



**Otieno v Ison Technologies Kenya Limited (Cause E509 of 2022)
[2023] KEELRC 2924 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2924 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E509 OF 2022
JK GAKERI, J
NOVEMBER 16, 2023**

BETWEEN

MESHACK OMOLLO OTIENO CLAIMANT

AND

ISON TECHNOLOGIES KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a Memorandum of Claim alleging unfair termination of employment by the respondent.
2. It is the claimant's case that he was employed by the respondent on July 1, 2015 as a Sales Executive at a basic salary of Kes74,900/= and served diligently and faithfully until August 28, 2020 when he was dismissed from employment on allegations of absenteeism from 12th to August 14, 2020.
3. The claimant avers that he was issued with a notice to show cause on 17th August, 2020, responded and was subsequently invited for a disciplinary hearing and attended on August 24, 2020.
4. The claimant faults the dismissal both substantively and procedurally in that on 12th August, 2020 he had a meeting at Path International, Kitsuru and on 13th and 14th he was working from home due to COVID-19 and Mr. Bhatti was aware and there was no complaint on any unfulfilled assignment.
5. The claimant further avers that he was dismissed by his accuser, the Human Resource Manager, one Jacinta Kahi.
6. The claimant also alleged that he was targeted because he declined to be the respondent's witness in ELRC Cause No. 114 of 2020 where the respondent's legal officer, Sophia Gathoni attempted to coerce him to give a false statement implicating the claimants therein.



7. The claimant prays for
 - i. Compensation for unfair termination Kes 1,033,620/=.
 - ii. Unpaid house allowance Kes 651,630/=.
 - iii. Notice pay.
 - iv. Costs of this suit.
 - v. Interest on (i), (ii) and (iii) above.
 - vi. Any other relief the court may deem fit and just to award.

Respondent's case

8. The respondent avers that the claimant was responsible for sales, coordinating and tendering process, improving customer relations, converting and retaining customers and growing the respondent's business.
9. That in June 2020, the respondent found out that the claimant was working with ESNT Technologies whilst an employee of the respondent. That the name of the company was phonetically crafted to create the impression that it was related to the respondent.
10. That the claimant was conflicted but the dispute was amicably resolved.
11. According to the respondent, the claimant's response to the notice to show cause was unsatisfactory and precipitated the disciplinary hearing on August 24, 2020 which led to termination of the claimant's employment.

Claimant's Evidence

12. On cross-examination, the claimant confirmed that he signed the employment contract provided by the respondent and was familiar with the respondent's Human Resource Manual.
13. The witness testified that he had nothing to show that he attended a meeting at Path International on August 12, 2020 or communicated the same to the supervisor.
14. That he was unaware of the capacity in which the Human Resource Manager issued the notice to show cause.
15. The claimant purported to contest the contents of the minutes of the hearing but confirmed that he freely signed the minutes and did not raise any objection before he signed them.
16. The claimant testified that on 13th August, 2020, he was working from home but had verbally told Mr. Bhatti. He confirmed that he was not calling Mr. Bhatti as a witness.
17. The witness confirmed that the respondent's Human Resource Manual provided for the appointment of the disciplinary committee of at least 3 senior members of the organization including a representative of the Human Resource Department.
18. The witness testified that according to him, RWI sat in the meeting as the accuser but he did not object to her being present.
19. Regarding the alleged attempt by Sophia Gathoni to coerce him to give evidence, the claimant confirmed that he had no evidence of the alleged attempt and was neither party to the case nor a witness.



20. The claimant admitted that he had no evidence to prove the allegations set out in paragraph 29, 30 and 31 of the claim.
21. It was his testimony that his salary was not consolidated.

Respondent's Evidence

22. RWI, Jacinta Kahi confirmed that she was the respondent's Human Resource Manager and had signed the termination letter and the notice to show cause in that capacity and had no authority to issue letters.
23. That the complaint about the claimant's absence came from the supervisor. She confirmed that leave could be carried forward.
24. On cross-examination, the witness confirmed that all complaints on employees were referred to her office and Mr. Bhatti was the complainant and was part of the disciplinary hearing. That Mr. Bhatti did not file a statement denying the claimant's allegation as he had already left the organization.
25. That there were instances when employees were working from home.
26. That the contract did not indicate that the claimant's salary was consolidated or that it included housing allowance.
27. On re-examination, RWI confirmed that the claimant had no any evidence of bias by any member of the committee or that Mr. Bhatti made the decision to terminate his employment.

claimant's submissions

28. Counsel identified four issues touching on termination, house allowance and reliefs.
29. On procedural fairness, counsel submitted that the claimant's case was heard and determined by his accusers who were conflicted, one Jacinta Kai and complainant Mr. Bhatti.
30. The decision in *Joshua Rodney Marimba v Kenya Revenue Authority* (2019) eKLR was cited to urge that a hearing cannot be fair if the committee is improperly constituted as was the decision in *Nicholus Muasya Kyula v Farmchem Ltd* (2012) eKLR.
31. That the complaint from Bharti was not shared with the claimant.
32. Reliance was made on the decision of Ndolo J. in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* (2014) eKLR on documents in possession of the employer.
33. Counsel submitted that the claimant was not given a chance to cross-examine the accuser, yet he responded to their questions at the hearing.
34. The termination was without notice.
35. On substantive fairness, counsel urged that since the claimant was a Sales Executive, his duty was to source clients that he went to Path International, Kitsuru for a meeting and on 13th August, 2020, he was working remotely due to COVIL-19 and was not expected in the office.
36. That on August 14, 2020, he was compensating for one leave day not taken and the respondent tendered no evidence that the claimant was not working from home.
37. Counsel relied on the allegation that one Sophia Gathoni had approached the claimant to be a witness in a case filed by former employees but the claimant declined and was thus being targeted for dismissal.



38. The claimant tendered no evidence in support of the allegation.
39. On house allowance, counsel urged that since the claimant's salary was not consolidated or included in item for house allowance, the claimant was entitled to the allowance and cited the decision in *Lucy Woldu v African Development Solution (ADESCO)* (2021) eKLR where house allowance was awarded as well as *Sheila Wikashei & another v Super Broom Services Ltd* (2022) eKLR.
40. On the reliefs sought, counsel urged the court to award 15% house allowance, 12 months' salary compensation, salary in lieu of notice and costs of the suit.
41. The decision in *Nisha Nilesbbhai Bhavsar v Kensalt Ltd* (2022) eKLR was relied upon to reinforce the submission on house allowance.

respondent's submissions

42. Counsel isolated two issues for determination, on termination of employment and the reliefs sought.
43. On the 1st issue, counsel relied on the sentiments of the court in *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* (2017) eKLR to urge that for a termination to pass as fair, there must have been a valid reason and fair procedure encapsulated in the provisions of sections 41, 43, 44, 45 and 47 of the *Employment Act*, 2007.
44. On substantive fairness, counsel submitted that the claimant had not adduced any evidence to show that he was at work on the days in question as he who alleges must prove as held in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* (2005) 1 EA 334 and *JK Patel v Spear Motors Ltd* (1993) VI KALR.
45. That the claimant had failed to prove that he was at work on 12th and August 13, 2020 and was on leave on August 14, 2020.
46. Reliance was also made on the provisions of section 43 of the *Employment Act*, 2007.
47. On procedural aspects, counsel relied on sections 41 and 45 of the *Employment Act*, 2007 to urge that the claimant's dismissal was conducted in accordance with the law in that he was given the details of the allegation, an opportunity to respond which he did, invited for a hearing and attended, though alone and was also given the outcome of the process.
48. That the claimant was at liberty to adduce evidence in support of his claim and could be accompanied by a witness.
49. According to counsel, RWI and Mr. Bhatti were not conflicted as they were acting on behalf of the respondent and the respondent's Manual allowed them to sit as members of the disciplinary committee and they were not the sole decision makers nor was the Human Resource Manager the accuser.
50. Counsel submitted that since employees were allowed to work from home on Monday, Wednesday and Friday and the claimant was not working on 13th August, 2020 which was a Thursday, he was absent from work. That on 14th August, 2020, the claimant was justifying his absence and the respondent had leave application procedures.
51. The decision in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR were relied upon to highlight the essentials of a fair termination of employment and urge that the respondent complied with the requirements of section 41 of the *Employment Act*, 2007.
52. As regards the reliefs sought, it was submitted that the claimant was not entitled to any.



53. Reliance was made on the decisions in *South Nyanza Sugar Co. Ltd v Leonard O. Arera* (2020) eKLR, *National Bank of Kenya Ltd v Pipe Plastic Samkolit* (2002) 2 E.A 503 and *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR to urge that parties are bound by the terms of their contract as were the provisions of section 35(4) and 44(4) of the *Employment Act*, 2007.
54. That since the claimant was dismissed for gross misconduct, he was not entitled to notice pay.
55. On housing allowance, counsel relied on section 31(2)(a) of the Act to urge that the claimant's salary was consolidated and thus inclusive of housing allowance and he did not raise the issue in 5 years.
56. Finally, counsel relied on the provisions of section 47(5) of the *Employment Act*, 2007 and the decision in *Omar Ndaro Zuma v Modern Coast Express* (2019) eKLR to submit that the claimant did not adduce evidence to show that his dismissal from employment was unfair.

Determination

57. The issues for determination are;
 - i. Whether termination of the claimant's employment was unfair.
 - ii. Whether the claimant is entitled to the reliefs sought.
58. On the 1st issue, counsels have adopted opposing position with the respondent's counsel maintaining that the claimant's employment was lawfully terminated.
59. It need not be gainsaid that the provisions of the *Employment Act*, 2007 provide the architecture on termination of employment from notice, reason for termination and proof thereof, validity and fairness of the reason, grounds for summary dismissal, justification of the ground and procedural aspects.
60. These requirements are set out in sections 35, 41, 43, 44(4), 45 and 47(5) of the *Employment Act*, 2007.
61. In a nutshell, the foregoing provisions are unambiguous that for a termination of employment to pass muster, it must be proved that the employer had a valid and fair reason to terminate the employee's employment and did so in accordance with fair procedure as exquisitely captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows;

“ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also 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 to effect the termination.”
62. The Court of Appeal made similar sentiments in *Naima Khamis v Oxford University Press E.A Ltd* (2017) eKLR.

Reason for termination

63. While the claimant testified that he attended a meeting at Path International on August 12, 2020 and worked from home on August 13, 2020 and compensated an earlier leave day by not working on August 14, 2020, the respondent's case was that he was absent without leave for the 3 days.
64. As regards the claimant's absence on August 14, 2020, which he admitted, email communication show that the claimant was compensating for July 29, 2020 when he alleged to have been in the office but



his leave had commenced on July 29, 2020, having been requested by the Manager to delay his leave but could only avail a single day.

65. However, the claimant tendered no evidence to prove that he had notified his supervisor about the alleged compensation and the same had been authorised.
66. Based on the evidence on record, the claimant did not establish the fact that his absence from work on August 14, 2020 had been made known to and/or authorised by the supervisor. The minutes of the disciplinary hearing which the claimant signed reveal that the claimant had not notified his supervisor about his extension of leave.
67. Although the claimant attempted to discredit the minutes, he could not reconcile the same with the reality that he had signed the minutes willingly and had not objected to any of the contents.
68. As regards August 13, 2020, the claimant's email reveal that it was not a working day.
69. However, a subsequent email dated August 18, 2020 modifies the explanation stating that on August 13, 2020, the claimant was "online as usual and was unaware that anyone looked for him.
70. The disparate explanations of the claimant's status on August 13, 2020 is puzzling as it is possible to be on-line and not be working.
71. As regards August 12, 2020, the email record shows that the claimant indicated that on that day, he attended a meeting at Path International and could provide the contact person if required. The claimant tendered no evidence to prove that he met anyone at Path International as the response to the notice to show cause dated August 18, 2020 was not availed.
72. The email makes no reference to the agenda of the meeting or the timing nor outcome of the meeting.
73. Evidence of who the claimant met or contacted and the general nature of discussion and outcome would have buttressed the allegation that indeed there was a meeting.
74. Puzzlingly, none of the emails make reference to the supervisor having been aware of the meeting or its timing and Mr. Bharti stated that he had not been informed of the meeting.
75. The claimant confirmed that he had no scintilla of evidence in support of the alleged meeting.
76. Section 44(4)(a) of the *Employment Act*, 2007 provides that it is a gross misconduct if an employee;
"Without leave or other lawful cause absents himself from the place appointed for the performance of his work."
77. The respondent's manual provides that;
"Employees are required to obtain advance approval for leave from their supervisor."
78. Similarly, the manual provides that employees are expected to be at their designated work station during regular work hours except for lunch break as defined by supervisor and notify their supervisors, if they are going to be late and notify their Managers upon closing for the day.
79. From the evidence on record, it is clear that for the three days in question, the claimant made no effort to contact his supervisor by phone or email, as he did not allege that they talked on the phone or that he did an email or had given prior verbal notice of the meeting on 12th, absence on 13th and the compensation of leave on 14th August, 2020.



80. Significantly, section 43(2) of the *Employment Act*, 2007 provides that;
- “The reasons or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
81. In legions of decisions, courts have held that a termination of employment by the employer will pass muster so long as the employer demonstrates that he or she or it had a reasonable basis for genuinely believing that the grounds relied upon existed.
82. Similarly, in *Kenya Revenue Authority v Rewel Waitbaka Gitabi & 2 others* (2019) eKLR, The Court of Appeal expressed itself as follows;
- “The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee’s services. That is a partly subjective test.”
83. The foregoing would appear to be consistent with the so called “band of reasonableness test” as captured by Lord Denning MR in *British Leyland UK Ltd v Swift* (1981) IRLR 91 that as long as a reasonable employer would have dismissed the employee in those circumstances, the dismissal will pass as fair.
84. For the foregoing reasons, it is the finding of the court that the respondent has on a preponderance of probabilities demonstrated that it had a valid and fair reason to terminate the claimant’s employment.

Procedure

85. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the elaborate procedure prescribed by Section 41 of the *Employment Act*, 2007 is mandatory for a termination of employment to pass as fair.
86. As regards the procedural precepts of Section 41 of the Act, in *Postal Corporation of Kenya v Andrew K. Tanui* (supra), the Court of Appeal pronounced itself as follows;
- “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 are made;
 - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
87. While the claimant faulted the procedure employed by the respondent on the premise that the Human Resource Manager, one Jacinta Kahi, his accuser issued the notice to show cause and was present during the hearing and was thus conflicted, the respondent submitted that the Disciplinary Committee was constituted in accordance with the respondent’s Human Resource Manual and RWI denied having been the claimant’s accuser.



88. Was the Human Resource Manager conflicted? or biased?
89. The respondent's Manual provide for the appointment of Disciplinary/Complaints Committee by management. The function of the committee is to consider the allegations of misconduct to determine whether disciplinary action ought to be taken against an employee.
90. The Manual states;

“The committee shall consist of not less than three members, all of whom shall be senior members of the organization. These include a representative of the Human Resource department and 2 senior members as elected by management.”
91. The minutes on record reveal that three persons sat on August 24, 2020, namely Mr. Athar Bharti, Sophia Gathoni and Jacinta Kahi. The latter was the respondent's Human Resource Manager, Sophia Gathoni, the Legal Officer and Arthar Bharti the claimant's supervisor, all senior employees of the respondent.
92. From the minutes, it is apparent that the Human Resource Manager acted as Chair of the meeting as she is the one who welcomed those present and explained the purpose of the meeting.
93. From the minutes, the Human Resource Manager asked one question why the claimant did not report to the office on his way to Path International as the office is on the way to Kitsuru, the alleged venue of the meeting and nothing else is reported after the issue of not reporting to the office first was disposed of but for a clarification on working days.
94. From the minutes, there is decipherable bias or hostility by one of the members against the claimant.
95. The minutes create an impression that the meeting was cordial and the claimant signed the same willingly without any protest.
96. The claimant's counsel's submissions that the Disciplinary Committee was not properly constituted was not supported by evidence of any violation of the respondent's Human Resource Manual.
97. In the court's view, the fact that the Human Resource Manager issued the notice to show cause and was present at the hearing does not of itself suggest bias.
98. Being the Human Resource Manager, all personnel or employees issues were housed in her office and disciplinary matters are some of them.
99. Typically, Human Resource seldom take roll call of employees and unless it is responsible for reviewing the clocking in and out system, if electronic, it is practically impossible for Human Resource to ascertain who reported to work and who did not on a daily basis.
100. It is typically the duty of supervisors to do so and report any absenteeism or other misconduct including lateness.
101. Consequently, the court is not persuaded that the claimant has demonstrated that Human Resource Manager of the respondent was his accuser or was biased during the hearing and typically Chairpersons of meetings such as this one have no voting power unless there is a tie.
102. In the absence of evidence that the Human Resource Manager made the decision alone or had made it before August 24, 2020, the allegation of bias remains unsubstantiated.
103. On the procedural aspects, the claimant faulted the process on the ground that his defense was not considered.



104. From the minutes, it is clear that the claimant responded to the questions asked regarding the days he was absent from the work place and ably responded to them thereby appraising the committee of his position which explanation the committee considered in arriving at the decision to terminate the claimant's employment.
105. The claimant did not allege that he was not accorded time to present his defense or call a witness.
106. The invitation letter dated August 21, 2020 indicated clearly the purpose of the meeting and informed the claimant that he was at liberty to be accompanied by a witness at the hearing.
107. Significantly, the letter also notified the claimant that if he had any documentary or other evidence in support of his case, he was free to produce the same at least 2 hours before the meeting.
108. The letter also informed the claimant how the decision of the committee would be communicated.
109. From the minutes, it is clear that the claimant appeared alone and had no documentary evidence to adduce, contact and name of the person(s) he met at Path International would have effortlessly covered August 12, 2020.
110. Evidence of a call or message to the Supervisor or Human Resource would have explained the absence on 13th and August 14, 2020. Puzzlingly, no such evidence was adduced.
111. In sum, the court finds no evidence was adduced to show that the claimant's defence was not considered in the decision making process.
112. Paragraph I of the termination letter makes reference to the stages the claimant was taken through, a statement he agreed with.
113. It would appear to follow that the Disciplinary Committee considered his written response and the answers he provided during the hearing.
114. Finally, it is common ground that the respondent accorded the claimant an opportunity to state his case as he received a notice to show cause, submitted a response, was invited for a disciplinary hearing with all attendant rights and he attended the hearing and actively participated.
115. Counsel's submission that he was not accorded the opportunity to cross-examine witnesses is unpersuasive as the claimant was present, responded to questions and did not raise any objection or request for witnesses and signed the minutes as evidence of the proceedings.
116. From the evidence on record, it is the finding of the court that the respondent has demonstrated that it conducted the termination of the claimant's employment in accordance with a fair procedure as by law required.
117. In sum, it is the finding of the court that the termination of the claimant's employment by the respondent was substantively justifiable and was conducted in accordance with a fair procedure.
118. On the reliefs sought, the court proceeds as follows;

i.Compensation for unfair termination

119. Having found that the termination of the claimant's employment was substantially justifiable and procedurally fair, the prayer for compensation is unsustainable and is declined.



ii.Unpaid house allowance

120. Under section 31 of the *Employment Act*, 2007, an employer is obligated to provide housing to its employees or pay a housing allowance to enable the employee secure reasonable housing.
121. In this case, the Employment Contract states that the claimant’s salary is Kes70,000/= “fixed” and Kes25,000/= “variable”. None of these terms is explained.
122. It is unclear to the court whether the salary included a housing allowance component since the agreement is silent and RWI admitted, on cross-examination that the contract did not state that the salary was consolidated which is further amplified by the copy of the payslip on record which expressly states that the salary indicated is basic salary.
123. The claimant testified that his salary was not consolidated.
124. In the circumstances, the court is satisfied that the claimant is entitled to housing allowance at 15% of the basic salary for 3 years, Kes404,460/= as the right accrued on employment.

iii.Notice pay

125. Having found that the termination of employment was not unfair, the prayer for notice pay is unsustainable and is declined.
126. Having found that termination of the claimant’s employment was fair within the meaning of section 45 of the *Employment Act*, 2007, other than the sum of Kes 404,460/= for house allowance for a period of 3 years, the claimant’s suit is unsustainable and it is accordingly dismissed.
127. The claimant is awarded 50% of the costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF NOVEMBER 2023

DR. JACOB GAKERI

JUDGE

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 has 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.

Dr. Jacob Gakeri

Judge

