



**Kisili v Consolidated Bank of Kenya Limited (Employment and Labour Relations
Petition E040 of 2023) [2023] KEELRC 2075 (KLR) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2075 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E040 OF 2023**

**AN MWAURE, J
AUGUST 18, 2023**

BETWEEN

JAPHETH KISILI PETITIONER

AND

CONSOLIDATED BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The Petitioner filed a petition dated 28th February 2023.
2. The prayers therein are as hereunder:-
 - a. A declaration that any interdiction and/or suspension by the Respondent against the Petitioner in relation to the matters alleged is flawed, manifestly unreasonable and violates the Petitioner's rights inter alia his right to fair administrative action, fair hearing, and the presumption of innocence until proven guilty in any proceedings therefore null and void ab initio.
 - b. A declaration that the Respondent has violated the Petitioner's rights to equal benefit of the law under Article 27 of the Constitution, the right to be treated with human dignity under Article 28 of the Constitution, the right not to be treated in a cruel, inhuman or degrading manner under Article 29(1) of the Constitution, the right to fair labour practices under Article 41 (1) of the Constitution, right to fair administrative action under Article 47 of the Constitution, the right to access justice under Article 48 of the Constitution and the right to a fair hearing under Article 50 of the Constitution.
 - c. A declaration that all subsequent actions taken to wit termination of the Respondent's employment with the Respondent are null and void.



- d. A declaration that the Petitioner be reinstated to work forthwith and all withheld emoluments benefits entitled to him to be paid forth with.
- e. An order of compensation for the violation of the Petitioner's rights and fundamental freedoms under Article 27,28,29,35,41,47, 48 and 50 of the Constitution.
- f. A declaration that the actions of the Respondent constitute a violation of the Petitioner's rights under Article 31 (d), 35 (1) (b), 41 (1), 47 and 50 of the Constitution.
- g. An order of injunction be issued against the Respondent, its agents, servants, representative or any other person under its instructions barring them from commencing proceeding or in any other way completing or implementing the decision of the disciplinary process as commenced through the Respondent's letter dated 21st December 2022 or in any other way interfering with the employment of the Petitioner.
- h. In an alternative the Respondent, be ordered to compensate the Petitioner the sum equivalent to the salary and compensation for any benefits he would have earned and or enjoyed till retirement at the age of 60 years.
- i. A permanent injunction restraining the Respondent from converting the staff loan into a commercial loan and levying commercial loan rates.
- j. Cost and interest
- k. Any other relief the court may deem fit and just to grant.

Petitioner's Case

3. The petition was based upon the Petitioner's supporting affidavit and exhibits thereto filed together with the petition and a further supporting affidavit sworn on 28th February 2023. The petitioner's case is as follows:
 - a. He was employed as a Chief Accountant on permanent and pensionable terms in 2004 and over the years he rose through the ranks as Head of Finance, General Manager up to Chief Commercial Officer a position held prior to the events complained about in the petition.
 - b. Sometime in 2021, he was asked by the Respondent's Board of Management to serve as the acting Chief Executive Officer, a position he held till October 2022.
 - c. On 21st December 2022, he received a show cause letter requiring him to respond to fifteen allegations relating to non-adherence to Bank Procedures and Public Procurement and Asset Disposals Act in the procurement of the core banking systems.
 - d. On 7th December 2022, he says he had been involved in an accident resulting to serious bodily harm immobilizing him from a while, thereby he informed the Respondent of the same and that he was not in a possession of documents relevant to his defence, however, his request for the documents was not granted and he raised this in his response vide a letter dated 11th January 2023, in which he denied the allegations made against him and offered explanations with supporting documents. He avers this act by the Respondent to refuse him access to his office and his document amounted to victimization and unfair administrative action against him.



- e. He nevertheless responded to the notice to show cause vide his letter dated 11th January 2023 but nevertheless pointed out he was not facilitated and was refused access to his office to get his records.
- f. The petitioner says prior to the disciplinary hearing held on 13th February 2023, the Respondent was aware he was not medically fit, but they proceeded with the disciplinary hearing in his absence and consequently decided to terminate him. He says he had furnished the respondent with his medical reports but nevertheless proceeded with the hearing in his absence.
- g. That the basis of determination of the Respondent's Board to terminate him was ultra vires on the grounds that it was based on allegations that were not in the show cause letter; communication was made by the CEO who is not a gazetted member of the board; and the decision to terminate him referred to a sitting of the board of 14/02/2023 which he had not been invited to attend and not one of 13/02/2023 when he notified the Respondent of his inability to attend due to sickness.
- h. The Petitioner contends that the Respondent's action to invite him to attend the hearing virtually whilst knowing he was sick amounted to unfair and discriminatory employment practices.
- i. The Claimant maintains the Respondent's decision to terminate his employment was in breach of section 41, 43 and 45 of the Employment Act and Article 47 and 50 of the Constitution.

Respondent's Case

4. The Respondent filed a replying affidavit dated 23rd March 2023 sworn by Wakonyo Igeria, the Head of Legal and Company Secretary in the Respondent. It was stated and urged as follows:
 - a. That the Respondent as a bank has a Core Banking System (CBS) it uses to run its day to day activities as a financial institution and that the previous CBS licence was to expire on 31st May 2021.
 - b. On 28th May 2021, the Respondent's Board granted approval to commence the process of identifying a supplier for a new CBS, however, it had not received the formal budget approval from the National Treasury to fund the procurement. The Respondent through the Petitioner as the acting CEO wrote to the National Treasury seeking approval for the budget to procure the CBS to no avail.
 - c. On 7th July 2021, the Petitioner caused the tender to procure the CBS to commence vide advertisement through newspapers on 8th July 2021.
 - d. On 31st August 2021, the Respondent's evaluation committee issued a report recommending the winning bidder as Inlaks Computer Limited at a cost of USD 3,167,090 subsequently on 9th September 2021, the procurement manager issued a professional opinion on the report and concurred with the committee's recommendations and supported the award to the winning bidder and the same was forwarded to the Petitioner.
 - e. The petitioner was indicted of beginning the procurement process before approval had been given by the board and the national to Treasury.



- f. Upon receipt of the evaluation committee's report and the procurement manager's opinion, the Petitioner declined to approve the same leading to frustration of the entire tender process as illustrated in the replying affidavit.
- g. He was also accused of interfering with the procurement processes of the core banking system by introducing new requirements that were not part of the original tender through the head of ICT.
- h. That the Petitioner and the Head of ICT in their concerted efforts led to the termination of the open tender process on 18th October 2021 by declaring the bids unresponsive and termination letters were sent to all bidders.
- i. That during the entire tendering period the National Treasury had not approved the budget of Kshs. 300 million to procure the CBS system. And that on 14th December 2021 during a board meeting discussing the CBS, the Petitioner on behalf of the Respondent's management stated in the event the respondent decides to use another vendor the current vendor has indicated the bank will pay the cost of the full licence which was USD 985,000 and that the current vendor has agreed to spread the cost upgrade over a period of 1-2 years.
- j. On or around October 2022 and upon completion of the procurement process, the Respondent vide an internal and external audit, conducted a review of the process to ascertain that it adhered to the legal process and the bank received value for its money. By this time the term of the Petitioner as the acting CEO had come to an end and the substantive CEO had been appointed. The respondent conducted both internal and external audit.
- k. An internal audit was conducted culminating to a report dated 16th December 2022, similarly an external audit was conducted by PricewaterhouseCoopers Limited (PWC) which also rendered its report on 16th December 2022. Both reports highlighted significant shortcomings and interference in the procurement process by the Petitioner and the then Head of ICT, Martin Omino resulting to a botched tender process. Both reports recommended disciplinary action be taken against the acting CEO (petitioner) and the Head of ICT.
- l. Vide a letter dated 21st December 2022, the Petitioner was invited to show cause and the same listed 15 charges against him and required him to respond not later than 12th January 2022 and a further notice to show cause dated 18th January 2023 was issued to the Petitioner for placing a tender advertisement in the newspapers on 29th March 2022 before obtaining approval of the board. The respondent incurred costs of kshs 128,975/- and further costs to cancel the advertisement
- m. The Petitioner was suspended from duty pending disciplinary hearing vide a letter dated 21st December 2022 and that during the suspension period the Petitioner was entitled to half salary and all other terms of his contract prevailed.
- n. That upon receipt of the suspension and show cause letter, the Petitioner emailed the Respondent's CEO requesting access to bank records and information for purposes of his response to the letters and the same was responded to on 29th December 2022 by the CEO requesting him to give a list of the documents he requires to review and the date he would come to review and further requested the Petitioner to liaise with the Respondent's Head of Human Resources. The Petitioner however never responded to the email or followed up on the matter but he proceeded to respond to the notice to show cause vide a letter dated 11th January 2023. But he still raised the issue of not being accorded access to his office and bank records.



- o. That the Respondent was still sympathetic to the Petitioner’s medical condition and for that reason it accorded him with four chances to attend the disciplinary hearing which was postponed on his account. Further, the Respondent’s own doctor despite acknowledging his condition did not recommend a sick off but the same was recommended by the Petitioner’s doctor. The respondent provided the Petitioner an alternative to attend hearing virtually on the last hearing date.
- p. The Respondent states: -
 - i. The basis of the petitioner’s termination was not ultra vires since it was predicated on charges framed in the show cause letter.
 - ii. The CEO is the chief executive of the Respondent which is a state corporation and as such has a right to be present at a meeting of the Board or committee thereof. Further, the board can delegate any officer of the Respondent individually or jointly with others to carry out any mandate bestowed to it including issuing correspondences.
 - iii. The record of the disciplinary hearing i.e the hearing on 13.02.2023 speaks for itself that the hearing was held on the said day as well as what transpired.
- q. The Respondent denies all allegations of victimization, unfair administrative actions and discriminatory employment practices and put the Petitioner to strict proof.

Analysis and Determination

- 5. Final submissions were filed for the parties. The petitioner submission are dated 19th April 2023 and the respondents submissions are dated 2nd May 2023. The Court has considered all the material on record. The following issues arise in this case:-
 - a. Whether the Respondent violated the Petitioner’s constitutional rights
 - b. Whether the Petitioner was unlawfully and/or unfairly dismissed
 - c. Whether the Petitioner is entitled to the reliefs sought

Whether the Respondent’s actions violated the Petitioner’s constitutional rights

- 6. Article 27 – Equality and freedom from discrimination provides specifically as follows:-

“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

In *Simon N. Mwaniki & 25 others v Permanent Secretary Ministry of Defence & 3 others* [2018] eKLR, the court held as follows:-

“The Petitioners alleged discrimination against them in that they were either demoted or terminated from employment. Discrimination is defined in *Blacks Law* 9th Edition at page 534 as:-

“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability. Differential treatment especially failure to treat all persons



equally when no reasonable distinction can be found between those favoured and those not favoured”.

The above definition envisages treating one group differently or preferentially as against another group under similar circumstances. In submitting that they were treated in a discriminatory manner the Petitioners did not point out what they were subjected to in a discriminatory manner as opposed to a different group under similar circumstances.”

In view of the foregoing, the Petitioner has failed to raise a valid case for the said discrimination, therefore the same is unfounded.

7. The Petitioner also submitted that their right under Article 28 of the *Constitution* was breached. Article 28 of the states as follows:-

“Every person has inherent dignity and the right to have that dignity respected and protected”.

8. The Petitioner averred that the law under Article 41, 47 and 50 of the *Constitution* were not followed. Article 41 deals with fair labour practices. Article 47 refers to fair administrative action whereas Article 50 also deals with a fair hearing.

9. In submitting this, the Petitioner avers that he was denied access to information by the Respondent, the disciplinary hearing was held without his presence and without regard of his unavailability to attend the hearing due to his medical condition.

10. However, the Respondent have painted a very different picture which is backed with documentary evidence showing that the Petitioner was adequately served with the notice to show cause letter and disciplinary hearing notice clearly stating the allegations raised against him.

11. Indeed elaborate process was undertaken by the respondent in every process including giving him notice to show cause which they issued twice and invitation to disciplinary hearing which they accorded him four times. The Respondent tolerated the Claimant’s postponement of the hearing four times and accorded him enough time to recover before settling on proceeding with the disciplinary hearing without his presence. All the time the respondent was informed of his right to take a witness of his choice to the hearing.

12. Section 41 of the *Employment Act* provides as follows:-

“(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.”



13. The respondent clearly invited the petitioner to the hearing four times. They even had him examined by the doctor. The petitioner did not turn up for the hearing and he did not demonstrate he was so unwell so as not to even attend the hearing virtually.
14. The Respondent has satisfied this court that it followed due procedure in accordance with Section 41 of the *Employment Act* to conduct the disciplinary process and it was forced to proceed with the hearing without the presence of the Petitioner as it can be adduced from his conduct and abrupt sick leave sheets even at the 11th hour that he was avoiding to attend the hearing and was using his alleged medical condition as a delaying tactic.
15. The respondent followed the mandated procedure to conduct the petitioner's disciplinary hearing.

The second issue is whether the Petitioner was unlawfully and/or unfairly dismissed

16. Section 47 (5) of the *Employment Act*, 2007 provides thus;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
17. Also it is trite law that an employer cannot terminate the employment of an employee without a valid reason. Section 45(1) of *employment act* provides that:

“No employer shall terminate the employment of an employee unfairly. “
18. The Petitioner's main argument in support of his claim on unfair dismissal is that he was denied access to relevant documents necessary for his defence and that the Respondent failed to take cognisance to his medical condition and proceeded to conduct the disciplinary hearing.
19. The Respondent has presented a strong case and shown how it accommodated the Petitioner and gave him time to heal before proceeding with the hearing. Further to this, it is key to note the Petitioner chose what to respond to in respect to the disciplinary issue at hand.
20. The respondent clearly had valid reason for terminating the claimant as the claimant had begun procurement process of the banking system without the approval of the board of the respondent or of the national treasury. He also interfered with the procurement process of the said system by introducing new requirements that were not in the original tender through the head of ICT. These were just some of the indictments against the petitioner as per the termination letter.
21. The petitioner in his response dated 11th January 2023 did not give convincing explanations to the issues raised. About the approval of the budget by the national treasury for example he says the supplementary budget was approved during the tenure of the previous CEO. He says the board was asked to submit a supplementary budget and so both the board and the national treasurer were informed about he needs and contents of the supplementary budget. Such an explanation falls short as clearly the budget was not approved.
22. Even about the matter of the extension of the licence the explanation is not clear and is not supported by any evidence.



23. The issues raised by the respondent are not petty issues and needed well thought out response with supportive evidence. This is not presented to the court and little wonder the petitioner was after his response invited for disciplinary hearing which disciplinary hearing he shunned.
24. The court in deciding if employer has a valid reason or reasons for terminating an employee provides that employer only needed to show a standard of proof on a balance of probability and not beyond reasonable doubt and that was held in the case of *Kenya Revenue Authority vs Renwel Waitbaka Gitabi & 2 others* (2019) eKLR. Further the court held that what is required of the employer is to show the reasons are those he genuinely believed to exist causing it to terminate employee's services.
25. In the case of *Kenya Ports authority vs Fadhil Juma Kisuwa* Civil Appeal No. 76 of 2016 the court held:
- ” the respondent's response to notice to show cause was hollow and did not offer any explanation regarding the forged documents yet that was the crux of the matter. But he was afforded a hearing which he squandered by failing to squarely deal with the question of forgery of certificates. His explanation that he only presented the certificate from Kipsengere secondary school did not answer the more serious question.”
26. Similarly in this case the court finds the petitioner was given credible reasons for his discipline and his disciplinary hearing was fairly and procedurally conducted. Hence his constitutional rights were not violated and his termination was fair and procedural. The upshot of the above is that he is not entitled to all the prayers sought and his petition is dismissed. The court will not interfere with the repayment of the loan as there is a valid contract document and parties are bound by the terms of their contract.
27. Each party however will meet their respective costs at least considering the long period claimant served the respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF AUGUST 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

