWI testified on re-examination that the Disciplinary Committee was supposed to present the recommendation to him for deliberation, he led no evidence to show whether the recommendation was discussed and how the decision of the Committee was overturned and for what reasons.
78. The retort that since he engaged the Claimant, he determined whether she remained in employment or was terminated is undoubtedly antithetical to the provisions of *Employment Act*, 2007.
79. In the court's view, the fact that the Respondent appointed a Disciplinary Committee which heard the Claimant, but ignored its findings and recommendation would appear to suggest that RWI, the second Respondent had made up his mind that the Claimant's employment would be terminated.
80. In other words, the committee hearing was a formality to demonstrate some semblance of compliance with the law.
81. As courts have maintained, procedural precepts are not mechanical exercises, they are a constitutional imperative and serve an important role in the termination of employment.
82. The Respondents, in this case appointed a Disciplinary Committee to create the impression that they had complied with law. In other words, to hoodwink the court.
83. This court will neither dignify nor legitimize such conduct.



84. In sum, the Respondents' conduct on matters procedure establish beyond peradventure that it had no valid and fair reason to terminate the Claimant's employment.
85. For the foregoing reasons, the court is satisfied and finds that the Respondent has failed to prove on a balance of probabilities that termination of the Claimant's employment was fair. A declaration to the effect that it was unfair is merited.

Appropriate Reliefs

86. In the course of the hearing, the Claimant admitted that she was paid for the accrued leave days, and the withheld salaries for September and October 2015 and abandoned the claims.
87. The only outstanding prayer is for compensation for unlawful termination of employment and having found that the termination was indeed unfair, the Claimant is entitled to the relief under Section 49(1) (c) of the *Employment Act*, 2007.
88. In determining the quantum of compensation, the court has taken into consideration the fact that;
- i. The Claimant was an employee of the Respondent from 30th September, 2013 to 19th October, 2015, about 2 years, a fair short period.
 - ii. The Claimant wished to continue in employment as observed by the Disciplinary Committee.
 - iii. The Claimant did not appeal the decision of the 2nd Respondent having had the benefit of the Committee's recommendation.
 - iv. The Claimant contributed to the termination of employment.
89. In the circumstances, the court is satisfied that the equivalent of three (3) months gross salary is sufficient.
90. In the upshot, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment was unfair and unlawful.
 - b. Equivalent of 3 months gross salary.
 - c. Interest at court rates from date of judgement till payment in full.
91. The Claimant did not pray for costs and the same are not awarded.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

