



**Havyarimana v Permanent Secretariat of the Transit and Transport
Co-ordination Authority of the Northern Corridor & another (Cause
922 of 2016) [2023] KEELRC 2642 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2642 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 922 OF 2016
AK NZEI, J
OCTOBER 26, 2023**

BETWEEN

CYRIAQUE HAVYARIMANA CLAIMANT

AND

**PERMANENT SECRETARIAT OF THE TRANSIT AND
TRANSPORT CO-ORDINATION AUTHORITY OF THE NORTHERN
CORRIDOR 1ST RESPONDENT**

DONAT M BAGULA 2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents vide a memorandum of claim dated 2/12/2016 and set forth the following claims against the Respondents, jointly and severally:-
 - a. unpaid leave salary for July 2013:.....USD 1,321
 - b. 13 leave days attributable to suspension.....USD 2,786
 - c. gratuityUSD 15,583
 - d. pension dues.....USD 46,468
 - e. salary for the ongoing breached contract (31 months).....USD 185,873
 - f. home leaveUSD 4,000
 - g. educationUSD 40,500
 - h. medical coverUSD 6,458
 - i. additional terminal dues.....USD 1,687



- j. amount due for the contract to be renewed for a further 4 years including salary, gratuity, pension dues, home leave education and medical cover.....USD 497,050
Total USD 801,726
 - k. a declaration that the Claimant’s staff Appraisal for the year 2012 was flawed and that the same be re-appraised in an inclusive process.
 - l. a declaration that the Claimant’s termination on 6th December 2013 was unlawful, wrongful and illegal.
 - m. reinstatement to the position the Claimant was employed in or re-engagement in work comparable to that in which he was engaged before termination.
 - n. refund on tickets for the Claimant’s family in the sum of USD 2,002.
 - o. declaration that the certificate of service is flawed.
 - p. an order compelling the 1st and 2nd Respondents to issue a clean certificate of service.
 - q. costs of the suit and interest at such rate and for such period of time as the Court may deem fit to grant.
 - r. such other or further reliefs as the Court may deem appropriate.
2. The Claimant pleaded that the 1st Respondent is the executing organ of Northern Corridor Transit and Transport Coordination Authority (NCTTCA) established under the Northern Corridor Agreement executed between Burundi, Democratic Republic of Congo, Kenya, Rwanda, Uganda and South Sudan, and is based in Mombasa County in Kenya; while the 2nd Respondent is an adult of sound mind working for gain in Mombasa within the Republic of Kenya.
 3. It was the Claimant’s pleading that he was employed by the 1st Respondent as a Conference Officer/Translator on 16/7/2008, and that his employment contract was renewed on 13/6/2012 for a further 4 years at a consolidated monthly salary of US\$ (United States Dollars) 4,700, and that this salary was subsequently adjusted to US\$ 5,572 vide a letter dated 22/7/2013. The Claimant further pleaded that during the period of employment, his overall performance was consistently appraised as “very good”, and that for the period 1st January 2012 to 31st December 2012, the 2nd Respondent maliciously and without right and justification downgraded the Claimant’s appraisal to “good”, meaning that the Claimant generally met performance expectations and targets and only performed the directed or tasked duties without improving the status of his work. That no show cause letter was issued to the Claimant as evidence that he was not delivering on his duties properly.
 4. The Claimant further pleaded that he on 16/4/2013 appealed the Appraisal to the 1st Respondent’s Chairman, and that this led to the 2nd Respondent sidelining the Claimant and frustrating him in the performance of his official duties. That although the 2nd Respondent was cautioned by the 1st Respondent’s Chairman and duly acknowledged that an objective staff appraisal should be participatory, he on 6/5/2013 issued a warning letter to the Claimant, contrary to the principles of natural justice and the 1st Respondent’s laid down procedures. That on 15/7/2013, the 2nd Respondent issued the Claimant with a suspension from duty and subsequently terminated the Claimant’s services effective 9/12/2013; and maliciously issued him with a certificate of service dated 3/3/2014 which contravened the 1st Respondent’s Personnel Rules and Regulations.
 5. The Claimant further pleaded that his suspension and termination of his employment were illegal and contravened his employment right in that the warning letter issued to him by the 2nd Respondent



- were biased and without basis, that the termination arose from a flawed appraisal and that the ad hoc disciplinary committee had a pre-determined outcome and failed to apply rules of natural justice.
6. Other documents filed by the Claimant together with the memorandum of claim included his written witness statement dated 26/11/2016 and a bundle of evidential documents. Among the filed documents were copies of the Claimant's contract dated 13/6/2012, a letter of salary adjustment dated 22/7/2013, copies of Staff Appraisal Forms, a warning letter dated 6/5/2013, a Suspension from duty letter dated 15/7/2013 and a termination of employment letter dated 9/12/2013, among other documents.
 7. The Respondents defended the suit vide a Response to Claim dated 4/5/2017. The Respondent pleaded diplomatic immunity under *Privileges and Immunities Act* (Cap 179 Laws of Kenya) for things done in the Course of its official duties; and gave notice that it would raise a preliminary objection and object to the Court's Jurisdiction.
 8. The Respondents further pleaded that the Claimant was employed on periodic contracts between 2008-2013, and that his services were terminated due to gross insubordination, and that his dues were duly computed and paid.
 9. The Respondents denied the Claimant's claim and pleaded:-
 - a. that the Claimant was summoned before a duly constituted Disciplinary Committee on 6/11/2013 at Mombasa Beach Hotel, and that his allegation that he was not granted a hearing was false.
 - b. that the certificate of service issued to the Claimant was not maliciously issued, and that the Claimant's suspension from duty and termination of employment was not unfair, illegal or wrongful, and that the Claimant was not entitled to the sum of US\$ 801,726 claimed.
 - c. that due process was followed in terminating the Claimant's employment; and that the Claimant's dues were computed, a sum of US\$ 67,690, and paid in full and final settlement.
 - d. that the Claimant's claims are exaggerated and that some of the claims are not known in law.
 - e. that the Claimant had no cause of action against the Respondents and his claim was a non-starter.
 10. On 9/6/2017, the Respondents filed a Notice of Preliminary Objection dated 8/6/2017 and stated that this Court had no jurisdiction to entertain the Claimant's suit herein as the Respondent's enjoyed diplomatic immunity from legal process of every kind in respect of words spoken or written, and all acts done by them in their official capacity.
 11. The Court (O.N. Makau, J) heard the objection and delivered a Ruling on 3/11/2017, upholding the Preliminary Objection and striking off the Claimant's suit.
 12. Aggrieved by the said Ruling, the Claimant appealed to the Court of Appeal vide the said Court's Civil Appeal No. 103 of 2018. The Court of Appeal delivered its judgment on 7/3/2019, allowing the appeal, setting aside the orders of this Court (O.N. Makau, J) and directing that the suit herein proceeds to hearing.
 13. Trial commenced before Ndolo, J on 4/3/2021 when the Claimant testified and adopted his witness statement dated 26/11/016 as his testimony and produced in evidence the documents referred to in paragraph 6 of this Judgment. The Claimant further testified:-



- a. that upon appealing to the (1st Respondent's) Chairman, the Chairman, vide a letter dated 16/4/2013, instructed the 2nd Respondent to reappraise the Claimant in a participatory way. That instead of abiding by those instructions, the 2nd Respondent gave a warning letter to the Claimant.
 - b. that the Claimant appealed to the Board against the warning, but his appeal was never considered.
 - c. that the Claimant was suspended on 15/7/2013 without notice.
 - d. that there was a disciplinary hearing on 6/11/2013 by an ad hoc committee composed of former colleagues whereat the Claimant was given a questionnaire of 18 questions.
 - e. that the Claimant was terminated in December 2013, and was on 3/3/2014 issued with a certificate of service whose contents did not accord with regulations, and which rendered the Claimant unemployable.
14. Cross-examined, the Claimant testified that although he appeared before a disciplinary committee, he was not given an opportunity to defend himself. That he only filled a questionnaire and that there was no verbal discussion at the meeting. That the Claimant objected to computation of his dues.
15. The defence case opened before me on 8/11/2022 when the Respondent called one witness, Professor Lievin Chirha Lwirwa (RW-1), who told the Court that he was the 1st Respondent's Director of Infrastructure Development and Management. RW-1 adopted his witness statement dated 23/3/2021 as his testimony and produced in evidence the Respondents' documents listed on a list of documents dated 8/6/2017. The witness further testified:-
- a. that starting July 2013, the Claimant was suspended for insubordination and misconduct.
 - b. that on 6/11/2013, the Claimant appeared before a disciplinary committee and was heard, and that the committee gave its recommendations in a report dated 8/11/2013, sending the matter to the Executive Board for appropriate decision. That the Executive Board met on 3rd to 5th December 2013 and decided to terminate the Claimant's employment.
 - c. that the 1st Respondent's Executive Secretary (the 2nd Respondent) implemented the Executive Board's decision by writing a termination letter to the Claimant.
16. Cross-examined, RW-1 testified that he was a member of the disciplinary committee, and that the Claimant was given a questionnaire to fill during the disciplinary meeting, which he filled. That the report which the disciplinary committee wrote formed the basis of the Claimant's termination. That the Claimant was not part of/did not attend the Executive Board which sat in Bujumbura.
17. It is to be noted that the issue of jurisdiction having been decided by this Court (O.N. Makau, J), and having been taken up on appeal in the Court of Appeal, the same is not before me for determination. Parties herein did not even address that issue during the trial.
18. Having said that, and having considered pleadings filed and evidence presented by parties, issues that present for determination, in my view, are:-
- a. whether termination of the Claimant's employment was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
19. On the first issue, the Claimant's tribulations which eventually led to termination of this employment on 9/12/2013 are shown by evidence to have stemmed from an appeal letter dated 3/4/2013 which the



Claimant wrote to the Chairman of the 1st Respondent's Executive Board regarding his appraisal by the 2nd Respondent; and to which the said Chairman responded on 16/4/2013. The Claimant termed the appraisal as unfair. Based on this sequence of events, the 2nd Respondent issued the Claimant with a warning letter dated 6/5/2013 accusing him of dishonestly, disrespect, insubordination and misconduct. The said warning letter was followed with another letter dated 15/7/2013 suspending the Claimant from duty "with immediate effect."

20. According to the evidence adduced in Court by both the Claimant and the Respondent's witness (RW-1), the Claimant was, vide a letter dated 28/10/2013, invited to appear before a disciplinary committee on 6/11/2013 at Mombasa Beach Hotel. The said letter reads as follows:-

"Following your suspension from duty in mid July 2013, a Disciplinary Committee was instituted to review your case. In addition to examining various correspondences and evidential matter, the committee now wishes, as part of natural justice, to give you chance to clarify on some related matters.

You are therefore invited to appear before the Disciplinary Committee on Wednesday 6th November 2013 without fail.

The Disciplinary Committee will meet with you for one hour starting from 11.30 Am at Mombasa Beach Hotel.

The purpose of the summons is for you to answer a few questions regarding your ongoing disciplinary case."

21. Both the Claimant and the Respondents (RW-1) testified that at the convened disciplinary committee meeting aforesaid, the Claimant was only given a questionnaire which he was required to fill, and which he filled. RW-1 testified that the Disciplinary Committee wrote and send a report to the 1st Respondent's Executive Board, and that the said Report formed the basis of the Board's decision that the Claimant's employment be terminated, and that the Claimant did not have an opportunity to appear before the said Executive Board.
22. The Claimant submitted that the foregoing procedure adopted by the Respondents in terminating his employment did not accord with Section 41 of the *Employment Act*. Section 41 of the Employment provides a mandatory procedure that must be adhered to by any employer contemplating terminating of an employee's employment for misconduct, physical incapacity or poor performance. The Section provides as follows:-

"(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make."



23. I do agree with the Claimant that the procedure adopted by the Respondents in terminating his employment did not accord with the forgoing mandatory provisions of the statute. The Claimant was not shown to have been given an opportunity to be heard on the allegations levelled against him, and was not shown to have been notified of his right to be accompanied by a fellow employee (witness) to the disciplinary committee meeting. Indeed, both the Claimant and RW-1 testified that all that was done at the disciplinary hearing was the filing of a questionnaire by the Claimant, given to him by the said committee. RW-1 testified that he was part of that committee.
24. I find and hold that termination of the Claimant's employment did not accord with the mandatory procedure set out in Section 41 of the [Employment Act](#), and was therefore procedurally unfair.
25. Further, the validity of the allegations of dishonesty, disrespect, insubordination and misconduct levelled against the Claimant by the Respondents were not proved at the trial herein. The issue is also not shown to have been addressed at the disciplinary committee level, whereat no hearing is shown to have taken place.
26. Section 43(1) of the [Employment Act](#) 2007 provides as follows:-
- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”
27. Section 45(1) and (2) (a) of the [Employment Act](#) provides as follows:-
- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:-
- (a) that the reason for the termination is valid;
- (b)
- (c)”
28. As already stated in this judgment, the Respondents did not demonstrate the validity of the allegations levelled by them against the Claimant. Indeed, the Respondents did not demonstrate that anything done by the Claimant, either regarding his appraisal forms that were in issue or otherwise, contravened either the 1st Respondent's Rules and Regulations or the law; and that the penalty for such contravention was termination of employment.
29. It was held as follows in [Walter Ogal Anuro v Teacher Service Commission](#) [2013] eKLR:-
- “...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
30. I find and hold that termination of the Claimant's employment was procedurally and substantively unfair, and I so declare.



31. Further it should be noted that subjecting employees to several disciplinary actions over the same set of allegations is in itself unfair. A warning letter or a letter of reprimand is itself a disciplinary action. Following up the warning letter with a suspension from duty and then termination of employment on the basis of same allegations is unfairness.
32. This Court stated as follows in the case of *Sammy Charo Karisa v Texas Alars [K] Ltd* [2022] KEELRC 78(KLR):-

“...it is to be noted that issuance of a warning letter by an employer to an employee is in itself a disciplinary action and is a culmination of any form of disciplinary proceedings that may have proceeded it. It was held in the case of *Dr. Joseph Maingi Maitha v Permanent Secretary Ministry of Medical Services & Anotehr* [2015] eKLR that once some form of disciplinary action is shown to have taken place against an employee, offences forming the subject matter of the concluded disciplinary process cannot be used against the employee at a future date.

An employer cannot, therefore, use warning letters as a basis for terminating an employee’s employment.”
33. On the second issue, and having made a finding that termination of the Claimant’s employment was unfair, and taking into account the circumstances in which the termination in issue took place, I award the Claimant an equivalent of nine months’ salary as compensation for unfair termination of employment. That is US\$ 5,272 X9 = 47,448.
34. The claims for gratuity, pension dues and salary for the ongoing contract breached were not specifically pleaded, and were not proved. The same are declined. Likewise, the claims for leave, home leave, medical cover, education, gratuity, additional terminal dues and amount due to contract to be renewed were not specifically pleaded and were not proved. The same are declined. I decline to make a declaration that the Claimant’s staff appraisal was flawed as none of the parties herein addressed the Court on that issue at the trial. The prayers for reinstatement and re-engagement cannot be allowed as termination occurred over three years ago.
35. The claims for refund on tickets for the Claimant’s family was not proved and is declined.
36. The claim for issuance of a clean (proper) certificate of service is allowed. It was not proper for the Respondents to issue the Claimant with a certificate of service and to state therein that the Claimant had been “terminated due to indiscipline, insubordination and misconduct.” This contravenes the provisions of Section 51(1) of the *Employment Act* which specifically provides for what a certificate of service must contain. Section 51(1) is clear on the fact that particulars in a certificate of service must be as provided by the Act or as may be prescribed. The reasons that an employer believes to be the cause of termination is not one of the particulars or matters that the law requires to be included in an employee’s certificate of service. I agree with the Claimant that the Respondents did not act in good faith in issuing the certificate of service dated 3/3/2014.
37. Ultimately, and having considered written submissions filed by Counsel for parties herein, judgment is hereby entered for the Claimant against the Respondents, jointly and severally, for US\$ 47,448 being compensation for unfair termination of employment.
38. The 1st Respondent shall issue the Claimant with a proper certificate of service pursuant to Section 51(1) of the *Employment Act*. This shall be done within thirty days of this judgment.
39. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH OCTOBER 2023



AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant

..... Respondent

