



**Okemwa v Intra Africa Assurance Company Limited (Cause
457 of 2018) [2023] KEELRC 2427 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2427 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 457 OF 2018
SC RUTTO, J
OCTOBER 6, 2023**

BETWEEN

MERCY KWAMBOKA OKEMWA CLAIMANT

AND

INTRA AFRICA ASSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted the suit herein vide a Memorandum of Claim dated 29th March, 2018, in which she avers that she was employed by the Respondent on 4th July, 2016 as an Actuarial Assistant. She was confirmed on 3rd November, 2016 and by February, 2018, she was earning the sum of Kshs 166,625/= per month. She further avers that in late 2017, the Respondent experienced certain changes that adversely affected employees including her in that their leave days were reduced from 28 to 24 days and in January, 2018, the leave allowance was scrapped off without notice or consultation. Following a staff meeting in January, 2018, she was elected as a staff representative with her mandate being to discuss with the Board of the management and or Directors of the Respondent, issues the staff were facing. Following a series of events, the Claimant avers that she received her termination letter. According to her, the termination was without notice and was on the basis that the company had lost confidence in her. She contends that she was not given a chance to be heard and or defend herself. It is against this background that the Claimant seeks against the Respondent the sum of Kshs 2,983,124.50 being three months salary in lieu of notice, unpaid leave allowance, pending leave days, severance pay and compensatory damages.
2. In response to the Claim, the Respondent filed a Memorandum of Reply and Counterclaim. The Respondent avers that on 1st January, 2018, it began implementation of a performance based bonus scheme in line with the company's 2017-2022 strategic plan which introduced performance management model and a balance score card as a measure of performance. Consequently, the Human



- Resource Policy Manual that incorporated the changes was shared to the staff through email. The Respondent further states that the reason for the Claimant's termination were explained to her.
3. The Respondent has further averred that the Claimant upon being informed of her termination, maliciously deleted company data. In addition, the Respondent counterclaimed against the Claimant the sum of Kshs 722,637/= being a loan balance she had secured in the course of her employment.
 4. During the hearing which proceeded on 23rd November, 2022 and 17th April, 2022, both sides called oral evidence.
 5. In the course of the hearing, both parties revealed to the Court that the Claimant had cleared the loan balance hence the Counterclaim had been settled save for the issue of costs which was reserved for the Court to determine.

Claimant's case

6. The Claimant testified in support of her case and to start with, she adopted her witness statement to constitute her evidence in chief. She proceeded to produce the bundle of documents filed together with her Claim as exhibits before Court.
7. It was the Claimant's evidence that her duties as an Actuarial Assistant included valuation of technical liabilities; computation of Risk Based Capital; reporting on solvency status every quarter; and assisting in preparation of reinsurance statements.
8. She went on to state that on 6th January, 2018, there was a sub-committee meeting, nominations and remuneration committee. That six staff representatives, her included, were elected to discuss the issues that staff were facing.
9. On 9th February, 2018, she requested for a meeting on 12th February, 2018 at 10.00 hours to articulate the staff issues since there was a vacuum due to non-existence of a human resource office following the retirement of the previous Human Resource Manager in September, 2017. Consequently, on the day of the meeting, the sitting Chairman, Mr. Archibald Githinji dismissed the six staff representatives in attendance on grounds that there was no agenda. Thereafter, the staff collectively agreed to join the Bankers and Insurers Trade Union (BIFU).
10. The Claimant further averred that on Tuesday, 27th February, 2018, at 21:43 hours, the Reinsurance and Risk Manager Ms. Muthoni Gacheche called and spoke to her on how her allegiance should only be to the Board and that she should not have been part of the staff representatives and as a result, she would face dreadful consequences.
11. On Wednesday, 28th February 2018 at 16:00 hours, she received a termination letter from the Technical/ Underwriting Manager, signed by the Board Chairman discharging her of her duties immediately without any prior warning or facing any disciplinary committee for purposes of fair hearing.
12. The Claimant further stated that the reason for her termination was loss of confidence, but the same was not explained or proved. She further contended that she was not taken through any disciplinary process hence she considered her termination unfair.

Respondent's case

13. On its part, the Respondent called oral evidence through two witnesses being Mr. Moses Kirima and Mr. Rufus Muchiri, who testified as RW1 and RW2 respectively. Mr. Kirima was the first to go. He identified himself as the Respondent's Head of Underwriting. He started off by adopting the



Respondent's Response, his witness statement and bundle of documents to constitute his evidence in chief.

14. It was RW1's evidence that beginning 2017, the Respondent commenced a 2017– 2022 strategic plan aimed at effecting wide reaching changes within the company. As part of the changes, leave allowance was eliminated to make way for a performance based bonus scheme. Based on the Claimant's performance over the course of the first quarter of 2018, the management lost confidence in her and were left no choice but to terminate her employment.
15. RW1 further stated that on or about 4th July, 2018 the Claimant received a letter of termination setting out the reasons thereof and she was paid her terminal dues.
16. On or about 28th February, 2018, upon being informed of her termination and served with a letter thereof, the Claimant returned to her former desk where she accessed the company laptop formerly assigned to her and maliciously deleted company data. The Respondent (sic) had full knowledge of the fact that the company data on the laptop would be required for the compilation of monthly reports to the IRA as the responsibility for generating these reports was part of her job description prior to her termination. As a result of the deletion, the Respondent was forced to incur additional expenses in contracting system Auditors to attempt to recover the valuable data deleted.
17. Mr. Rufus Muchiri who testified as RW2 identified himself as an Information Systems Auditor and a fraud examiner. It was his testimony that he was contracted by the Respondent and he prepared a report which he produced as an exhibit before Court.
18. It was RW2's evidence that he was called on 7th March, 2018 by a person by the name Erastus from the Respondent company. Erastus told him that he had tried to log in to a machine unsuccessfully. Upon checking the machine, he could see the data had been deleted hence he undertook a forensic audit. He checked the download folder and could not find anything. He checked the data deleted on 28th February, 2018 and found that the person who deleted the data was the user who is Kwamboka. That the user name was kwamboka.intraafrica.local. According to him, 185 files including emails, had been deleted. The email accounts were intraafrica.co.ke so he came to ascertain that they were from the Respondent company.
19. It was RW2's further evidence that although the computer was used by other people, they wanted to know who deleted the data and it was Kwamboka (the Claimant).

Submissions

20. It was submitted on behalf of the Claimant that her termination was unfair as she was never given any warning on her performance and was not given any Notice to Show Cause to respond to. That in the event she was underperforming, she was not given time to improve her performance. In support of the Claimant's submissions, the Court was invited to consider the determination in the case of National Bank of Kenya vs Samuel Nguru Mutonya (2019) eKLR.
21. It was further submitted that all the documents relied upon by the Respondent are not helpful and or relevant as she was not terminated on account of having deleted company data but on account of poor performance.
22. On the Respondent's part, it was submitted that the circumstances leading to the termination of the Claimant's employment was an outright breach and neglect of duty justifying summary dismissal under the law. That the dismissal followed a finding that the Claimant was guilty of poor performance. The Respondent further argued that the Claimant's termination had nothing to do with her association with the Union as claimed.



Analysis and determination

23. Arising from the pleadings, the evidence on record as well as the rival submissions, it is apparent that the Court is being called to determine the following issues:
- a. Whether the Respondent has proved that there was a justifiable cause to terminate the Claimant's employment;
 - b. Whether the Claimant's termination was in line with fair procedure;
 - c. Is the Claimant entitled to the reliefs sought?
 - d. Who bears the costs of the Respondent's Counterclaim?

Justifiable cause?

24. In order to establish fair termination under the *Employment Act* (Act), an employer is required to prove the reasons leading to an employee's termination. What's more, in terms of Section 45(2) (a) and (b) such reasons ought to be fair, valid and related to an employee's conduct, capacity or compatibility; or based on the employer's operational requirements. This is also known as substantive justification. Worthy to note is that the burden of proof in this instance, lies with the employer.
25. Turning to the instant case, it is apparent that the reason for the Claimant's termination from employment was "loss of confidence". I will produce the relevant excerpt of the said letter of termination, thus:
- "Dear Mercy,
- Re: Termination of Employment
- The above subject and your appointment effective 4th July, 2016 refers. The Company has deemed it untenable for you to continue working with us due to loss of confidence. Consequently, the Company will be paying you a one (1) month's salary in lieu of the contractual 30 days' notice so that your last working day will be 28th February, 2018....."
26. It is instructive to note that the allegation of "lack of confidence" on the part of the Claimant was not substantiated at all. As a matter of fact, the same was couched in very general terms and does not contain better particulars.
27. Coupled with the general nature of the allegations levelled against the Claimant, there was no evidence presented before Court to justify her termination.
28. It goes without saying that the Respondent ought to have specified the particulars of the reason leading to the Claimant's termination. In this regard, the term "lack of confidence" ought to have been specified. The same is too general and it's impossible to decipher its real meaning and import. Indeed, the same does not disclose any particular action or omission on the Claimant's part.
29. In his testimony before Court, RW1 stated that the Respondent lost confidence in the Claimant due to her performance over the course of the first quarter of 2018. Despite these assertions, the Respondent did not adduce evidence of the Claimant's poor performance. Besides, there were no parameters to measure her performance. Hence, one wonders how the Respondent was able to ascertain that the Claimant's performance was poor and wanting. In any event, if indeed the Claimant's performance was wanting, nothing would have been easier than for the Respondent to state as much in her letter of termination and to lead evidence to prove as much.



30. In any case, since the Claimant's letter of termination has not indicated that she was terminated on account of poor performance, the said reason cannot really be attributed to her termination.
31. I must add that the Claimant was entitled to know the substance of the allegations against her, but in the face of such a blanket term as "lack of confidence", she was denied such an opportunity.
32. Ultimately, the Respondent's allegations against the Claimant remained bare and were not backed by any evidence in whatever form, shape or nature.
33. The Court of Appeal in the case of *OI 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.
34. As stated herein, the burden was on the Respondent to prove the reasons for the Claimant's termination from employment. How else could it discharge this responsibility without evidence? Needless to say, in absence of any evidence, the Respondent failed to discharge its evidential burden.
35. 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?

36. Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. What constitutes fair procedure is stipulated under Section 41(1) of the Act. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations. Worthy to note is that the employee is entitled to be accompanied by a fellow employee or a shop floor union representative of own choice in making such a representation.
37. In this case, it is not in contest that the Claimant was not subjected to the process contemplated under Section 41 of the Act. This is evident from the letter of termination which indicated that the Claimant's termination was to take effect the same day. Besides, the Respondent did not prove, let alone suggest that it notified the Claimant of the reasons for which it was considering terminating her employment. In addition, there is no evidence that the Claimant was given an opportunity to respond to whatever allegations and appear in any forum to give her side of the story. Put another way, the Claimant was dismissed in a manner that was contrary to the procedure stipulated under Section 41 of the Act.
38. In considering the import of Section 41 of the Act, the Court of Appeal had this to say in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR: -

“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.....Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;



- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
39. I wholly reiterate the position in the above case and apply the same herein and hold that the provisions of Section 41 are mandatory and there is therefore no room for maneuver when it comes to applying fair procedure in effecting an employee’s termination from employment. Anything short of the standard established under Section 41 invalidates a termination as in the instant case.
40. I further wish to reiterate the determination by the Court of Appeal in the case of Kenfreight (E.A.) Limited v Benson K.Nguti (supra), where it was held that:-
- “ Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken”.
41. Essentially, what the Respondent ought to have done prior to issuing the Claimant with the letter of termination, was to go a step further and explain to her the reasons for which it was considering terminating her employment in the presence of another employee or a union official in a language she understands.
42. As the Respondent failed to meet the threshold stipulated under Section 41 of the Act, the Claimant’s eventual termination from employment was procedurally unfair within the meaning of Sections 45(2) (c) of the Act.
43. In the end, the Court is satisfied that the Claimant’s termination from employment was devoid of substantive justification and procedural fairness within the meaning of Sections 41, 43, and 45 of the Act.
44. In total sum, the Claimant’s termination was unfair and unlawful.

Reliefs

Compensatory damages

45. Having found that the Claimant’s termination was unfair and unlawful, the Court awards her compensatory damages equivalent to four (4) months of her gross salary. This award has taken into consideration the length of the employment relationship and the fact that the Respondent failed to prove substantive justification and that it applied a fair process in effecting the Claimant’s termination.

Notice Pay

46. With regards to the claim for three months salary in lieu of notice, it is apparent that the Claimant was paid one month’s salary in lieu of notice following her termination. Notably, her letter of appointment provides for three months’ notice or payment of three months’ salary in lieu of notice. What this means is that the Claimant is entitled to two months unpaid salary in lieu of notice as per her terms of contract.

Leave allowance

47. Turning to the claim for leave allowance, it is evident from the Claimant’s letter of appointment, that she was entitled to the annual sum of Kshs 108,750/=. It is not in dispute that the said allowance was



discontinued with effect from 1st January, 2018. This was communicated through a Memorandum issued to all staff of the Respondent company. No doubt, this amounted to a fundamental change of the Claimant's contract of service hence it follows that such a change ought to have been done in line with the provisions of Section 10(5) of the Act which provides as follows:

“(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

48. It is not in doubt that the withdrawal of the leave allowance was detrimental to the Claimant as it had the effect of reducing her remuneration. It was therefore imperative for the Respondent to evidence and document how the change was effected and specifically, how the Claimant's consent was obtained in that regard.
49. Without evidence it can only be presumed that there was no consent from the Claimant's end, to withdraw the leave allowance. This leads me to conclude that the change was undertaken unilaterally. This was in contravention of Section 10(5) of the Act.

Leave Pay

50. As to the claim for leave pay, the Claimant's letter of appointment provides that she was entitled to 30 days leave. There is no evidence that she was paid prorated leave at the time of her termination. She is therefore entitled to the same.
51. The claim for severance pay is declined as the same is only payable under Section 40(1) (g) of the Act where employment has been terminated on account of redundancy, which is not the case herein. In any event, the Claimant's letter of termination indicate that she was to be paid one half months basic salary for every worked. This very well covers the Claimant's claim for severance pay. Notably, from the Claimant's submissions, this claim was dropped.

Costs of the Counterclaim

52. The other pending issue is with regards to the costs of the Respondent's Counterclaim. From the record, the Respondent filed the Counterclaim together with its Reply to the Claimant's Memorandum of Claim on 5th November, 2018. It is noteworthy that the Claimant did not dispute the Counterclaim but apparently, she settled the outstanding loan balance in 2021 during the pendency of the suit.
53. Section 27 of the [Civil Procedure Act](#) is key in determining this issue hence I will reproduce the same thus: -

“[27](1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”



54. This position was amplified in Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

55. With regards to the word “event”, Justice (Rtd) Kuloba defines the same in his literary work “Judicial hints on Civil Procedure” to mean: -

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite even in defeating the claim to judgment in the whole or in part”.

56. In this case, the successful party with regards to the Counterclaim was the Respondent. Hence in following with the term “costs follow the event”, the Respondent is awarded the costs of the Counterclaim which shall be taxed by the Deputy Registrar of the Court.

Orders

57. In total sum, the Claim succeeds and Judgment is entered in favour of the Claimant against the Respondent as follows:

- a. The Claimant is awarded compensatory damages in the sum of Kshs 666,500.00 being equivalent to 4 months of her gross salary.
- b. The Claimant is awarded two months salary in lieu of notice being the sum of Kshs 333,250.00.
- c. The Claimant is awarded the sum of Kshs 108,750.00 being unpaid leave allowance.
- d. The Claimant is awarded prorated leave pay for two months in 2018, being the sum of Kshs 27,775.00.
- e. The total award is Kshs 1,136,275.00.
- f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.

58. As costs follow the event, the Claimant shall be entitled to the costs of the Claim while the Respondent shall be entitled to the costs of the counterclaim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

.....
STELLA RUTTO



JUDGE

Appearance:

For the Claimant Mr. Rakoro

For the Respondent Mr. Ogara

Court Assistant Abdimalik Hussein

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 15th March 2020 and subsequent directions of 21st 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

