



**Odhiambo v East African Breweries Limited (Cause 1482 of 2018)
[2023] KEELRC 2323 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2323 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1482 OF 2018
MN NDUMA, J
SEPTEMBER 28, 2023**

BETWEEN

ENGINEER BOAZ OLONDE ODHIAMBO CLAIMANT

AND

EAST AFRICAN BREWERIES LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by a contract dated October 24, 2005 as a Graduate Management Trainee effective October 31, 2005 at a salary of 64,000. The claimant rose in ranks over the years to the position of Facilities Manager earning a monthly salary of Kshs 614,000.
2. The claimant did not have a disciplinary record until by a letter dated August 16, 2018, he was suspended from duty on allegations of procurement fraud, extortion and bribery made to a supplier in breach of respondent's Code of Business.
3. The claimant responded to the notice to show cause by a letter dated August 22, 2018 denying the allegations. The claimant received a letter of summary dismissal from Employment dated September 20, 2018. The reason for the dismissal were set out in the letter being that the claimant was found guilty of demanding and/or extorting bribes from a supplier which conduct amounted to abuse of office with intent to obtain financial gain. That it was also in breach of company's Code of Business Conduct (COBC).
4. The claimant was to be paid salary for days worked and in lieu of leave days not taken. Claimant was also to be refunded all money due to him under the Rule of the East African Breweries Limited (EABL) Retirement Benefits Scheme [2003] and the Rules of the EABL Share Save Scheme.
5. The claimant told the Court that on September 20, 2018 he was called by one M/s Michelle to go to the Corporate Centre and he met Ms Njeri Njenga (Human Resource Business Partner) who informed him that the company had decided to part ways with him and handed him the said letter of dismissal.



- The claimant said that he had attended a disciplinary hearing and explained himself prior to that. The claimant said that his rights were violated in that he was not given the statements from his accusers for him to be able to respond appropriately to them. That he had not received any feed-back from the disciplinary committee before he was given the letter of dismissal.
6. The claimant said that he was discriminated by being targeted for dismissal alone since the allegations were made against several employees and not himself alone. That the dismissal was malicious, unlawful and unfair. That the allegations were false and not proved. The claimants seeks the following reliefs:-
 - (i) One month salary in lieu of notice - Kshs 614,000.
 - (ii) Payment in lieu of 45 leave days -Kshs 1,062,652,30.
 - (iii) 12 months' salary in compensation for the unlawful and unfair dismissal.
 - (iv) Costs and interest
 7. The claimant was closely cross-examined by advocate Nyaburi for the respondent. The claimant explained the process of procurement and that he supervised requisition which commenced from his department. That quotations would be made and approvals done and sent to suppliers. The Purchase Order was then generated. That he was not involved in that process. The claimant admitted that he knew the company called Termipest and knew its Director called Charles Manyara.
 8. The claimant stated that he had called Mr Charles Manyara and told him his Purchasing Order (PO) had been approved. The claimant narrated that he had informed Charles that he had discussed the matter with the Head of Engineering for the position to be approved.
 9. The claimant denied that he had demanded payment of money to push for the approvals of the Purchase Orders to be done. The claimant said he was not aware of the amount of the quotation made by Charles's company but he learnt that it was for Kshs 480,000. The claimant stated that he was not aware that an approval for Kshs 960,000 was done. The claimant said Charles did not tell him his Purchase Order had an issue. The claimant denied that he had requested for a bribe of Kshs 200,000 from Charles to facilitate fast-tracking of approvals of his future Purchase Orders.
 10. The claimant denied that the recorded words in a telephone he made to Charles – “Toa hio kitu, kuja nayo.” were uttered by him demanding the bribe money to be brought to him. The claimant did not deny that he had uttered those words in a telephone conversation to Charles but denied the meaning attributed to the words by the respondent. The claimant admitted that the procurement team had about five (5) people in the Engineering department. The claimant stated that he had not known that Charles only accused him of demanding a bribe and not the others.
 11. The claimant said he was aware that soliciting for a bribe was unlawful and they had signed commitments every year not to engage in corrupt practices. The claimant said he had explained his words in the response to the notice to show cause. The claimant admitted that he had listened to an audio of the words he had uttered over the phone. The claimant said that he was told that he could be accompanied by a colleague at the disciplinary hearing and that he could call a witness. That on September 3, 2018 he attended the disciplinary hearing but did not call any witness because his colleagues were afraid to attend. Claimant said he was not accompanied by a colleague. The claimant said he signed the minutes to confirm what had transpired at the hearing. The claimant stated that he received money in his account upon termination but did not know what it was for. The claimant said that Gross pay was Kshs 618,284 and got no payment at all because outstanding loan of an equal amount was deducted from the terminal benefits paid. The claimant said he was not aware he had been paid until he filed suit.



12. The respondent called RW1, Joseph Munene who was a Global Audit and Risks Manager, Diageo. That in the year 2018, he was Contract Compliance and Ethics Manager of EABL.
13. That he was aware of the matter involving the claimant and had recorded a witness statement dated June 10, 2022 regarding the same. That he was aware the claimant left the respondent company following a disciplinary case that followed upon conduct of investigation on allegation of bribery made against the claimant by a whistle blower to the effect that the claimant had requested for a bribe from a supplier in exchange of works to be done. That the supplier of service involved was Termipest represented by one Charles Manyara Kamau. That the claimant had requested him for a bribe. That he conducted investigations on the matter by interviewing people involved; looked at documents related to the works and recorded statements. A report was made and submitted to Human Resource Department which Report is before Court. That the claimant was part of the Engineering Team tasked to contract the works and were to make sure that the process was correct. RW1 said they retrieved a telephone recording by the claimant to Charles Manyara to the effect “Toa hio kitu kuja nayo.”
14. RW1 said this was a bribery request made to Charles by the claimant. That they had established vide investigations that the claimant had demanded a bribe of Kshs 200,000 from Charles in order to hasten approval of the tender. That the bribe request went up to Kshs 400,000 and the price of the Purchase Order was inflated by Kshs 480,000. The bribe was Kshs 400,000. That Charles Manyara informed the investigators that this was the bribe demanded from him by the claimant. That the telephone conversation retrieved was tied to the evidence by Charles to conclude that the claimant was guilty of demanding a bribe of Kshs 400,000 to hasten the approval of a tender for works, hence the disciplinary action and the dismissal.
15. RW1 was candid and consistent in his answers while under intense cross-examination by advocate, Mrs Guserwa for the claimant. RW1 admitted that the investigation report was not shared directly with the claimant. RW1 said they could not disclose the identity of the whistle blower. RW1 admitted that they could not call the supplier to the disciplinary committee but he recorded a statement which formed the basis of a notice to show cause issued to the claimant. RW1 said Charles Manyara was also not called as a witness before Court. RW1 said that money was not mentioned directly in the said recording but the recording was corroborated by the statement of the supplier on the demand of bribe made to him by the claimant to facilitate the conclusion of the tender documents and in particular hasten the approval of the purchase order (P O).
16. RW1 said the claimant was not Head of his department. The Head signs the final procurement documents. That the Head was Samuel Muiru and he recorded a statement which was not before Court. RW1 said the claimant did not work in the procurement team. That Kshs480,000 was the quotation for cleaning of two tanks of carbon dioxide (CO2). RW1 said that the claimant was not asked to comment on the report before it was submitted to Human Resource. RW1 said they found no evidence of any Mpesa transaction between the claimant and the supplier. RW1 said they got more allegations of bribery demands made by the claimant against other suppliers. That the investigations team had recommended disciplinary action against other officers including one Boaz who was also based in Kenya. RW1 said that there was no evidence of fraud before Court. This was a case for demand of bribery by the claimant. RW1 said the respondent talked to the claimant through the report at the disciplinary hearing and that he had responded in writing to the notice to show cause.
17. RW2 Njeri Njenga told the Court that she was The Human Resource, Business Partner for Kenya Breweries. That as at August, 2018, she held the same post and did all Human Resource work. She adopted witness statement dated June 10, 2022 as her evidence in Chief. She told Court that the claimant left employment for soliciting for a bribe. RW2 said she conducted the disciplinary process.



- That the claimant was first suspended on August 16, 2018 and asked to show cause in a notice dated August 20, 2018 why he should not be disciplined for soliciting a bribe. The claimant received a notice to attend a hearing dated August 30, 2018. The hearing was scheduled for September 3, 2018. That the claimant was informed of his rights to be accompanied by a colleague and to call witness. The hearing proceeded as scheduled. The minutes of the meeting were recorded and shared with the claimant who signed them to confirm that the record was accurate. The claimant remained in suspension until the committee reached a verdict to terminate the employment of the claimant for soliciting a bribe contrary to the Business Code of Conduct of the respondent. He was summarily dismissed. That the claimant was paid terminal benefits less deductions made.
18. That the termination was lawful and fair. RW2 was cross-examined by Guserwa for the claimant. RW2 said that the claimant had no complaints made against him prior to this matter. That RW2 received an investigations report before suspending the claimant. RW2 said the report was not shared with the claimant but he was provided with detailed allegations in the Notice To Show Cause. That no attachments were annexed to the Notice To Show cause. That the claimant denied the allegations in a written response and a disciplinary hearing was set up. RW2 chaired the meeting. RW2 said the whistle blower and Charles Manyara did not attend the disciplinary hearing.
 19. RW2 said that the claimant did not get copies of their statements. That the committee decided to dismiss the claimant after considering his representations at the disciplinary hearing. RW2 said the investigations revealed evidence of soliciting for a bribe by the claimant. RW2 said that the claimant was an Engineer with the respondent for a period of 14 years. That he was not paid in lieu of notice since he was summarily dismissed. He was paid for leave days not taken and for work done up to September 20, 2018. That Kshs 217,507.82 was deducted from his terminal benefits.
 20. RW2 reiterated that the claimant was well aware of the allegations made against him pursuant to a recorded conversation between him and a supplier. He responded to these specific allegations but was found guilty by the committee. That the dismissal was lawful and fair.

Determination

21. The parties filed written submissions which the Court carefully considered together with the testimony by CW 1, RW1 and RW2. The totality of evidence presented by the respondent against the claimant is that he was recorded on telephone demanding a bribe from a supplier of the respondent named Charles Manyara. That investigations on the matter were conducted by RW1 who recorded statements from a whistle blower and Mr Manyara, and all other persons involved in the matter. That RW1 compiled a report which formed the basis of charges preferred against the claimant. The Claimant was suspended and was served with a Notice To Show Cause. That he responded to the Notice To Show Cause in writing.
22. The claimant was then called to a disciplinary hearing where he was given opportunity to explain himself. That his explanation was not satisfactory and he was found guilty of soliciting a bribe from a supplier contrary to the respondent's Business Code of Conduct. The claimant was summarily dismissed for the misconduct.
23. In terms of the Court of Appeal decision in *Kenya Revenue Authority vs Renwel Waithaka Gitahi & 2 Others* [2019] eKLR, the employer has an obligation to demonstrate that it had a valid reason to terminate the employment of an employee in terms of Section 43(1) and (2) of the *Employment Act, 2007*. The Court stated:-

“The employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the respondent had committed gross misconduct



in their employment and had done acts which were substantially detrimental to Kenya Revenue Authority. It is not for the Court to substitute its own reasonable grounds for those of the employer.”

24. This test applies in the present case. The Court finds that the respondent has proved on a balance of probabilities that the claimant had committed misconduct in soliciting for a bribe from a supplier which was sufficient for the respondent to summarily dismiss him from employment despite his 14 years of service to the respondent on good conduct.
25. The Court is satisfied that the evidence adduced by RW1 and RW2 sufficiently rebutted the allegations by the claimant that the summary dismissal by the respondent was wrongful. The claimant did not discharge the onus placed on him under Section 47(5) of the *Employment Act*, 2007. To the contrary, the respondent demonstrated that it had given the claimant sufficient notice to adequately explain the allegations of soliciting for bribery made against him.
26. The claimant was aptly recorded on phone. Though the conversation did not expressly demand for stated amount of money, other evidence he was confronted with in the Notice To Show Cause and at the disciplinary hearing Collaborated the suspicion by the employer that indeed the claimant was guilty of soliciting for a bribe from a supplier with a promise to fast-track the approval of a purchase order for works tendered for and to be done at the respondent’s premises.
27. The Court further relies on a decision by Onesmus Makau, J. in *Amos Kitavi Kivite vs Kenya Revenue Authority* [2020] eKLR which had similar features as the present case.
28. Like in the present case, the claimant was given sufficient information in the Notice To Show Cause to respond to the charges of misconduct made against him. The claimant responded in writing to the charges and was invited to a disciplinary hearing and advised that he could be accompanied to the hearing by a colleague and/or call a witness but he chose to attend the hearing alone and without calling any witness as in the case of Amos (*supra*). In the present case, though the claimant was not given the investigation report, the Court is satisfied that the information presented to him in the Notice To Show Cause was sufficient to give the claimant opportunity to explain himself.
29. The Court finds that the respondent satisfied the provisions of Section 36, 41, 43, and 45 of the *Employment Act*, 2007. The summary dismissal was for a valid reason and the respondent followed a fair procedure in dismissing the Claimant from employment.
30. The claimant, has failed to prove that he is owed any further terminal benefits by the respondent. To the contrary, the respondent has demonstrated sufficiently that it paid fully all the terminal benefits due and owing to the claimant at the time of the summary dismissal. Summary dismissal is justifiable in terms of Section 44 of the *Employment Act*, and no payment in lieu of notice is payable where an employee is justifiably summarily dismissed as happened to the claimant.
31. Accordingly, the suit is dismissed in its entirety and each party to meet their own costs of the suit having taken into account the 14 years of service the claimant gave the respondent before he fell into error in a gross manner.

It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 28TH DAY OF SEPTEMBER, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance



Mrs Guserwa for claimant

Mr. Nyaberi for respondent

Ekale: Court Assistant

