



**Kikayaya v Local Authorities Provident Fund Board (Cause 1336 of 2014)
[2023] KEELRC 2245 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2245 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1336 OF 2014
J RIKA, J
SEPTEMBER 29, 2023**

BETWEEN

JANET PISOI KIKAYAYA CLAIMANT

AND

LOCAL AUTHORITIES PROVIDENT FUND BOARD RESPONDENT

JUDGMENT

1. The Claim herein was initially filed against two Respondents – the above Fund Board, and its Chief Executive Officer, David Koross.
2. In a Ruling dated 10th August 2021, the Court discharged the Chief Executive Officer from the proceedings, finding that he is an Employee of the 1st Respondent, and was improperly joined to the proceedings.
3. The Claim is therefore solely against the Fund Board.
4. The Statement of Claim was amended on 21st July 2015.
5. The Claimant states that she was employed by the Respondent as a Supply Chain Officer, on 21st September 2011.
6. She was unfairly and unlawfully dismissed by the Respondent, on 11th June 2014.
7. Summary dismissal decision was malicious, occasioned by her highlighting of procurement irregularities within the Respondent. Highlights were contained in her letter to the Chief Executive Officer David Koross, dated 28th May 2014.
8. The Respondent, through its Chief Executive Officer, immediately transferred the Claimant from Nairobi to Nyeri, through a letter dated 30th May 2014.



9. She was on attachment at JKUAT for her Master's degree programme; her family was in Nairobi; her children schooled in Nairobi; and she was not trained and skilled in marketing. She was being transferred from a procurement role to a marketing role. She therefore appealed against the transfer decision to the Chief Executive Officer.
10. She was advised to report to Nyeri, while her appeal was under consideration.
11. However, on 11th June 2011, the Chief Executive Officer summarily dismissed the Claimant.
12. She was earning a monthly salary of Kshs 153,262.
13. She states that she was not given an opportunity to defend herself; summary dismissal was against the Respondent's terms and conditions of service, which provides for equitable employment practice; and that she ought to have been requested to retire early under the 50-year rule. Summary dismissal was contrary to the *Employment Act* and the *Constitution*.
14. She attributes her transfer to the Chief Executive Officer's personal vendetta against her, which was meant to defeat her objection to procurement irregularities.
15. She prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair.
 - b. 12 months' salary in compensation for unfair termination at Kshs 1,839,144.
 - c. 7 months' salary under the 50-year retirement rule.
 - d. Costs, interest and any other suitable relief.
16. The Respondent filed its Statement of Response and Counterclaim, on 10th November 2014. Its position is that the Claimant was initially employed on probation for a period of 6 months. Her performance was below par, and probation was extended for 3 months, beginning 3rd May 2012, ending 3rd August 2012.
17. Over the extended period of probation, she was culpable of various disciplinary infractions. She made her presentations before the Human Resource Committee on 28th November 2012. The disciplinary complaints against her were enumerated. It was recommended that since there was no formal contract with the Claimant, her contract would not be confirmed at the end of the probation.
18. She was sent on annual leave on 17th December 2012, after her appraisal, showed that she did not understand her work. She was not a team player. She was always involved in unbecoming conduct. The complaints against her were tabled before the full Board, at its 86th meeting.
19. She was only confirmed as a pensionable and permanent Employee after she undertook to mend her ways. She was at the time, on the verge of being dismissed. The Respondent confirmed her begrudgingly, on 25th March 2013.
20. Her eventual summary dismissal, was fair. It was not malicious. It was not triggered by her letter raising procurement concerns, dated 28th May 2014.
21. She was transferred to Nyeri Zonal Office, through a letter dated 30th May 2014. She was transferred as Coordinator of the said Office. Transfer was in accordance with clause B.10 of her terms and conditions of service.



22. The full Board had approved reorganization of the Respondent, pursuant to its meeting held on 25th March 2014. Other officers were affected by the transfers including Sylvester Mutie, Valentine Maina, and Stella Goiri. Other departments besides the Claimant's, were affected.
23. The Claimant did not obey the transfer instructions and did everything to frustrate the process. She called one Jane Mmasi from the Human Resource department, vowing that she would revenge against transfer. She vowed to bring down the Chief Executive Officer, by spreading malicious rumours in the media; she would inform the media that the Chief Executive Officer had awarded tender of Kshs 550 million for sale of land in Upperhill, against a government valuation of Kshs 450 million; she would escalate the complaint against the Chief Executive Officer to the Cabinet Secretary in the parent Ministry; and would use the State House and the Office of the Deputy President, to destroy the Chief Executive Officer.
24. She proceeded to write a letter dated 28th May 2014, which was delivered on 3rd June 2014, purporting to respond to a letter of warning she had received from the Chief Executive Officer dated 19th May 2014. She complained about procurement irregularities, and also appealed against her transfer.
25. She was to report to Nyeri on 1st June 2014. She declined saying she was on annual leave, and would hand over procurement records after she resumed. The Respondent decided to wait for her resumption.
26. She reported for handover on 9th June 2014 and spent the whole day wasting time. She asked to be allowed to hand over the next day, and was granted the time. She did not show up the next day. She sent a text message saying she had a sick child. She had no leave of the Respondent, to be away.
27. She contacted senior government officers, to intimidate the Chief Executive Officer into revoking transfer decision. Among the officers who called the Chief Executive Officer to intercede for the Claimant was State House Comptroller Lawrence Lenayapa and a politician, Joshua Kuttuny.
28. She was advised that her appeal would be processed for hearing, but in the meantime, she was to report to Nyeri. She did not, but opted to paralyze the Respondent's reorganization exercise.
29. She never understood procurement, and her assertion that change of role to marketing disadvantaged her, was a red herring.
30. Termination was fair and lawful. She had been heard variously and given a chance to redeem herself. She was given adequate opportunity to defend herself. She had multiple disciplinary issues, which had piled up, day after day, rendering her uncontrollable.
31. On computation of her final dues, it was realized that she owed the Respondent Kshs 22,601, which the Respondent counterclaims from her.
32. The Respondent prays for dismissal of the Claim, and grant of the Counterclaim, in the sum of Kshs 22, 601.
33. The Claimant gave evidence and closed her case, on 4th November 2022. Jane Mmasi, Human Resource and Administration Manager gave evidence for the Respondent on 17th February 2023, closing the hearing. The Claim was last mentioned on 14th July 2023, when Parties confirmed filing and exchange of their closing submissions.
34. The Claimant adopted in her evidence-in-chief, her witness statement and documents exhibited as number 1-7. She restated that she was not given a hearing or a notice before termination. She was transferred after she raised a red flag, over procurement irregularities. She was assigned to the marketing



- department, while her skills, competence and experience was in procurement. She was to report on 12th June 2014 at Nyeri, but was dismissed on 11th June 2014. She did not refuse to report. She was dismissed before her appeal against transfer was considered.
35. Cross-examined, she told the Court that she was availed a copy of her terms and conditions of service on employment. She read, understood and accepted them. She did not have warning letters or disciplinary proceedings. She did not quarrel with colleagues. Minutes of a meeting held on 28th November 2012, indicates she had a disciplinary case. There were issues raised against her by the Respondent. It was alleged that she approved procurement without budgetary approval; and that she quarrelled with Khadijah from Nairobi City Council.
 36. She raised her red flag on procurement irregularities, on 28th May 2014. The Respondent must have received it, because a reply was made. She received memo on transfer. 3 other Employees were affected. They complied with the memo. The Claimant did not, because she was dismissed, and was also on sick-off. She was not given adequate chance to defend herself.
 37. She was paid pension at approximately Kshs 800,000. She did not recall receiving Kshs 150,000 separately, in terminal dues. The Chief Executive Officer was authorized to effect inter-departmental transfers. Redirected, the Claimant emphasized that she did not refuse transfer. She was never called to answer any allegations. Issues raised by the Respondent against the Claimant related to the probationary period.
 38. Jane Mmasi adopted her witness statement and documents filed by the Respondent [1-21] as her evidence-in-chief. She confirmed that the Claimant was employed by the Respondent. The Claimant was placed on probation, which was extended for lack of satisfactory performance. She was confirmed after several discussions with the Respondent, where she undertook to improve her performance.
 39. There was reorganization. All Employees were informed. The Claimant was assigned the Nyeri Office and paid relocation allowance. She declined transfer, inconveniencing both Nyeri and Nairobi.
 40. She even engaged external persons, to exert pressure on the Chief Executive Officer, not to transfer her. She then took leave, and the Respondent was not able to engage her. Other transferred Employees appealed transfer successfully, or moved to their new stations. She stormed the Chief Executive Officer's Office, confronting him on the subject. She was paid her terminal dues. The Respondent paid relocation allowance to her at Kshs 22,601, which the Respondent counterclaims.
 41. Cross-examined, Mmasi told the Court that she had a good working relationship with the Claimant. The Claimant declined transfer. Her refusal was part of the reasons, why she was summarily dismissed. Other reasons were what she did after her refusal. She was to relocate on 1st June 2014. She was not on leave at the time. She was given until 12th June 2014 to report to Nyeri. She did not, stating that she was appealing against the decision. Dismissal was on 11th June 2014, a day before the date of reporting to Nyeri.
 42. She had several incidents of poor performance. There was no record of her intoxication and absenteeism. There was a disciplinary case concerning her conduct and performance. Staff complained about her conduct. As on November 2012, she was on extended probation. She was confirmed on 25th March 2013. She did not have a formal contract. There are no minutes of the Board's 87th meeting. The meeting took place. The Claimant was given a hearing. There was no record of the Claimant being on leave.
 43. She called government officials to forestall transfer. The Chief Executive Officer wrote file notes, recording the irregular interventions from government officials acting at the behest of the Claimant.



The Chief Executive Officer would not record something that did not happen. Her performance was dismal. Salary increment was based on cost of living adjustment and performance. It cut across all Employees. Her expertise was in procurement. She was assigned marketing at Nyeri. Investigations were carried out by the Board. The Claimant was dismissed for continued refusal to follow instructions and use of abusive language. Board resolutions are not on record. The Human Resource Policy provides for opportunity to appeal. The Claimant was not given an opportunity to do so. The Board had the mandate to terminate. The Chief Executive Officer had delegated authority of the Board and was its Secretary.

44. Redirected, the witness told the Court that 12th June 2014, was not the first date instructions were given to the Claimant, to transfer. She was initially to report on 1st June 2014. She did not do so, because she had not handed over. She was given time to report. Her failure to report to Nyeri, amounted to absenteeism. The file notes by the Chief Executive Officer need not have been signed. Her appeal was not considered, because she did not report to Nyeri. She was aware of her terms and conditions of service, and the grounds for her dismissal. She was advised that she owed the Respondent Kshs 22,601. She was aware of her right of appeal against dismissal. She did not exercise it.
45. The issues are whether summary dismissal of the Claimant was procedurally and substantively fair, in accordance with Sections 41, 43 and 45 of the *Employment Act*; whether she is entitled to the remedies pleaded, costs and interest; and lastly whether the Counterclaim is merited.

The Court Finds: -

46. The Claimant was employed by the Respondent as a Supply Chain Officer, on 21st September 2011. She was confirmed as permanent and pensionable on 25th March 2013, after serving initial probation of 6 months, and secondary probation of 3 months.
47. She was dismissed on 11th June 2014 through a lengthy letter [8 pages] signed by the Respondent's Chief Executive Officer David Koross.
48. Dismissal letters ought to be shorter, concise, and targeted, otherwise the Employer risks blurring the reason or reasons cited, in justifying termination.
49. The letter discloses multiple ground in justifying termination. The Court has distilled them to include: adamant refusal to transfer from Nairobi to Nyeri; refusal to complete hand over office at Nairobi on 9th May 2014; storming the Chief Executive Officer's Office and insisting she would not hand over, as her appeal against transfer had not been heard and determined; dropping names of prominent persons she alleged were interceding on her behalf against transfer; insisting that handover is carried out under the supervision of PPOA and EACC; she displayed arrogance, defiance and insubordination; she disregarded the rules and regulations applicable to Employees of the Respondent; the Respondent had concerns about the Claimant's conduct preceding her confirmation; she had on 18th October 2012 quarrelled another Officer named Khadijah, in front of a client; and used offensive language against the Chief Executive Officer.
50. The Respondent concluded that the Claimant's conduct, especially the continuous refusal to follow instructions, was in violation of the Respondent's terms and conditions of service, Sections K and L, and Section 44 [4] of the *Employment Act*.
51. Validity of reasons: The Court would agree with the Claimant that having been confirmed as permanent and pensionable, accusations relating to the probationary period, were not valid dismissal grounds.



52. The letter of summary dismissal lists various offences at paragraph 6, committed by the Claimant in the year 2012. There are remarks indicated on the list, of actions taken against the Claimant, including verbal and written warnings. The offences were irrelevant in justifying dismissal on 11th June 2014. Not only had the Claimant been punished for those offences while on probation; she was confirmed as permanent and pensionable on 25th March 2013, well after the events of 2012. She completed her probation successfully, otherwise the Respondent would not have confirmed her, as permanent and pensionable Employee.
53. Of relevance are the offences concerning the year 2014. It is common ground that the Claimant was transferred to Nyeri Zonal Office from Nairobi. She was to report on 1st June 2014.
54. She crafted various grounds, to delay transfer, and eventually decline transfer, which included that her family was in Nairobi; her Children were schooling in Nairobi; she was not qualified for the marketing role she was being assigned at Nyeri; her area was procurement; she was undertaking a Master's degree course at Nairobi; she had appealed against the decision and would not transfer until the appeal was determined; and that she would not hand over Nairobi docket unless the exercise was supervised by the PPOA and EACC. Accountant Chemashack Ndiwa, confirms in his report to the Chief Executive Officer, dated 12th June 2014, that the Claimant declined to hand over, on the ground that she had lodged an appeal against transfer, and that she would only hand over in the presence of PPOA and EACC.
55. In resisting transfer, there is evidence that the Claimant adopted unacceptable tactics, which included seeking the intercession of political operatives such as Joshua Kuttuny and Lawrence Lenayapa. The involvement of these influencers is captured in file notes dated 4th June 2014, which were prepared by the Respondent's Chief Executive Officer.
56. Lenayapa served as the Comptroller of State House, and personally called the Chief Executive Officer Koross, threatening him that, "Koross, wacha hiyo mchezo wako, wacha hiyo mchezo wako, unaguza msichana mmsai." In Kiswahili, loosely translated to, "Koross stop your games, don't you dare touch that masai girl."
57. On the same day the Chief Executive Officer received threats from Lenayapa, he received a call from politician Joshua Kuttuny, pleading that the Chief Executive Officer does not transfer the Claimant, whom he stated was his friend and relative, to Nyeri.
58. The Claimant refused to transfer to Nyeri, and sought outside influence from powerful quarters, including no less than the State House, to intimidate the Chief Executive Officer and her Employer, from exercising their managerial prerogatives.
59. It was confirmed by the Human Resource Manager Jane Mmasi that the Claimant was bitter about transfer, and had expressed her wish to bring down the Chief Executive Officer in revenge. She declined to report to Nyeri on 1st June 2014, and there is every indication that she did not intend to report on 12th June 2014. Her argument that she was dismissed on 11th June 2014 before she could report, does not persuade the Court that she was willing to report to Nyeri. She had been moving heaven and earth since she was instructed to report to Nyeri on 1st June 2014, to ensure transfer did not materialize. Her contact with State House, Office of the Deputy President, relevant Cabinet Secretary, Political Operatives and Influencers, can be seen against this commitment, to bring down the Chief Executive Officer in revenge.
60. Her conduct was clearly an act of undisguised gross misconduct. She openly defied the Respondent, and was guilty of insubordination, by her refusal to report to Nyeri.



61. She had submitted her appeal, she had been paid relocation allowance, and her grievances concerning her family could have been dealt with on appeal, even as she reported at Nyeri. What was difficult in reporting to Nyeri while on leave, and going back to Nairobi to pursue her appeal after reporting? If there were good grounds, the Respondent would have rescinded its decision, in exercising its managerial prerogative, and recalled the Claimant to Nairobi.
62. There were other Employees who had been transferred, within a reorganization exercise carried out by the Respondent. The Chief Executive Officer was effecting a decision made by the full Board, at its meeting held on 25th March 2014, to implement a revised organizational structure, in keeping with the Respondent's strategic plan. There is no weight to be attached to the Claimant's assertion that the Chief Executive Officer was actuated by personal vendetta, as alleged by the Claimant. His was a corporate decision. Other Employees complied and/or appealed the decision to move them, in accordance with the terms and conditions of service. The Claimant opted to adamantly decline transfer, and call in the aid of powerful external forces, to intimidate the Chief Executive Officer, into submitting to her wish to remain in Nairobi. Her terms and conditions of service authorized the Respondent to assign her roles and transfer her in accordance with the organizational needs.
63. There is no evidence at all, that she was victimized for raising a red flag on any acts of corruptions against the Chief Executive Officer. The Chief Executive Officer is to be lauded for standing up for corporate governance, against malevolent forces. The Claimant's red flags, and insistence on calling in the PPOA and EACC before she could hand over office, fell within her scheme of making corruption allegations against the Chief Executive Officer, to obscure her act of defiance to transfer.
64. The Court is satisfied that the Claimant was summarily dismissed for valid reasons under Section 43, 44[4] and 45 of the *Employment Act*.
65. Procedure. The Claimant was quite aware about the principal ground why the Respondent dismissed her from service. She does not deny that she received instructions to transfer, and kept delaying transfer. It is documented that she did not hand over office at Nyeri, when she was instructed to do so, and when it was agreed she would hand over. She made it impossible for the Chief Executive Officer to convene a formal disciplinary hearing, storming his office; keeping away from office on a conveniently taken annual leave which coincided with transfer; and worst of all moving to State House and other high offices seeking intercession, instead of submitting to the rules and regulations at the workplace.
66. The disciplinary procedure under Section 41 and 45 of the Employment is based on the presumption that both the Employer and the Employee, shall act rationally, within the confines of their employment contact and law, and shall be available without exerting external influences on each other, when required to settle grievances and disciplinary issues at the workplace. The Employee must demonstrate the willingness to adhere to the disciplinary procedure, submit to the terms and conditions of service, the *Employment Act*, and make it possible to have a disciplinary hearing within the workplace. When an Employee storms the Chief Executive Officer's Office, disregards the Executive Office and its authority over her, and approaches powerful forces outside the workplace to intervene on workplace grievances, it becomes difficult for the Employer to take her through a formal disciplinary hearing. The Claimant frustrated every endeavour of the Respondent, to discharge its managerial prerogative, including the convention of a formal disciplinary hearing.
67. She similarly made it difficult for the Respondent to rationally consider her appeal on transfer. She believed in authorities higher up than her Chief Executive Officer, and entrusted the sorting out of her employment grievances through those higher up authorities. She did not make the environment at work conducive to a conventional disciplinary hearing. She did not create the right atmosphere for



consideration of her appeal concerning transfer. Upon dismissal, she concedes she was aware of her right of appeal, but did not exercise that appeal.

68. There is no foundation to her claim that she should have been requested to retire early, under the 50-year rule. She was engaged in unalloyed acts of gross misconduct, and early retirement is not the punishment for gross misconduct. It is not an alternative to summary dismissal. Employees guilty of acts of gross misconduct, are not allowed the luxury of recommending the form of punishment, their Employers should mete out to them. There is no basis for the Claimant to propose, that her Employer should have made any request to her, in punishing her for gross misconduct. If it was her view that she should be retired early, rather than go to Nyeri, she ought in any event to have put out her request to the Respondent for early retirement, instead of waiting for the Respondent to make the request to her, and instead of tenaciously fighting the Respondent for having transferred her. Her prayer for 7 months' salary allegedly due to her under the 50-year retirement rule, is an absurdity and totally misconceived.
69. The Claim has no merit.
70. The Respondent suggested to the Court that in addition to pension payment made to the Claimant at approximately Kshs 800,000, she was paid sundry terminal dues at Kshs 150,000. If any amount was owed to the Respondent by the Claimant, the Respondent ought to have recovered payment from her terminal dues, and not wait until the Claimant filed her Claim, to seek recovery through the aid of the Court, by way of counterclaim. The Counterclaim, has not been established and is declined.

It Is Ordered: -

- a. The Claim is declined.
- b. The Counterclaim is declined.
- c. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 29TH DAY OF SEPTEMBER 2023.

JAMES RIKA

JUDGE

