



REPUBLIC OF KENYA



KENYA LAW
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**Mainga v Kenya Broadcasting Corporation (Cause 1281 of 2015)
[2023] KEELRC 2893 (KLR) (14 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2893 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1281 OF 2015
NZIOKI WA MAKAU, J
NOVEMBER 14, 2023**

BETWEEN

PRISCA NDUKU MAINGA CLAIMANT

AND

KENYA BROADCASTING CORPORATION RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent Corporation through the Memorandum of Claim dated 27th July 2015, wherein she prayed for Judgment against the Respondent for:
 - a. A declaration that the Claimant's dismissal from the Corporation's service was wrong, unfair and unlawful.
 - b. A declaration that the decision to dismiss the Plaintiff was too harsh and extreme in the circumstances of the case and that the same be set aside.
 - c. An order that the Claimant be reinstated back into her employment with the Corporation at her then scale and service.
 - d. The Claimant be paid all her unpaid salary and allowances for the period she has been out of service.
In The Alternative.
 - e. An order do issue that the Claimant be paid all her terminal benefits and entitlements as would be due to her in a normal retirement under her scheme of service, age, and rank being;



- i. Salary unpaid for the period of suspension from June 2012 to September 2014 when the dismissal letter was served (27 months x Kshs. 42,400/-)Kshs. 1,144,800/-
 - ii. 1 month's salary in lieu of noticeKshs. 42,400/-
 - iii. Unpaid/ untaken leave days for period 2011-2014 (Kshs. 42,400/- x 3 years)Kshs. 127,709/-
- f. That owing to the unfair, unlawful and false summary dismissal, the Claimant is entitled to compensatory damages for the dismissal at 12 months' gross salary (Kshs. 42,400/- x 12 = Kshs. 508,800/-) plus interest therein from the date of filing of this case.
- g. An order that the Claimant is entitled to her full pension benefits payment being her own contribution and the Corporation's contributions made to the date of dismissal plus all interest accrued thereon.
- h. The Respondent do pay the Claimant's costs with interest.
2. The Claimant's case was that the Respondent employed her from or about 30th August 1995 as a Clerical Officer and she rose through the ranks to become a Senior Human Resource Assistant. That after serving the Respondent for over 17 years without blemish, her services were however terminated on 1st September 2014 with her last salary computed at Kshs. 42,400/- per month. The Claimant averred that she was served with a suspension letter on or about 5th June 2012, on false allegations of manipulation of the payroll to fraudulently pay staff members who had either been retired, resigned or on secondment. She responded to the said suspension letter on 11th June 2012 with a detailed defence to the allegations raised and thereafter followed up with the Respondent over the unexplained delay in giving her a disciplinary hearing, which should have been held within 12 months after the suspension. She averred that it was close to two (2) years after suspension that she was served with a letter inviting her to appear before a disciplinary committee on 30th March 2014. That on the material date of the hearing, the Respondent's Secretary in its Legal Department informed her that the committee lacked quorum and that another date would be communicated to her. That at around 8:00am on 14th April 2014, one of the Respondent's officers called her on phone informing her to appear before the Disciplinary Committee at 11:00am. She contended that she protested the short notice but made her way to the Respondent's premises for the hearing, which she was unable to prepare for and further find a fellow employee to accompany and assist her. She further averred that sometime in September, she was served with a Dismissal Letter dated 1st September 2014.
3. It was the Claimant's averment that her dismissal was unfair, unlawful and carried out in the background of malicious undertones and without due regard and consideration for the law, procedure and norm and that it was hence illegal. She particularly noted that firstly, the allegations levelled against her were not substantially proved and the investigation report relied upon was not presented to her. Secondly, she was neither represented at the disciplinary hearing nor was she allowed to question the investigator and/or any witnesses. Thirdly, the clear and rebutting evidence that she presented was completely disregarded and no witness(es) were called to prove the allegations raised against her. Lastly, the said Committee failed to conduct the disciplinary process within the prescribed timelines as provided by the Respondent's Code of Regulations (hereinafter "the Respondent's Code"). The Claimant's stance was that it was as a result of the aforementioned Respondent's acts that she was suspended from duty without salary for 27 months from 5th June 2012 until 1st September 2014.



Furthermore, the appeal she filed on 29th September 2014 against her dismissal had never been considered and neither had a hearing for the same taken place nor had she received any communication on the same. The Claimant further averred that she was exposed to the harshest punishment possible yet the Respondent had other options including:

- a. Surcharge of an amount in respect of damages/loss
 - b. Deferment in increment of salary
 - c. Withholding of increment of salary
 - d. Reduction in rank
 - e. Retirement on the ground of public interest or in the interest of the Corporation.
4. She thus pleaded with the Court to reverse the Respondent's decision and declare her dismissal as unfair, unlawful and harsh to the extreme.

Respondent's Case

5. In reply, the Respondent filed a Memorandum of Response dated 22nd December 2015 averring that it issued the Claimant with several disciplinary warnings during her employment. It asserted that the allegations raised against the Claimant were borne out by an audit of the payroll system. It further averred that the delay in giving the Respondent a hearing after her suspension was occasioned by the Respondent awaiting a report on the investigations carried out by the police. According to the Respondent, the Claimant was given adequate time to prepare for the disciplinary hearing and was also reminded that she could choose to have a fellow employee present at the hearing. That the Claimant confirmed she was ready to proceed and did not exercise her right to have a witness present.
6. Further, the Respondent denied that the Claimant's dismissal was unfair, unlawful, or malicious. It contended that the claim herein was an afterthought and scandalous because the Claimant was given the reasons for her dismissal, was given an opportunity to show cause why she should not be dismissed, refused to call a fellow employee as a witness, and did not request to question the investigator or witnesses. It further denied that the Claimant suffered any punitive measures, asserting that she was suspended without salary as provided by the Respondent's Code and that the period of suspension was justified due to the then ongoing investigations. It asserted that the charges against the Claimant were true, founded and proven and that she did not have a clean record. It was the Respondent's averment that no demand or notice of intention to sue was given and that the claim should be dismissed with costs.
7. The Respondent also filed a Witness Statement dated 23rd April 2018 by Ms. Violet Araka who asserted that the Respondent employed the Claimant in or about June 1995 vide an appointment letter dated 12th June 1995. That the Claimant's appointment to Senior Human Resource Assistant was done pursuant to a meeting held on 23rd February 2010 by the Respondent's Board of Directors and she was informed of the appointment by a letter dated 16th March 2010. She further asserted that the Claimant's suspension in 2012 was a culmination of several disciplinary warning letters sent to her during her employment, on account of negligence in her duties or delay in entering data into the payroll system, absence from duty without permission and laxity or lateness to work. Ms. Araka stated that an Audit Trail Report in the Respondent's payroll system for the period between January 2010 and April 2012 showed that a total of Kshs. 1,836,269.60 was fraudulently paid to members of staff, who had either been retired, resigned or on secondment to other institutions. That subsequently, the Respondent's Principal Internal Auditor wrote a Memo to the Managing Director recommending that the HR Department provides the names of the officers responsible for the manipulation of the payroll,



for disciplinary action. That it was then discovered that the Claimant was responsible for some of the said manipulations having been in charge of the inputting of dates. That prior to that discovery, the Claimant had been granted a 12 days' annual leave with effect from 22nd August 2011 to 6th September 2011 and was paid her leave allowance at the rate of Kshs. 10,000/- alongside her September salary.

8. Ms. Araka further stated that the Claimant was informed, in her Suspension Letter, to provide her explanation within seven (7) days of 5th June 2012, on why disciplinary action should not be taken against her. That on 30th August 2012, a Staff Management Committee meeting was held to look into the allegations raised against the Claimant, which meeting resolved that she remains suspended until finalization of the case by the police. That the said Committee later on held a meeting on 28th March 2014 and recommended that it goes through the Audit Trail Report to establish the appropriate disciplinary action. The Committee thereafter deliberated and resolved that the case be forwarded to the Legal Department for further advice and recommended that the Claimant retires in the Corporation's interest as per the Respondent's Code. Ms. Araka confirmed that a meeting set on 30th March 2014 did not go on as planned because of quorum but that the Claimant later appeared before the said Committee on 14th May 2014 for the disciplinary hearing. It was Ms. Araka's assertion that the Respondent Staff Management Committee also held a meeting on 20th August 2014 and resolved that pursuant to the Board's meeting held on 12th June 2014, the Claimant be dismissed as opposed to the earlier recommendation for her retirement in the Corporation's interest. That the Claimant was informed of the same on 1st September 2014 including that the dismissal was with effect from 12th June 2014. That the Respondent's HR Manager also wrote an internal Memo to the Corporation's Secretary on 8th October 2015 entailing a summary of the chronology of events leading to the Claimant's dismissal from service. Ms. Araka further asserted that due to the breach of trust occasioned by the Claimant's actions, an order for reinstatement would be wrong and prejudicial to the Respondent.

Evidence

9. The Claimant relied on her Witness Statement as her evidence in chief and produced her Bundle of documents as exhibits in support of her case. She testified that her response to her suspension letter was that the payroll system was faulty and there was always the issue of calling external programmers to access the same and who would resolve an issue but another issue arises. The Claimant asserted that she informed the employer who never took action. She further testified that when she appeared before the disciplinary hearing, she was only given a print-out of the Audit Trail Report but its author was not present and that no police investigation report was availed to her. She notified the Court that no criminal charges were levied against her and asserted that the disciplinary letter having come four (4) months after her dismissal from service, it was unfair and unlawful.
10. The Claimant stated under cross-examination that the Respondent's payroll system came in when the percentages had already been set. That pension deductions were made for permanent employees who were active in the system and that several people had access to the payroll system i.e. salaries office, IT people, and the HR Manager. She denied having zero rated any pension of any employee and asserted that the team in the Registry Unit headed by a HR officer had access to the HR system.
11. The Respondent's witness, Ms. Violet Araka (RW1) adopted her Witness Statement and the Respondent's Bundle and Supplementary Bundle as her evidence. She stated under cross-examination that the Claimant was dismissed after the Respondent found that she had sent money to fictitious accounts while conducting her role of inputting data into the system. That it was the Claimant who had the rights to enter the data which then went for authorisation and approval before going to bank for payment. RW1 further stated that the Police Investigation Report at page 110 of the documents



attached in her witness statement was received by the Respondent towards end of January 2014. That whereas the said Police Report indicated that Willis was the guilty one, both the Claimant and Willis were guilty and that Willis was charged disciplinary in absentia. It was her testimony that the Claimant was given adequate notice for her appearance before the Committee and that she did not indicate to the Committee that she was not ready to proceed with the hearing or that the notice for the same was short. Further, that the Claimant did not ask for the Police Investigations Report when she appeared before the Committee for her hearing. RW1 further testified that the Claimant had neither earned her annual leave for 2012 nor sought the payment and confirmed that the Claimant had not been paid her dues as she was yet to clear. RW1 stated in re-examination that the Claimant did not question the auditor who was present at her hearing. She asserted that one had to apply for leave for it to be paid and since the Claimant did not apply for leave in 2012, she was not paid. She stated that the Claimant's appeal was not heard as the Committee was in the process of being reconstituted.

Claimant's Submissions

12. According to the Claimant, the issues for determination by this Court are whether the Claimant was subjected to a fair disciplinary process prior to dismissal; whether the Claimant is entitled to the prayers sought; and who should bear the costs of this suit? The Claimant submitted that Article 41(1) of *the Constitution* of Kenya provides that every worker has a right to fair labour practices while Article 47(1) provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. That section 41 of the *Employment Act* mandates an employer to take an employee through a fair disciplinary process prior to dismissal or termination of employment. In addition, that the Respondent's Code under clause K.8. (iv)(c) stipulated that all disciplinary cases shall be dealt with expeditiously by the staff committee within a period of not more than six (6) months.
13. It was the Claimant's submission that the disciplinary process against her took an unreasonable long time before conclusion. That she was at first swiftly suspended without being invited to show cause why a disciplinary action should not be taken against her, the Respondent then unjustifiably delayed to call her for hearing for about two (2) years or formally extend the suspension beyond the provided six (6) months and it further delayed the verdict for over five (5) months after the disciplinary hearing. That that the said prolonged process does not accord with fair procedure as contemplated under section 45 of the *Employment Act*, clause K.8. (iv)(c) of the Respondent's Code and Articles 41 and 47 of *the Constitution* of Kenya. She submitted that the Court has pronounced itself on the issue of prolonged suspension in the following authorities – *Gregory Owuoth v Mumias Sugar Company [2016]* eKLR, where Onyango J. stated that the respondent could not put an employee on indefinite suspension against the provisions of its very own regulations and that if the respondent was not ready to conclude the process within prescribed period, it should have carried out and finalised its investigations before sending the claimant on suspension. The Court further noted that any disciplinary action must take the shortest time possible or else it turns into a punishment. In *Teresia N. Peter v Kitui Teachers Savings & Credit Co-operative society [2014]* eKLR, the Court held that an employee on suspension has a legitimate expectation that they will be given an opportunity to respond to any adverse findings arising out of investigations conducted by the employer and that suspension should not therefore be unduly prolonged. It was submitted that moreover, in furtherance of the unfair disciplinary process, the Respondent failed to give the Claimant adequate time to prepare for her defence and call a witness and she was notified of a disciplinary meeting just three (3) hours prior to the said hearing. The Claimant cited the case of *Nelson Nyabuto Nyambaso v Irianyi Tea Sacco [2014]* eKLR where the claimant had received a letter at 8am to attend a meeting at 9.30am, and the Court observed that the length of time given for him to appear and defend himself was short and inadequate and that the claimant was neither accorded a proper hearing under the law nor due process before his dismissal. It was the Claimant's submission that since there were no justifiable reasons for the two-year delay in



concluding the disciplinary process, the administrative action against her was therefore unlawful and unfair. She further submitted that she was not accorded a fair hearing, her appeal was not considered and no communication tendered to her in that regards. That the Respondent also failed to substantiate the accusations against her and that in the case of *Walter Ogal Anuro v Teachers Service Commission [2013]* eKLR, the Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.

14. The Claimant submitted that she was entitled to the prayers sought save for prayers (ii) and (iii) due to lapse of time. On compensation, she prayed that the same be awarded at 12 months' salary taking into consideration her long duration of service with the Respondent and the Respondent's callous and irresponsible conduct in handling her case. She cited the case of *Peter Mbutia Gitau v Kenya Revenue Authority [2019]* eKLR. The Claimant submitted that similarly for a period of 33, 12 and 10 years of service, the ELRC awarded full compensation at 12 months respectively in the cases of *Alfred Muthomi Mutiria & 2 others v National Bank of Kenya Limited [2018]* eKLR, *Anthony Yamo Ihito v Basco Products (Kenya) Limited [2022]* eKLR and *John Malonza Nzeva v Directors of Imani Hotel [2021]* eKLR. In conclusion, the Claimant submitted that the Respondent must be condemned to pay interest on the awards and pay the costs of this case.

Respondent's Submissions

15. As to whether the Claimant's termination was fair, the Respondent submitted that the law requires that a valid reason for the said termination exists and the procedure undertaken in terminating the employee was fair and cited the case of *Jane Wanja Muthaura v Ethics and Anti-Corruption Commission [2021]* eKLR. The Respondent submitted that section 41 of the *Employment Act* requires the employer to explain to the employee the reason for which the employer was considering termination in the presence of the employee's representative, and consider the employee's explanations before terminating an employee on grounds of misconduct, poor performance or physical incapacity. That section 43 of the Act provides that the employer ought to prove the reason or reasons for termination of the employee's contract while section 45 sets the threshold of what unfair termination is. It submitted that further, the Claimant confirmed in her response dated 11th June 2012 that erroneous payments were made to persons who had either retired, resigned or were on secondment. That the allegations against the Claimant were thus neither malicious nor baseless having been borne out of the audit of the payroll system and as admitted by the Claimant herself, they did in fact occur. The Respondent relied on the case of *Margaret Adagala Ambe v Moi Teaching & Referral Hospital [2016]* eKLR (Cause No. 375 of 2013) wherein Radido J. found that with the admissions made by the claimant in her response, the Court was satisfied that the respondent had valid reasons to dismiss her in terms of section 45(2) of the *Employment Act*, 2007. Additionally, the Respondent submitted that as could be seen in the Respondent's List of Documents dated 13th November 2019, some of the employees listed in the Audit Report had indeed resigned, retired or were on secondment and each of these actions was accompanied by a form addressed to the salaries section, indicating that such employees' salary ought to be stopped as at the date specified, and their names deleted from the payroll. It argued that given that it was the Claimant's primary obligation and duty to effect entries and input data onto the payroll, the said questionable activities on the payroll had to be put through external police investigations in order to guide the Respondent on the best course of action in the circumstances. It was the Respondent's submission that therefore in accordance with sections 43 and 45 of the *Employment Act*, it proved its reason for termination that was valid, and which prompted it to suspend and thereafter dismiss the Claimant.
16. The Respondent further submitted that whereas the Claimant had attempted to argue that she worked in a team and therefore received data from the salaries team for her input onto the payroll, the same was



false on account of RW1's testimony that the core obligation of the salaries department was to calculate the figures of the persons appearing on the list and was not to undertake the Claimant's job, which was by implication to ensure that only those whose names ought to appear on the said list/report were included. That the fact the salaries team could flag an error on the Claimant's report and notify her to correct it could not possibly shift the mandatory obligation placed upon the Claimant to perform her duties honestly and/or without any negligence. That in any event, all employees were bound under clause K.5 of the Respondent's Code to undertake prudently all matters touching on official business.

17. As regards the Claimant's suspension, the Respondent submitted that the same was undertaken pursuant to clause K.7.13 (ii)(c) of the Respondent's Code that allows for suspension without a salary for serious offences such as gross negligence or dishonesty occasioning loss of official funds or property. That owing to the fact that the said manipulations of the payroll led to the Respondent losing a huge amount of money, and based on the recommendations in the Audit Report dated 24th May 2012, the Respondent company had to suspend the Claimant to pave way for external police investigations. Moreover, RW1 testified that the limit of 6 to 12 months under clause K.4 (iv) of the Code speaks to circumstances where a disciplinary case requires internal investigations but not where an external investigation which the Corporation has no control over is concerned.
18. It further submitted that contrary to the Claimant's assertions of having not been given ample time to prepare for the disciplinary hearing, she had been informed to be on standby for communication on another hearing date after the first failed to happen due to quorum. Having thus been called to appear before the disciplinary committee two weeks later, it was reasonably expected that the Claimant continued to prepare for the imminent hearing within the said two weeks. That she could not thus claim that she was not given ample time to prepare whereas she was ready to proceed only two weeks prior to that and did not state that she was not ready to proceed. In addition, since the Claimant did not choose to exercise her right to have a witness present, she could not be heard to claim that she was prevented or denied such right. The Respondent submitted that it had duly demonstrated that the Claimant was informed of the disciplinary hearing and was informed of her right to have a representative present but chose not to exercise such right; as evinced in the Minutes it produced in evidence. It cited the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd [2013] eKLR in which Radido J. outlined the essentials of procedural fairness that the employer should inform the employee the charges the employer is contemplating using to dismiss the employee; the employee should be accorded a proper opportunity to prepare, to be heard and to present a defence in person, writing or through a representative or shop floor union representative, if possible; and if it is a case of summary dismissal, the employer is obligated to hear and consider any representations by the employee before making the decision to dismiss or give other sanction. The Respondent submitted that pursuant to clause K.4 (ii) of the Code, the Board recommended that the Claimant be dismissed in accordance with clause K.7.15 (ii)(g) of the Code, which was in line with the Code as the provision stated that, "In the case of employees on salary Scale BA4 and below, the Managing Director may impose such punishment as the Appeals Committee or Staff Committee or the Human Resource Manager, guided by these rules, may advise." According to the Respondent, since the use of the word 'may' does not impute a mandatory nature but rather that an action could or could not be done, the Managing Director acted accordingly well within his powers in finding that the Claimant be dismissed. Lastly, the Respondent submitted that costs should follow the event and that given the foregoing submissions, it is indisputable that the Claimant ought to bear the costs of this suit and thus Court should humbly grant costs to the Respondent.
19. It seems there was basis for termination but the Respondent took 2 years to hear the Claimant. The Claimant was culpable in the manipulation of the payroll. The Respondent ought to have dealt with the disciplinary matters within a reasonable time but not over 2 years. From June 2012 to September



2014, a period of 27 months, the Claimant was not heard. This is untenable as employees facing disciplinary action are entitled to a just and expeditious process. The Court finds there having been inordinate delay in resolving the matter, the employee is entitled to the salary she would have earned in the 27 months which is Kshs. 1,144,800/-. She was terminated unfairly (process) for which some recompense is achieved with the Respondent being compelled to pay 2 month's salary as compensation – Kshs. 84,800/-. As she had to seek relief from the court, she will be entitled to costs of the suit and a certificate of service.

20. In the final analysis, I enter judgment for the Claimant against the Respondent for:-

- i. Unpaid salary – Kshs. 1,144,800/-
- ii. 2 month's salary as compensation – Kshs. 84,800/-
- iii. Costs of the suit
- iv. Certificate of service.
- v. Interest at court rates on the sums in (i) and (ii) from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

