



**Agoro v Constituencies Development Fund Board (Cause E013 of 2020)
[2023] KEELRC 2490 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2490 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E013 OF 2020
S RADIDO, J
OCTOBER 18, 2023**

BETWEEN

BONFACE OTIENO AGORO CLAIMANT

AND

CONSTITUENCIES DEVELOPMENT FUND BOARD RESPONDENT

JUDGMENT

1. On 23 October 2017, the National Government Constituencies Development Fund Board (the Board) wrote to Bonface Otieno Agoro (the Claimant) to notify him of the termination of his contract/secondment. The Board also notified the Principal Secretary, Ministry of Devolution of the decision.
2. On 23 October 2020, the Claimant sued the Board alleging unfair termination of employment and breach of contract.
3. The Board filed a Response on 23 March 2022 and the Cause was heard on 7 March 2023, 20 March 2023, and 18 September 2023.
4. The Claimant filed his submissions on 2 October 2023 (should have been filed and served before 29 September 2023) and the Board on 11 October 2023.
5. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

6. The Claimant's immediate supervisor issued him a show-cause dated 16 April 2017. The Claimant responded.



7. The Board then issued another show-cause notice to the Claimant on 19 April 2017, requesting him to answer to allegations of absconding duties. The Claimant responded on the same day.
8. On 31 May 2017, the Board again wrote to the Claimant asking him to report to his new station and respond to the allegation of absconding duties within 7 days, failure to which disciplinary action would be taken.
9. The Board then invited the Claimant to attend a disciplinary hearing on 24 August 2017, but on 23 August 2017, the Claimant requested more time to prepare for the hearing.
10. The Board rescheduled the hearing to 28 August 2017 and advised the Claimant that at that stage, he was not entitled to legal representation.
11. The Claimant sent an email to the Board on 27 August 2017, indicating that the response was sufficient. The Disciplinary Committee deliberated on the issue culminating in the termination of the contract by the Board.
12. In Court, the Claimant asserted that he was not afforded an opportunity to be heard because he was not allowed to be accompanied by an advocate and that the time given to attend the disciplinary hearing was short and contrary to the 7 days envisaged under the Public Service Commission Discipline Manual for the Public Service.
13. By the time the Claimant was invited to the disciplinary hearing, he had been aware of the allegations against him for over 3 months. The time was sufficient for him to prepare both mentally and physically for the physical hearing.
14. Section 41 of the *Employment Act*, 2007 sets out the basic ingredients of procedural fairness. Being accompanied by an advocate is not one of the ingredients though the employee undergoing disciplinary action is entitled to representation by a union official if a member of a trade union or a colleague.
15. The Claimant insisted to the Board that he was entitled to legal representation at the disciplinary hearing. He did not draw the attention of the Court to any legal or contractual stipulation in the Public Service Commission Disciplinary Manual or the Board's human resources policies providing for legal representation.
16. Since the Board informed the Claimant of the allegations to confront, gave him an opportunity to respond in writing, and thereafter invited him to an in-person disciplinary hearing, the Court is satisfied that the Board was in substantial compliance with the requirements of procedural fairness.

Substantive fairness

17. By dint of sections 43 and 45 of the *Employment Act*, 2007, the Board had the burden of proving the validity and fairness of the reasons for terminating the Claimant's contract.
18. The reason for terminating the Claimant's contract was absconding duty.
19. The Claimant was informed of a transfer to Samburu North Constituency through a letter dated 5 January 2017. The Claimant was instructed to report no later than 10 January 2017.
20. The Claimant was involved in an accident in which he sustained fractures and upon seeking medical treatment, he was given 6 weeks' sick-off. The Claimant informed the Board of the sick-off and in a reply dated 22 February 2017, the Board advised the Claimant that the sick-off would lapse on 25 February 2017 and that he was expected to report to duty on 27 February 2017.
21. The Board asserted that the Claimant did not report to the new station despite the advice.



22. The Claimant did not deny failing to report but explained away the failure on the grounds that his attempts to contact the officer he was going to replace for handing over were futile (the officer had resigned to join elective politics) and further that he was still undergoing physiotherapy up to 22 March 2017.
23. The Claimant testified that the Board was aware of all these as he communicated with it in writing.
24. The Claimant had lawful cause to be away from work during the sick-off and the time he was going through physiotherapy.
25. After the physiotherapy, the Claimant did not report to the new station, allegedly because the person who was supposed to hand-over to him could not be reached.
26. Was that reasonable? What would a reasonable employer have done? Reporting to a new station and handing over are closely linked but the non-availability of the person to hand-over cannot be an excuse to fail to report to a new station.
27. The Claimant was the author of his misfortune. The Court finds that the Board had and has proved valid and fair reasons to terminate the contract and release him back to the Ministry of Devolution.

Breach of contract

Unpaid salaries

28. The Claimant sought to be paid Kshs 5,775,000/- as unpaid salaries for 33 months.
29. Although clothed as unpaid salaries, what the Claimant was asserting was the earnings he would have been paid after March 2017 when the sick-off ended, and the salaries had he served the full 3 years' contract.
30. The Claimant did not disclose which legal right entitled him to salaries after separation from the Board.
31. This head of the claim was not proved and the Court takes comfort in the holding by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2008) UGSC that:

the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.

Gratuity

32. The Claimant's contract provided for the payment of gratuity.
33. Instead of paying gratuity directly to the Claimant, the Board paid the same to the pensions department as contemplated by section D36.5 of the Public Service Human Resource and Procedures Manual.
34. The action of the Board was in consonance with the policies in place. The monies are not lost. The Claimant can and should utilise the mechanisms in place to access the benefits.

Hardship/baggage allowance

35. The Claimant did not prove that he was entitled to a hardship allowance.



36. He did not report to the new station. He cannot validly claim baggage allowance.

Leave allowance

37. The Claimant did not disclose the years or period he did not proceed on leave to lay an evidential foundation to this head of the claim and relief is declined.

Certificate of Service

38. A Certificate of Service is a statutory entitlement and the Board should issue one to the Claimant.

Conclusion and Orders

39. Save for a certificate of service which the Board should issue to the Claimant within 30-days, the Court finds no merit in the Cause and it is dismissed with no order on costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 18TH DAY OF OCTOBER 2023.

RADIDO STEPHEN, MCIARB

JUDGE

