



Karisa v Independent Electoral and Boundaries Commission (Cause 1319 of 2017) [2023] KEELRC 2350 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2350 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1319 OF 2017
MN NDUMA, J
SEPTEMBER 21, 2023**

BETWEEN

EDWARD KENGA KARISA CLAIMANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

JUDGMENT

1. The suit is based on amended statement of claim dated 10/2/2021. The claimant prays for an order in the following terms:-
 - (a) A declaration that the claimant was unfairly terminated.
 - (b) Payment of Kshs.3,088,580 being the claimant's illegally withheld half salary for the period of October, 2013 to September, 2014.
 - (c) Payment of half of claimant's leave allowance of Kshs.226,270 retained in January, 2014 and
 - (d) Payment of unremitted employer pension contribution in the sum of Kshs.373,340.
 - (e) An order of mandamus to issue compelling the respondent to reinstate the claimant to his position as Director of Finance and Procurement. In the alternative, the respondent be ordered to pay the claimant salary inclusive of allowances and benefits for the remainder of the period the claimant would have worked from the date of termination being September, 2014 until his lawful retirement being February, 2021, the expected retirement being at the age of 60 years.
 - (f) An order of compensation for the violation of the claimant's fundamental rights to dignity, fair administrative process and fair hearing as guaranteed under Articles 28, 47 and 50 of the Constitution.



- (g) An order that the respondent do pay the claimant 12 months' salary as general damages for unfair, wrongful and unlawful termination at Kshs.7,830,480 (Kshs.652,5400 x 12 months).
 - (h) An order compelling the respondent to issue the claimant with a Certificate of service.
 - (i) An order that the respondent do pay the claimant his full pension dues as per the respondent's pension scheme.
 - (j) Interest on the award at Court's rate
2. The respondent filed an amended memorandum of response dated 17/11/2021 in which the claim is denied in toto and puts the claimant to strict proof thereof.
 3. The claimant (C.W.1) testified that he was employed by the respondent as Director of Finance and Procurement in permanent and pensionable basis from January, 2010 and confirmed on 12/9/2010. That he worked diligently until 30/10/2013 when he was charged alongside three (3) other officials of the respondent, namely James Oswago, Wilson Shollei and Willy Gachanja Kamanga in Anti-corruption case No. 16 of 2013 with the offence of failure to ensure compliance with the procurement laws. That the charges were malicious and unfounded.
 4. That the respondent placed the claimant on suspension and on half pay in terms of the provisions of Section 62 of the Anti-corruption and Economic Crimes Act.
 5. That as at 2nd September, 2014, the claimant earned a basic salary of Kshs.452,540 and allowance of Kshs.200,000 making a total gross salary of Kshs.652,540.
 6. That the respondent withheld a sum of Kshs.226,270 per month plus Kshs.200,000 allowances making it Kshs.426,270. The suspension was on the month of October, 2013 and the claimant earned half salary and no allowance until September, 2014 when his services were unlawfully terminated.
 7. That the claimant was acquitted of the corruption charges on 27/5/2020 and is entitled to the full refund of the withheld salary and allowances during the period of suspension.
 8. That by a letter dated 14/8/2014, the respondent notified the claimant of its intention to terminate his employment on grounds set out in the said letter.
 9. The claimant protested the allegations contained in the said letter in a response dated 27/8/2014 and in particular the lack of specifics, clarity and details that would have enabled the claimant to respond adequately to the charges. The claimant also denied all the charges.
 10. By a letter dated 2/9/2014, the respondent terminated the employment of the claimant. That the letter of termination did not set out specific reasons for the termination. The claimant states that the termination was not for a valid reason, was malicious, unjust, unlawful and unfair.
 11. That the respondent condemned the claimant unheard and in violation of Articles 25(c) and 50 of the Constitution.
 12. That in his letter dated 27/8/2014, the claimant had requested for audience before a competent organ of the respondent. That the respondent did not respond to this request.
 13. That the respondent completely disregarded procedural fairness before terminating the employment of the claimant.



14. Claimant testified that sometimes in the year 2012, he had applied for the position of Deputy Commission-Secretary advertised by the respondent. The claimant was shortlisted and interviewed and came up as the 2nd best choice for the job.
15. The claimant said he was an outstanding employee and the termination was without any basis and in violation of the provisions of Sections 41, 43 and 45 of the Employment Act, 2007. That the action by the respondent violated its own disciplinary policy and procedure manual on Disciplinary Principles.
16. That the action also violated Articles 27, 28, 41, 43 and 47 of the Constitution. That the action violated the rules of natural justice and the rule of law. That to-date, the claimant is not aware of the grievances the respondent had against him nor has he been granted opportunity to defend himself.
17. The claimant stated that he suffered loss of unpaid half pay, Pension contribution by the employer at 15% of the basic salary or leave days not taken.
18. Under cross-examination by Mr. Abubakar for the respondent, C.W.1 stated that the charges made against him and subsequent suspension related to an international tender in excess of Kenya Shillings one billion before the election of August, 2017. The claimant said that he was not directly involved in the matters he was accused of. That he was the Vice Chairman of the Tender Committee and was not at all involved in the inspection of the EVIDS sought to be procured as that was the work of a specific Committee called the Inspection and Acceptance Committee who were appointed by the Chief Executive Officer who is the accounting officer on advice of the Head of Procurement.
19. The claimant stated that the tender committee only adjudicates the tender based on the report of the Evaluation Committee which recommended the person or company to supply. That due to checks and balances, the Tender Committee was not involved in any inspection of the material to be procured. That the claimant and the procurement committee could not check themselves. That the matter only came back to him at the point of payment vide a Letter of Credit (LC) which is done at the beginning of the process on bank to bank basis, an irrevocable Letter of Credit guaranteeing the process of procurement. The claimant stated that the charges were general and not specific and could not stand the test.
20. The claimant stated that he was not given opportunity to defend himself as no disciplinary hearing was held. That he had responded to the Notice to Show Cause denying the general charges and seeking further particulars to be able to defend himself. That the particulars were never provided. That he only received a letter of termination in violation of the Human Resource – Policy and procedure manual of the respondent which is an appendix to the contract of employment. The claimant emphasized that he was wrongly charged with the criminal offence and was acquitted by the Judge in Anti-corruption Court. That the people responsible that is, his co-accused were found guilty. The claimant stated that he was not involved at all with the matters the subject of the charge.
21. The claimant stated that he would have worked upto February, 2021 were it not for the unlawful termination and seeks general damages accordingly to cover the entire period he would have worked. The claimant also seeks compensation in terms of the Employment Act, 2007.
22. The claimant said that the issue of pension is managed by a separate entity but the respondent had to pay the withheld contribution to the pension fund up to the date the claimant would have retired at 15% of the salary earned by the claimant. That the pension is with AON Minet. The claimant stated that he did not attend the disciplinary meeting referred to in the letter of termination. That Clause 10.2.1 of the Human Resource Policy provides for setting up of a disciplinary committee which was not constituted to hear his case. That the termination had no basis at all. That the claim be allowed as prayed.



23. The respondent called one Peter Mulele a Senior Human Resource Officer who relied on a written statement dated 17/1/2022 as his evidence in chief. He also produced exhibits '1' to '6' in support of the respondent's case.
24. R.W.1 produced the charges preferred against the claimant and his co-accused at the Anti-Corruption Court being "willful failure to comply with law relating to procurement contrary to Section 45(2) (b) as read with Section 48 of Ant-corruption and Economic Crimes Act among others." R.W.1 provided a letter dated 1/11/2013 in which the claimant was suspended as a result of the criminal charges preferred against him in Criminal Case No. 141/50 of 2013 and ACC 12 of 2013. The suspension was in terms of Section 62(1) of the Anti-corruption and Economic Crimes Act which provided:-

"A public officer who is charged with corruption or economic crimes shall be suspended at half salary with effect from the date of the charge."

R.W.1 also provided the pay slip of the claimant for August, 2014.
25. R.W.1 stated that the respondent was not involved in the investigations and prosecution of the claimant. That the charges against the officers of the respondent occasioned lack of confidence in the commission and there was a public outcry. That the respondent was within its rights to charge the claimant with violation of the Code of conduct for his negligent and careless work which was prejudicial to the commission. R.W.1 stated that the claimant was paid his salary dues and allowances owed to him. That the suit lacks merit and it be dismissed. R.W.1 stated that the claimant complied with Section 41 of the Employment Act by issuing him with a Notice to Show Cause dated 14/8/2014. That the claimant responded to the notice to show cause in writing.
26. Under cross-examination, R.W.1 stated that he had no documents to show that a disciplinary hearing was held to give opportunity to the claimant to be heard before the termination.
27. R.W.1 stated that the suit be dismissed for lack of merit.

Determination

28. The parties filed written submissions which the Court has considered together with the evidence adduced by C.W.1 and R.W.1. The issues for determination are:-
 - (a) Whether the termination of employment of the claimant was for a valid reason arrived at following a valid procedure.
 - (b) Whether the claimant is entitled to the reliefs sought.
29. The facts not in dispute in this matter are that the claimant was employed by the respondent as the Director, Finance and Procurement from January, 2010. He was confirmed to his position by a letter dated 12/9/2010. The claimant worked continuously with no adverse record until himself and his colleagues were charged by the Anti-Corruption Commission with the offences of willful failure to comply with Procurement Laws inter alia on or about October, 2013. As a result, by a letter dated 30/10/2013, the claimant was suspended from employment on half pay in terms of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.



30. The prosecution ensued while the claimant was under suspension. Meanwhile the respondent served the claimant with a Notice to Show Cause dated 14/8/2014 in which the respondent accused the claimant as follows:-

“During your work in the commission in the performance of your duties as set out in your letter of employment, it has been found that there were serious shortcomings in your department during your assignment and specifically there were serious problems of financial mismanagement resulting to a huge unauthorized over expenditure together with lack of financial control and discipline. There were also serious shortcomings in procurement process during your term. You failed to provide leadership to the officers under you. You failed to ensure proper financial control and accounting procedures were adhered to. As a result of the above, the Commission intends to terminate your services; but before that is done you are hereby given fourteen (14) days to show cause why your services should not be terminated.”

31. In a reply dated 27/8/2014, the claimant stated that he had noted the contents of the said letter with surprise, shock and dismay. The claimant said the reasons given for the intention to terminate his employment- “lacks specifics and are general in nature. The period in which the alleged shortcomings were committed has not been defined.”

32. The claimant concluded “I am requesting that I be allowed to be heard and defend myself before any competent organ of the Commission.”

33. It is not in dispute that this letter was not responded to and a disciplinary Committee was not constituted.

34. In terms of the Human Resource and Administration Policies and Procedural Manual, of 2010, Clause 10.2.1 titled “Disciplinary Committee” provides:-

“There shall be two disciplinary Committees as follows:-

1. A Standing Disciplinary Committee at the Commission level as set up and agreed by the Commission; and
2. A standing Disciplinary Committee at the management level set up by the Chief Executive Officer.....”

These two committees will exercise the highest degree of impartiality in accordance with the existing procedures. There must be no victimization, discrimination or unjust dismissal.”

and

Clause 10.2.3

5. Employees shall have a right of appeal against any disciplinary action that may be taken.”

34. The respondent did not follow its own procedure before terminating the employment of the claimant. The Disciplinary Committee, standing or otherwise did not give the claimant a hearing before the termination of employment. The claimant was also given no opportunity to appeal the termination.

35. The respondent did not only violate its own Human Resource Policy Manual but also failed to adhere to Section 41 of the Employment Act. The respondent acted unfairly against the claimant and the



administrative action it took against him fell far short of procedural fairness and violated the rules of natural justice.

36. The respondent crafted vague charges and failed to substantiate the same when requested to do so. It is the conclusion of this Court that the respondent failed to prove that it had a valid reason to terminate the employment of the claimant. The termination violated Sections 41, 43 and 45 of the Employment Act, 2007 and was therefore unlawful and unfair. The claimant was later vindicated by the acquittal by the Anti-Corruption Court on all charges instituted against him by the DPP and Ethics and Anti-Corruption Commission.
37. It is the conclusion by this Court that the termination of the employment of the claimant was unjustified and the respondent ought to have refunded all the salary and allowances deducted from the claimant from the date of termination till the date of termination.
38. The Court has taken into account the recommendation by the High Court in *Mumo Matemu –vs Trusted Society of Human Rights Alliance and 5 others* [2013] eKLR where it held:-
 - (79) The determination of unsuitability or unfitness of a person to hold State or Public Office on grounds of lack of integrity is a factual issue dependent upon an evaluation of material evidence. When presented as a constitutional challenge, the evidentiary standard is on a balance of probabilities. This standard is heightened, given its implications on due process, fairness and equal protection. An approach in this regard is to undertake what the High Court called “an intensely fact-based enquiry.”
39. That is what the Court has undertaken in this matter and the facts relied upon by the respondent as set out in the Notice to Show Cause fell far short of the standard required in proving the validity of the reason for the termination of the employment of the claimant as the respondent is mandated to do under Section 45(1) and (2) of the Employment Act, 2007.
40. The claimant also invoked the provisions of Section 41 of the Constitution of Kenya, 2010 stating that the respondent engaged in unfair labour practice by ignoring its own Human Resource Policy and Procedure Manual by failing to subject the claimant to a disciplinary hearing before a committee instituted in terms of the document, this has been proved by the claimant on a balance of probability. In the same breath, the respondent violated Article 47 of the Constitution because this conduct fell short of fair administrative action as required by this Article as articulated further under the Fair Administrative Actions Act, 2015.
41. The Court further finds that the respondent violated Article 50 of the Constitution and the rules of natural justice by first failing to provide the claimant with information sufficient to enable him answer the charges he was faced with and secondly by failing to provide the claimant with an opportunity to be heard verbally as is required by the respondent’s own policy document which is binding to the respondent in as much as it binds the staff of the organization.
42. Furthermore, Article 236 of the Constitution provides:-

A public officer shall not be--

 - (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”
43. The Court finds that the respondent failed to adhere to its own procedure and policy before terminating the employment of the claimant and in the process also violated Sections 41, 43 and 45 of the Employment Act, 2007 and Articles 41, 50, 47 and 236 of the Constitution of Kenya, 2010.



44. In the final analysis, the Court finds that the termination of the employment of the claimant was unlawful and unfair and the claimant is entitled to remedies sought in the Statement of Claim as follows:-

a. Refund of Withheld ½ Salary and allowances.

The claimant was acquitted of the charges preferred against him by the DPP in terms of the Ethics and Anti-Corruption Act. The respondent had suspended the claimant on half pay with effect from the date of the charges. This was in terms of Section 62(1) of the Act. As soon as the claimant was acquitted, the said deducted half salary ought to have been refunded to him but this did not happen because by that time the employment of the claimant had already been terminated by the respondent. The claimant was charged on 30/10/2013 and the deduction was effective from that date. The termination of employment took place on 2/9/2014. Accordingly the deducted ½ salary plus allowances be and should be refunded for that particular period as set out in the statement of claim (a period of 11 months) in the sum of Kshs.3,088,580.

b. During the said period of 11 months, the respondent withheld pension contribution by the employer at 15% of the basic salary being Kshs.33,940 x 11 months in the sum of Kshs.373,340. The Court directs payment of the said amount to the claimant and/or to the pension fund, whichever is applicable.

c. The claimant is also entitled and is granted Kshs.226,270 in respect of leave allowance retained in January, 2014.

d. Reinstatement and compensation

In terms of Section 49(1) (c) and (4) the claimant is entitled to a maximum compensation to the equivalent of 12 months' salary for unlawful and unfair termination of employment.

45. The claimant is also entitled to reinstatement to his employment without loss of any remuneration from the time of termination till date of reinstatement in terms of Section 49(3) (a) as read with 49(4).

46. The claimant however, told the Court that the remedy of reinstatement has been overtaken by events since his retirement date at 60 passed in February, 2021. It is also pertinent to note that passage of time since termination to-date would not have been conducive to the remedy of reinstatement. However, the claimant seeks damages equivalent to the lost income till date of retirement.

47. The Court in this respect relies on the Supreme Court decision in Kenfreight (E.A.) Limited -vs- Benson Nguti [2016] eKLR where the Supreme Court stated:-

“Guided by the above analysis, we find that once a Court has reached a finding that an employer has unlawfully terminated an employee’s employment, the appropriate remedy is one provided under Section 49(1) of the Employment Act. We also need to clarify that a payment of an award in Section 49(1) (a) is different from an award under Section 49(1) (b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4).”

to find that the jurisdiction of the Court on compensation for unfair and unlawful termination of employment is as set out under Section 49(1) (c) of the Act. However, the Court has jurisdiction to award damages for other infringement on the rights of employees based on a lawful and proper assessment of damages as guided by common law and precedents of Kenyan Courts.



48. In the case of Pandya Memorial Hospital –vs- Geeta Joshi [2020] eKLR, the Court of Appeal quoted the case of G.M. Bank of Africa Limited [2013] eKLR as follows:-

“ This Court does not encourage employees to claim multiple remedies arising from the same wrong doing on part of the employer whether these violations are claimed to infringe the Constitution, the statute or the contract.”

49. In the present case, the Court finds that compensation under Section 49(1) (c) and (4) would suffice given the circumstances of the case. In this regard, the claimant was kept under suspension and on half pay for a period of eleven (11) months. The claimant was wrongly charged with corruption offences in respect of which he was acquitted by the trial Court and was fully vindicated in respect thereof. The respondent however stated that this was at the instance of the DPP and EACC and not the respondent. The Court finds that the non-specific charges framed against the claimant were an embarrassment to him and hindrance to furtherance of his financial career. The claimant had served the respondent diligently and with decorum for a period of four (4) years in a high position of Director Finance and Procurement which position he lost unlawfully without payment of terminal benefits and without compensation for the loss. The claimant desired to continue with the employment and to be reinstated by this Court in that respect. The claimant suffered loss and damage. The claimant having been acquitted of any wrong doing by the Criminal Court cannot be said to have contributed to the termination.

50. The Court has considered the case of Kenya Methodist University -vs- Kangane & Another (Civil Appeal No. 61 of 2017) (2022) KECA 90 KLR [4th February, 2022) while considering the appropriate relief to be granted in this matter and considers the conduct by the respondent egregious and an outright abuse of its authority as a public employer. The claimant suffered immense loss and damage occasioned by continuous loss of income to support himself and family for a prolonged period of time.

51. The Court therefore considers this an appropriate case to award the claimant the equivalent of eight (8) months' salary in compensation for the unlawful and unfair termination of his employment in the sum of Kshs.5,220,320.

52. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows:-

- (a) Kshs.5,220,320 in compensation.
- (b) Kshs.3,088,580 being withheld ½ salary for 11 months.
- (c) Withheld pension contribution at 15% of basic salary for 11 months in the sum of Kshs.373,340.
- (d) Unpaid leave allowance withheld in January, 2014 Kshs.226,270.
Total Award Kshs 8,908,510.
- (v) Interest at Court rates from date of termination till payment in full in respect of (b) (c) and (d) above and from date of judgment in respect of (a) above.
- (vi) Certificate of Service to the claimant in 30 days.
- (vii) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 21ST DAY OF SEPTEMBER, 2023.

MATHEWS N. NDUMA



JUDGE

Appearances

Mr. Karanja for claimant

Mr. Abubakar for Respondent

