



**Kiragu v Nairobi Bottlers Limited (Cause 1302 of 2018)  
[2023] KEELRC 2175 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2175 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1302 OF 2018  
SC RUTTO, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**BEATRICE KARWITHA KIRAGU ..... CLAIMANT**

**AND**

**NAIROBI BOTTLERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. It is the Claimant's case that she was unlawfully terminated by the Respondent on 12<sup>th</sup> August, 2015 without any reasonable or probable cause. She avers that the reasons given as the basis for termination of her employment were in breach of her contract of employment, false, malicious, had no basis in fact or in law and breached her fundamental right to protection of her reputation. Against this background, the Claimant prays for the following reliefs against the Respondent: -
  - a) A declaration that she was wrongfully, unfairly and unlawfully dismissed from her employment.
  - b) A declaration that she is entitled to compensation equivalent to the residual of her contractual period from the date of dismissal until lawful determination or end of her employment in accordance with her contract of employment;
  - c) A declaration that the disciplinary panel meetings that resulted in her dismissal from employment were not impartial and/or independent and were therefore unlawful, null and void and her employment was unlawfully terminated;
  - d) Damages for breaches of her rights and other benefits under her contract of employment, under the *Employment Act* and *the Constitution*;
  - e) Costs and interest incidental to this Claim;
  - f) Any other relief his Honourable Court may deem fit and just to grant.



2. Opposing the Claim, the Respondent contends that the Claimant's termination was lawful as it was done after following the set procedure for termination of employment under the Employment Act. The Respondent further denies causing injury and damage to the Claimant's character and reputation. To this end, the Respondent has asked the Court to dismiss the suit with costs.
3. The matter proceeded for hearing on 21<sup>st</sup> March, 2023, during which both sides called oral evidence.

### **Claimant's Case**

4. The Claimant testified in support of her case and at the outset, sought to adopt her witness statement to constitute her evidence in chief. She further produced the documents filed together with her Claim as exhibits before Court.
5. It was the Claimant's testimony that prior to her dismissal, she worked for the Respondent for 11 years. She averred that despite her detailed response to the disciplinary panel's questions on 5<sup>th</sup> and 12<sup>th</sup> August, 2015, and in her appeal, the Respondent maliciously and without any reasonable or lawful cause terminated her employment as a procurement specialist. She further stated that on or about 25<sup>th</sup> September, 2015, the Respondent published and/or caused to be published in mass circulation newspaper Daily Nation a colour photograph of herself portraying and creating the impression that she had been involved in criminal conduct and members of the public and any future employer should be warned accordingly.
6. The Claimant further stated that the publication and wide dissemination of her photograph and the wording in the caption thereon either was intended to and did cause injury and damage to her character and reputation and caused her a high degree of embarrassment and distress and her public esteem, character and reputation have been seriously assaulted, besmirched, scandalised, ridiculed and her fundamental right to the protection of her reputation as guaranteed under the Constitution have been breached.
7. By reason of the aforesaid publication, which the Claimant termed as malicious, unwarranted and based on falsehoods, she has been severely injured in her character, personal credit, reputation and standing as a procurement specialist, a business lady, family person and as a consequence, she has been gravely lowered in the estimation of right thinking members of the society generally and in particular her fellow colleagues in the procurement industry, potential employers, friends and she has been subjected to public ridicule, scandal, odium and contempt.
8. The Claimant further contends that the Respondent's actions were motivated by ill will and malice as demonstrated by the fact that prior to her termination from employment, the Respondent had urged her to resign, which request she declined.

### **Respondent's case**

9. The Respondent called oral evidence through Ms. Latiffa Cheronu who testified as RW1. She identified herself as the Respondent's Human Resource Manager and started by adopting her witness statement to constitute her evidence in chief. She proceeded to produce the documents filed on behalf of the Respondent as exhibits before Court.
10. It was RW1's evidence that the Claimant was issued with an employment offer to the position of a stock controller in the Respondent company on 27<sup>th</sup> July, 2005. she accepted the offer by signing the letter on 1<sup>st</sup> August, 2005. At the time of termination, the Claimant held the position of a procurement specialist.



11. RW1 further averred that on 3<sup>rd</sup> August, 2015, the Claimant was issued with a disciplinary enquiry notification through which she was cited for accepting inappropriate payments contrary to the Respondent's Code of Business Ethics and Company Values and her obligations to the Respondent.
12. The Claimant was notified of the date, venue and time when the disciplinary hearing was to be conducted, her right to representation as well as her right to bring evidence in support of her case.
13. On 5<sup>th</sup> August, 2015, the Claimant attended the panel hearing whereby she was informed of the charges against her. She also confirmed that she had no intention of bringing a witness to support her case. In response to the charges read out to her, the Claimant affirmed that she indeed transacted with one Joshua Mugo sometime around 2014 and that the proceeds of the transaction were remitted by the said Joshua via her personal account. She further confirmed that the name of the company that Joshua had used to transact with was Oshgoh and that the same was owned by Joshua. The Claimant further stated at the Panel hearing that she gave Kshs 500,000/= to Joshua to invest in the supply of furniture, water, system and CCTV where she was to get back her principal amount together with an interest of Kshs 100,000/= whereas she got back Kshs 300,000/=.
14. It was brought to the Claimant's attention that the Respondent was aware of two transactions one of Kshs 300,000/= that was deposited to her account and another of Kshs 560,000/= also made to her account. The Claimant admitted that she had made another transaction with Joshua Mugo in Machakos County and had received the money as proceeds for the Machakos transaction.
15. During the material time which the Claimant was transacting with the earlier stated Joshua Mugo and Oshgoh, Oshgoh had received money from Waveline who was at the time a supplier of the Respondent and the money had then been paid to the Claimant.
16. Being that the Claimant was a procurement specialist, she was directly involved with the tendering process within the Respondent's organization and the money sent to her by Waveline was contrary to the Business Code of Conduct of the Company.
17. It was RW1's further evidence that the claimant on being directed to produce documentation to her defence to show that the money was received as part of a different business venture, did not have any documentation to prove any of her other business. She however sought time to produce the said documents.
18. Upon the request by the Claimant to be allowed time to produce evidence in her defence, the panel adjourned the hearing and issued her with a suspension letter dated 5<sup>th</sup> August, 2022 and further informed her that the further disciplinary hearing was to be held on 12<sup>th</sup> August, 2015.
19. On 12<sup>th</sup> August 2015, the disciplinary hearing was convened and the Claimant was required to produce some documents as her defence, however she failed to produce the said documents before the panel. The hearing went on as scheduled.
20. Owing to the nature of business that the Claimant alleged to have been conducting and her knowledge in the procurement process, she was expected to produce before the panel documentation in support of the alleged business which she failed to do.
21. Upon the conclusion of the hearing, the panel deliberated on the proceedings and it was established that the Claimant was guilty of the charges brought against her and her actions were in gross violation of her duties and in contravention of the Company's Code of Business Conduct.
22. The Respondent tabulated the money due to the Claimant less any statutory deductions and paid the same as had been indicated in the termination letter. The balance was thereafter remitted to her.



23. She appealed against her termination and was invited to an Appeal hearing. She was informed of her right to representation and informed to bring evidence to substantiate the claims she made regarding her termination.
24. On 23<sup>rd</sup> September, 2015, the Respondent constituted a different panel for the appeal hearing and the hearing proceeded on the same day.
25. At the appeal hearing, the Respondent restated the charges that had been brought against the Claimant on 3<sup>rd</sup> August, 2015 and the hearing proceeded from thereon. The Claimant had brought documents in support of her appeal as well as a witness.
26. The documents produced by the Claimant was an OB reference number 21/21/112014, a personal statement and a loan agreement between herself and one Judy Njeri dated 22<sup>nd</sup> December, 2013. She had however failed to produce any further evidence in relation to the charges levelled against her. She further stated and admitted that she had received money and she thus did not see the need to produce any bank statements.
27. The panel considered her evidence and upon deliberation, reached a verdict to uphold the previous panel's decision to terminate the Claimant for the reason that she had not produced sufficient evidence to support her claim.
28. Further at the appeal hearing, the Claimant agreed that all her grounds of appeal had been fully and fairly dealt with and thus she was satisfied with the procedure and grounds leading up to her termination.
29. At the conclusion of the appeal hearing, the Claimant requested the panel to allow her to resign since she was of the opinion that a termination letter would cause damage to her career. The Claimant was then requested to step out so as to allow the panel deliberate on their verdict.
30. The panel deliberated and reached the verdict to terminate the Claimant. The panel further requested that the Claimant lodges a formal request for resignation for consideration. She however decided to withdraw her request to resign.
31. According to RW1, the Claimant's termination was fair and lawful and the reason for her termination was valid and accurate. That she was further aware that her actions of accepting inappropriate payments were contrary to the Respondent's Company Code of Business Ethics and Company Values is a ground for termination under the *Employment Act*, 2007.
32. RW1 further stated that owing to the position held by the Claimant at the time of her termination, being that of a Commodity Specialist tasked with competencies in Finance and Procurement, the Respondent saw it was prudent to notify the public of the end of her term in the Company following her termination. The publication was not intended to cause injury or damage to the Claimant's character.
33. The allegation by the Claimant that the publication was motivated by ill will and that it had caused her standing as a procurement specialist are untrue since she informed the Respondent at the appeal hearing that she had secured a new job and was due to report in January of 2016. The publication therefore did not affect her standing as a procurement officer and any allegations to the contrary are untrue.
34. It was RW1's further testimony that the assertion by the Claimant that the Respondent had prior to terminating her employment urged her to resign by tendering a resignation letter is untrue. That the Claimant at the appeal hearing had requested for the opportunity to be allowed to resign as opposed



to being terminated since in her opinion, it would have affected her employment record. Upon being granted her request, the Claimant withdrew her plea to resign and agreed to take the termination option.

### **Submissions**

35. It was the Claimant's submission that the Respondent had nothing to show that she received money from Waveline, a supplier of the Respondent company as alleged. She further contended that there was no evidence connecting her, Joshua, Mugo and Waveline and that she was therefore terminated on mere suspicion with no evidence; a fact which lends credence to the fact that the decision to terminate her had been premeditated. In support of her submissions, the Claimant placed reliance on the cases of Pamela Nelima Lutta vs Mumias Sugar Co. Ltd (2017) eKLR and Beatrice Nyambane Mosiria vs Judicial Service Commission (2019) eKLR.
36. It was her further submission that considering the seriousness of the offence and the consequences, the Respondent ought to have conducted its own investigations to verify the allegations rather than rushing to terminate her services.
37. It was further submitted that the Claimant was not given enough time to prepare adequately for the hearing as she was given a day to prepare a defence and to prepare for the hearing. That while the Respondent's witness testified at the hearing that she was given time to bring evidence after the first hearing, the minutes of the disciplinary enquiry of 5<sup>th</sup> August, 2015 prove otherwise. To this end, she referenced the case of Rebecca Ann Maina & 2 Others vs Jomo Kenyatta University of Agriculture and Technology (2014) eKLR and maintained that her termination was procedurally unfair.
38. On the Respondent's part, it was submitted that the Claimant's termination met the requirements set out under Section 41 of the *Employment Act* as there was a fair and valid reason to terminate her on account of violation of her duties through engaging in activities that were against the company policies. The Respondent further argued that proper procedure was followed and the reason for termination was explained to the Claimant vide the disciplinary enquiry notification form dated 3<sup>rd</sup> August 2015 and further particulars and explanations as to why the employer was considering termination followed during subsequent hearing sessions.
39. The Respondent further submitted that the Claimant was accorded an opportunity to representation by a fellow employee of her choice vide the same disciplinary enquiry notification form as well as the opportunity to bring any evidence or witness she may have in support of her case and to air her grievances through panel hearing meetings that she attended.
40. The Respondent maintained that the Claimant was terminated for a valid reason and that she has failed to prove otherwise. On this score, the Respondent sought to rely on the case of Magdalene M. Ngea v National Cereals and Produce Board (2017) eKLR.

### **Analysis and determination**

41. Having considered the pleadings on record, the evidence, as well as the rival submissions, the following issues stand out for determination:
  - i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
  - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
  - iii. Is the Claimant entitled to the reliefs sought?



## Justifiable reason?

42. Sections 43(1) and 45 (2) (a) and (b) of the [Employment Act](#) (Act) are key in determining this issue. To start with, an employer is required to prove the reasons for an employee's termination and failure to do so, such termination is deemed to be unfair. In terms of Section 45 (2) (a) and (b) of the Act, an employee's termination from employment is unfair if the employer fails to prove-
- a) that the reason for the termination is valid;
  - b) that the reason for the termination is a fair reason-
    - i. related to the employees conduct, capacity or compatibility; or
    - ii. based on the operational requirements of the employer; ...
43. The foregoing is what is essentially referred to as substantive justification.
44. Turning to the instant case, the Claimant was terminated from employment on grounds that she received money in the sum of kshs 860,000/= from Oshgoh Commercial Agencies (Oshgoh). This is discernible from her letter of termination which reads in part:
- “During the hearing, it was established that you received money amounting to Kshs 860,000 from Oshgoh Commercial Agencies. Through this, it was noted that you violated your duty by engaging in activities that were reasonably thought (sic) likely to cause, a conflict with the interests of the company.
- This action has been found contrary to the Company Code of Business Conduct and has raised serious questions about your integrity and ability to effectively handle your job. This has also led to loss of trust in you amongst the Company Leadership Team.
- In view of the above, you have been terminated from employment with effect from 12<sup>th</sup> August 2015 ...”
45. From the disciplinary proceedings, it is evident that the Claimant admitted receiving from one Joshua Mugo sometimes in 2014. According to the Claimant, this was for the supply of CCTV, water and sewerage systems to Makueni County. According to the Claimant, she was to receive the money back with interest. The proceedings further bear that the Claimant admitted knowing that the said Joshua Mugo, owned Oshgoh.
46. It is therefore not in dispute that the Claimant knew Joshua Mugo and transacted with him. What is in dispute is whether the said transactions amounted to a contravention of the Respondent's Code of Business Ethics and Company Values, by the Claimant.
47. From the record, it is not clear whether the said Oshgoh was a supplier of the Respondent. Such evidence, if any, was not tendered before the Court. As a matter of fact, the connection between the Respondent and Oshgoh was not established at all, even remotely.
48. In her testimony, RW1 attempted to draw a connection between the Respondent and Oshgoh through a company by the name Waveline. With regards to the said Waveline, it is notable from the disciplinary proceedings that there was a subtle indication that it was a supplier of the Respondent. However, what is conspicuously missing from the record is the connection between the said Waveline and Oshgoh. This was not made clear. Indeed, there was no evidence that Oshgoh had received money from Waveline and vice versa. It is therefore impossible to join the dots between Waveline and Oshgoh and subsequently, the Claimant.



49. What this boils down to, is that it is not possible to establish whether the Claimant had acted in conflict of interest or received a bribe or gift from a supplier of the Respondent.
50. The net effect of the foregoing is that the Respondent has failed to prove to the requisite standard that by receiving the money from Joshua Mugo or for that matter Oshgoh, the Claimant acted in contravention of the Respondent's Code of Business Conduct and specifically, in conflict of interest.
51. 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?**

52. The requirement for fair procedure is generally provided for under Section 45 (2) (c) of the Act. Further, Section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
53. From the record, the Claimant's disciplinary process was commenced by way of a Disciplinary Enquiry Notification dated 3<sup>rd</sup> August, 2015. The charges against the Claimant were spelt out as follows:

“You have been cited for accepting inappropriate payments contrary to NBL Company Code of Business Ethics and Company Values. This is contrary to your obligations to the organisation.

This charge arise out of your actions/performance behaviour on: Date: Various dates”
54. What is notable from the aforesaid notification is that the charges against the Claimant were quite general and lacking in particulars. I say so because, first, the person from whom the Claimant received the payment from was not indicated. Second, the amount of money received by the Claimant and the dates which she received the payment are not indicated. From the record, this information was only revealed to the Claimant during the disciplinary hearing of 5<sup>th</sup> August, 2018.
55. The Court of Appeal in the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [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
56. I fully align myself with the above determination. Nothing would have been easier than for the Respondent to avail more particulars as regards the charges against the Claimant.
57. Indeed, it may very well be said that going for the hearing, the Claimant was ill prepared as she was not fully aware of the charges laid out against her by the Respondent and the kind of defence she needed



to mount against the same. It is highly probable that this compromised her line of defence during the hearing.

58. Therefore, in as much as the Respondent appears to have complied with the procedural requirements under Section 41 of the Act, the same was marred by the fact that the Claimant went in for the disciplinary hearing not fully knowing the nature of allegations she was to be confronted with.
59. Further to the foregoing, it is not in dispute that the Claimant received the notification of the disciplinary hearing on 3<sup>rd</sup> August, 2015 whereas the hearing was scheduled for 5<sup>th</sup> August, 2015. Essentially, she had a day to prepare for the hearing. Needless to say, the notice period given to the Claimant in this case was quite short and not reasonable.
60. On this issue, I will apply the determination of the Court of Appeal in the case of Nebert Mandala Ombajo v Institute of Certified Public Accountants of Kenya (ICPAK), Nakuru Civil Appeal No. 62 of 2018, where it was held that: -

“The respondent has not justified the urgency in undertaking the disciplinary proceedings on the 4th March, 2014 when the letters were only written on 3rd March, 2014.

[27] Disciplinary proceedings are a grave matter for an employee as the consequences may be catastrophic to the employee’s life. In the case of the appellant, the complaints against him were serious, and there is no doubt that he needed sufficient time to prepare psychologically, and if need be, get the best advice that he could. Any prejudice to the respondent by having the appellant in his place of work could easily have been addressed by sending the appellant on compulsory leave, or interdicting him during the pendency of the disciplinary hearing, so that both the appellant and the respondent would have had time to reflect on and prepare to address the issues arising in the disciplinary process.

[28] The fact that the appellant nonetheless, did his best to respond to the allegations made against him and attended the disciplinary proceedings on the due date, did not ameliorate the prejudice that was caused to him by the inadequate notice. It was oppressive, unfair, and unjust, for the respondent to serve the appellant with a letter for a disciplinary hearing that was to take place the next morning. Such haste reduced the disciplinary hearing to a mere formality to achieve that which the respondent had already predetermined. There was no procedural justice and this vitiated the whole disciplinary process.”

61. I wholly apply and reiterate the above determination to the instant case. The Respondent would not have been prejudiced in any way by giving the Claimant sufficient particulars and reasonable time to allow her prepare her defence and appear for the hearing.
62. In the end, the process was procedurally unfair against the Claimant hence her termination was unlawful.

### **Reliefs?**

63. As the Court has found that the Claimant’s termination was substantively and procedurally unfair, the Court awards her compensatory damages equivalent to seven (7) months of her gross salary. This award further takes into account the length of the employment relationship between the parties.
64. The Claim for compensation equivalent to the residual of her contract period is denied noting that it is in the nature of an anticipatory relief. In arriving at this finding, I am guided by the determination of



the Court of Appeal in the case of D K Njagi Marete vs Teachers Service Commission [2020] eKLR, where it was held as follows: -

“On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

““There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word “permanent employment.”

Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.”

## Orders

65. 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 1,411,200.00 being equivalent to 7 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 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Ms. Ngessa

For the Respondent Ms. Nyambura instructed by Mr. Wathuta

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

