



**Musyoka v Kenyatta University (Cause 785 (B) of 2015)
[2023] KEELRC 2516 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2516 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 785 (B) OF 2015
MN NDUMA, J
OCTOBER 12, 2023**

BETWEEN

JANET KALEKYE MUSYOKA CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

JUDGMENT

1. The claimant worked for the respondent as a Cleaner from 1st July, 1990 earning a monthly basic salary of Kshs.17,466 as at the time of dismissal on 23rd March, 2015. The claimant served for a period of 24 years
2. The claimant was on 3rd April, 2014, suspended from employment on allegation of extorting and soliciting bribes from casuals together with members of her department in order to consider them for renewals and appointment. The letter of suspension stated that the bribes sought ranged from Kshs.1,000 to Kshs.3,000 per casual for first appointment and re-appointment respectively. The claimant was placed on half salary.
3. The claimant denied the charges in her testimony and said that the charges were not founded, were brought maliciously and in bad faith.
4. The claimant responded to the charges by letters dated 30th April, 2014 and 8th May, 2014 respectively. The claimant was then invited to appear before the junior Board of Discipline on 8th May, 2014 and 15th May, 2014 respectively.
5. The claimant states that she was not accorded opportunity to defend herself against the aforesaid allegations despite the invitation. The claimant stated that the respondent did not honour Clause 8(a) of the Collective Bargaining Agreement (CBA) by not paying her half salary while on suspension. She attributes this to malice on the part of the respondent. The claimant denied that she was involved in the employment of casuals and denied having taken any bribes as alleged or at all.



6. The claimant stated that when she attended the disciplinary hearing on 8/5/2014, it did not proceed and she was given another hearing date on 15/5/2014. That on this date, the claimant was asked to present a written defence to the charges but she did not do so. The claimant stated that she was asked questions by the panelists to answer true or false. The claimant said that she was not allowed to ask anything. The claimant added that she was not satisfied by the proceedings. That the respondent did not communicate to her until 23rd March, 2015 after one (1) year when she received a letter of summary dismissal. The claimant stated that she was asked to appeal within 14 days but did not do so.
7. The claimant testified that she went on leave every year. That she claims payment in lieu of leave days not taken during the suspension period. The claimant claims payment of service pay. She admitted that she was registered with National Social Security Fund (NSSF) and same was remitted by the respondent. The claimant added that she got into a Pension Scheme in the year 2013, and was sacked in the year 2014. The claimant stated that she was not informed that she could take a representative or witnesses to the disciplinary hearing. That no witnesses were called. It was only herself and the panelists who questioned her. That she was told to answer true or false. That she had studied up to form (2). The claimant denied that she had authority to get anyone employed. The claimant said she had no warning letter in the 24 years' service to the respondent. The claimant said she was now 58 years and was unemployed. That she prayed for compensation and payment of terminal benefits as set out in the amended statement of claim as follows.

Reliefs Sought

8. The Claimant prays that this Honourable Court exercises its powers conferred upon it by the Employment Act Number 11 of 2007 and award her:-
 - a. Twelve (12) months' salary Compensation..... Kshs.460,212
 - b. Three (3) month's salary in lieu of noticeKshs.115, 053
 - (c) Twenty four (24) years' service PayKshs.920,424
 - d. Payment in lieu of leave days not taken and leave allowance.....Kshs.46,551
 - (e) Unpaid salary April, 2014 to December, 2014 and January, 2015 to March, 2015.....Kshs.460,212
 - (f) Salary arrears as per the CBA 2013-2017..... Kshs.141,738
 - g. Costs of this Claim.
 - h. Interest at Court rates.
9. The respondent filed amended Response to the amended Memorandum of Claim in which the employment of the claimant is admitted. The respondent denies all the particulars of claim and the reliefs sought.
10. The responded called R.W.1 Ndiritu Gikaria, Registrar, in charge of Administration. R.W.1 adopted a witness statement dated 22/11/2022 as his evidence in Chief. R.W.1 testified that the respondent received credible information that in the period 2011 to 2014, the claimant had been extorting and soliciting bribes from casuals together with other members of her department at the time.
11. That the claimant was suspended, given opportunity to respondent to the charges in writing and was then invited to appear before the junior Board of Discipline on Thursday 8th May, 2014. That the claimant was again invited to attend a hearing on 15th May, 2014. That the claimant appeared on both



- days before the junior Board and was heard. That the claimant was by a letter dated 23rd October, 2014, again invited to a further disciplinary hearing that was held on 29th October, 2014.
12. That upon hearing the claimant, there was overwhelming evidence against the claimant and the junior Board found the claimant guilty of the charges of extorting and soliciting bribes from casuals with other members/of her department which amounted to gross misconduct.
 13. That by a letter dated 23rd March, 2015, the respondent summarily dismissed the claimant from employment. That the claimant was informed of her right to appeal against this decision to the Vice Chancellor of the respondent but she did not appeal.
 14. That the respondents followed the necessary procedure and the summary dismissal was lawful and fair. That the suit be dismissed.
 15. Under cross-examination by Mr. Ashiruma for the claimant, R.W.1 stated that the claimant appeared before the junior Board of Discipline and was duly heard. That on 8/5/2014, the hearing did not take place but it happened on 15/5/2014. R.W.1 stated that he was not sure if the claimant attended a hearing on 29/10/2014. R.W.1 said that investigations were conducted but the report of investigation was not before Court. That the matter was not reported to the police. R.W.1 said that if the claimant did not receive ½ salary during the period of suspension, it is her right to receive the same. R.W.1 said he was not aware of any warning given to the claimant prior to the matters that led to her dismissal. R.W.1 said that the claimant suspended casuals in the accommodation area and recommended recruitment to the Director Accommodation. R.W.1 said he had no records before Court to show that the claimant recommended employment of casuals to the Director Accommodation.
 16. That six (6) employees were charged with the offence, hence it took time to conclude the investigations and disciplinary process. R.W.1 admitted that there were no minutes of disciplinary hearing before Court to show that the claimant met or had opportunity to confront her accusers to-date.
 17. Under re-examination, R.W.1 changed his narrative to say that the investigation report was at page 71 and 72 of the respondent's record and that the claimant was mentioned at Clause (vi) (b) of the report. R.W.1 said that the summary dismissal was lawful and fair and the claimant failed to appeal the decision.
 18. The Court examined the report from Registrar Administration to the Vice Chancellor dated 8/3/2021. The report was signed by one Dr. D. Muindi. The filed report simply states that they had received credible reports that at the teaching programs Section recommendations for casuals re-appointment are made to the heads of Section by the supervisor M/s Doris Kaimenyi. That supervisor's decision to review or appoint was based on bribe of Kshs.1000 and 3,000 received. That the practice had been going on since 2011. That bribes are paid to Doris Kaimenyi through agent who are tribes-based and not necessarily working at the Teaching Programmes section. For example-

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- (b) "Casuals from Ukambani are forced to pay through Janet Kalekye Musyoka who works at Accountant services."

This is the basis of the charges that were laid against the claimant. R.W.1 prays that the suit be dismissed with costs.

Determination

19. The parties filed written submissions which the Court has carefully considered together with the evidence adduced by C.W.1 and R.W.1.



20. In terms of Section 43(1) and (2) which provides

“ 43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or 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.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

21. The respondent is obliged to prove that it had a valid reason to terminate and/or summarily dismiss the employee from work.

22. In terms of Section 47(5), the employee only need allege that the termination or dismissal was wrongful and then burden shifted to the employer, to demonstrate that the termination or dismissal was justified.

23. In the case of *Gibson D. Mwanjala –vs- Kenya Revenue Authority* [2015] eKLR, the Court held:-

“Pursuant to Section 43 of the *Employment Act*, 2007, an employer has a duty to prove the reasons for dismissing an employee. But the statute does not leave it at that. Under Section 45 of the Act, the employer has the added burden of showing that the reasons were fair and valid. The burden on the employer is an onerous one and it is unlike what obtains under the Civil Procedure regime and/or normal evidential provision where defendant do not have to do so much. In fact, so onerous, is the burden, that by dint of Section 45(4) of the Act, an employer should demonstrate its action to dismiss an employee was in accordance with justice and equity, considering the circumstances of the particular case.”

24. The test therefore as found under Section 47(5) is one to demonstrate on a balance of probability that the employer not only had a reason to terminate or dismiss the employee from employment but also that the reason was a justifiable and reasonable one considering the circumstances of the case.

25. In the present case, the respondent wholly relied on hearsay evidence without naming the source of the information and without giving the claimant opportunity to confront her accusers in writing and/or orally at the disciplinary hearing.

26. The report by the Registrar to the Deputy Vice Chancellors has zero probative value it being unsubstantiated hearsay. The proceedings at the disciplinary hearing were not placed before Court for it to assess the evidence placed before the junior Disciplinary Board which it relied upon to find the claimant guilty as charged.

27. It is the Court’s finding that the decision by the respondent to summarily dismiss the claimant from employment was based on non-credible and non- admissible evidence. The respondent had no valid reason to summarily dismiss the claimant from employment therefore.

28. The claimant had served the respondent for a period of 24 years without a single written warning and / or disciplinary record. This record means something and must be carefully weighed against third party



unsubstantiated allegations of soliciting for bribes. The claimant was a junior officer and it is common cause that he had no authority to employ casuals.

29. The evidence of actual soliciting, taking and/or passing bribes received was necessary in the circumstances of this case. None was placed before this Court. The alleged hearing, before the junior disciplinary board remains just that; an allegation. No record of the proceedings was placed before Court. R.W.1 admitted that no witness other than the claimant testified before the junior board. The respondent has therefore not laid any basis for the finding of guilty made against the claimant. The whole process violated Section 41 of the Employment Act, 2007. The Court agrees with the claimant that she had no opportunity to state her case and/or confront her accusers but was merely questioned by the panel based on hearsay evidence.
30. Accordingly, the summary dismissal of the claimant was unlawful and unfair and in violation of Sections 36, 41 43, and 45 of the Employment Act.
31. The claimant is entitled to compensation in terms of Section 49(1) (c) and (4) in addition to an award of terminal benefits in terms of the (CBA) as follows:-
 - a. Three month's salary in lieu of Notice as per the CBA..... Kshs.115,053
 - b. Kshs.46,551 in lieu of 30 days untaken leave
 - c. Unpaid salary from April, 2014 to December, 2014 and January, 2015 to March, 2015 in the sum ofKshs.460,212
 - d. Salary arrears as per the CBA 2013 – 2017Kshs.141,738
 - e. Twenty four years' service pay as per the CBA..... Kshs.920,424

Compensation

33. The claimant had served the respondent for 24 years without blemish. The claimant was unlawfully summarily dismissed and so did not contribute to the dismissal. The claimant suffered loss and damage, due to severance of her employment.
34. The claimant had not obtained alternative employment due to her advanced age. The summary dismissal was based on no -evidence at all and the allegations of soliciting for bribes, which is a criminal offence was not reported at all to the police.
35. The Court has considered a similar case of Mary Chemweno Kiptui -vs- Kenya Pipeline Company Limited [2014] eKLR and the evidence above to award the claimant the maximum compensation of the equivalent of twelve (12) months' salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs.460,212.
36. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-
 - (a) Kshs.460,212 in compensation.
 - (b) Kshs.1,683,978 terminal benefits.
Total amount Kshs.2,144,190
 - g. Interest at Court rates from date of judgment till payment in full.
 - g. Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 12TH DAY OF OCTOBER, 2023.



MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Ashruma for claimant/Applicant

Mr. Mwathe for respondent

