



Waruinge v Chuna Co-operative & Credit Society (Employment and Labour Relations Cause 184 of 2019) [2023] KEELRC 2730 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2730 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 184 OF 2019**

**BOM MANANI, J
NOVEMBER 2, 2023**

BETWEEN

MARTHA W WARUINGE CLAIMANT

AND

CHUNA CO-OPERATIVE & CREDIT SOCIETY RESPONDENT

JUDGMENT

1. This is a claim for unlawful termination of a contract of employment. The Claimant, who until 4th January 2019, was an employee of the Respondent has accused the Respondent of unlawfully terminating the employment relation between them. As a result, she claims for an order declaring the Respondent's decision unfair and for a further order for compensation.
2. The Respondent has resisted the claim. According to the Respondent, there was a valid reason to terminate the Claimant's contract of service. Further, the Respondent contends that the decision to terminate the contract between the parties was arrived at in accordance with due process. Consequently, it is the Respondent's prayer that the Claimant's case be dismissed with costs.

Facts of the Case

3. The facts of the case are not highly disputed. The parties agree that the Claimant was employed by the Respondent in 1997 in the position of office secretary. The parties also agree that they parted ways in January 2019 after the Claimant's contract was summarily terminated for alleged gross misconduct.
4. According to the Claimant, sometime in October 2018, she learned that one Ruth Okwach, the Respondent's Internal Auditor, had been using her (the Claimant's) desktop computer to execute some of her (Ruth Okwach) tasks without the Claimant's permission. The Claimant says that when she confronted the said Ruth Okwach over the matter on 11th October 2018, the latter created a scene at the office in a bid to insinuate that the Claimant had assaulted her.



5. The Claimant denies assaulting the said Ruth Okwach. It is the Claimant's case that she took the step of confronting Ruth Okwach over the unauthorized use of her computer because the computer contained sensitive information for the Respondent making it unsafe for other members of staff to access it without permission.
6. The Claimant avers that after Ruth Okwach created a scene at the office, other members of staff came in to see what was happening. It is the Claimant's case that some of these members of staff together with Ruth Okwach made a false report to the Respondent's management that the Claimant had assaulted Ruth Okwach and another employee by the name Peter Mbogo. As a result, the Claimant was verbally asked by the Respondent's management to leave the workplace before she was issued with a letter of suspension.
7. The Claimant avers that after her suspension from work, the Respondent summoned her for a disciplinary session on 15th November 2019 at which a decision was taken to terminate her contract. The Claimant has contested the validity of the disciplinary process and the decision to terminate her services.
8. According to the Claimant, the process was unfair. She accuses the Disciplinary Committee (DC) of failing to furnish her with statements by her accusers in time to enable her prepare her defense. She also accuses the DC of not calling the main actors in the matter to wit Ruth Okwach and Peter Mbogo, to testify before it. It is the Claimant's case that the failure to call the two witnesses deprived her of the right to cross examine them on the accusations that they had triggered against her.
9. The Claimant further contends that instead of the Respondent presenting the aforesaid witnesses before the DC, it opted to present one Martin Ogolla, its Chief Executive Officer (CEO) who had not witnessed the incident in question. That the said Martin Ogolla merely produced the written statements that had been prepared by the two witnesses (Ruth Okwach and Peter Mbogo). That these statements had not been shared with her (the Claimant) beforehand. The Claimant also contends that she was not given the opportunity to cross examine the said Martin Ogolla.
10. The Claimant accuses the Respondent's CEO of having acted as the complainant, investigator and prosecutor in the cause against her. She further accuses the CEO of tabling a damning dossier on her character before the DC for the sole purpose of disparaging her character in the eyes of the DC. It is her case that the Respondent's CEO had already determined her fate and was merely using the disciplinary process to window dress a predetermined decision.
11. The Claimant contends that she was not furnished with a show cause letter to enable her get clear particulars of the case against her in order to prepare her defense. At the DC, the Claimant asserts that she was not given a chance to state her case. According to her, the DC proceedings lasted for less than ten (10) minutes. The Claimant also avers that she asked the Respondent to furnish her with the DC minutes but this request was allegedly declined.
12. In the Claimant's view, all these missteps negatively impacted on the fairness of the process that resulted in the decision to terminate her contract of service. The Claimant argues that the entire process disregarded the principles of natural justice. As a result, she contends that the process was a sham.
13. On its part, the Respondent contends that the Claimant's conduct at the workplace violated its Human Resource Policy (HR Policy) and the *Employment Act*. The Respondent contends that the Claimant's act of assaulting other members of staff constituted gross misconduct for which it (the Respondent) was entitled to terminate her contract.



14. The Respondent avers that it granted the Claimant a fair hearing before it arrived at the decision to terminate her contract of service. The Respondent contends that in its letter inviting the Claimant for the disciplinary session, it notified her of the right to call witnesses of her choice and to seek legal representation.
15. The Respondent further contends that the Claimant failed to justify her actions thus leading to the decision to terminate her contract. The Respondent further contends that the Claimant was afforded an opportunity to appeal against the decision of the DC but her appeal was unsuccessful.
16. Consequently, it is the Respondent's case that it not only had valid reason to sever the employment relation between the parties but also did so in accordance with due process. As a result, the Respondent asks that the instant claim be dismissed with costs.

Issues for Determination

17. On 15th October 2019, the parties filed a list of agreed issues. The issues identified for determination are:-
 - a. Whether due process was accorded to the Claimant before dismissal.
 - b. Whether the Claimant is entitled to the prayers sought in the claim.

Analysis

18. There is no doubt that there was an altercation at the Respondent's premises between one Ruth Okwach and the Claimant which resulted in the latter losing her employment. The Claimant admits that she confronted the said Ruth Okwach after the latter accessed the Claimant's desktop computer without her permission. The Claimant states that the confrontation attracted other members of staff.
19. The Respondent did not take this incident lightly. According to the Respondent, it is not permissible for members of staff to engage in physical confrontations within the office. It is the Respondent's position that employees ought to find more cordial ways to address any disputes between them.
20. According to the Respondent, the Claimant's conduct was expressly prohibited under section 10(13) of its HR Policy. Similarly, such conduct was outlawed by the prevailing Collective Bargaining Agreement.
21. I have looked at the Respondent's HR Policy. The instrument expressly proscribes disorderly behavior by employees whilst at the workplace. It also expressly proscribes fighting between employees whilst at the workplace.
22. The Claimant raises a valid concern regarding the action by Ruth Okwach to access her (the Claimant's) computer without her permission. Indeed, in the statement by the said Ruth Okwach, she admits that she accessed the Claimant's desktop computer in her absence and without permission. In my view, the Claimant had every reason to feel aggrieved by this conduct.
23. This notwithstanding, it is doubtful that the Claimant adopted the right procedure to address the matter. In the face of clear prohibitions against disorderly conduct by employees, it was imprudent for the Claimant to have confronted the said Ruth Okwach in the way that she did. It would have been more appropriate if she (the Claimant) had taken up the issue with the Respondent's management.
24. To the extent that the Claimant opted for a physical confrontation that ended up attracting the attention of other employees, she conducted herself in a disorderly manner whilst at the workplace. Therefore, the Respondent was entitled to take disciplinary action against her.



25. However, even where the employer has valid grounds to discipline an employee, he must do so strictly in accordance with due process. Indeed, this requirement is anchored on the principles of natural justice which the Claimant accuses the Respondent of having violated.
26. The law that regulates the process of disciplinary action against an employee is anchored on *the Constitution*, the *Employment Act* and the Fair Administrative Actions Act. Together, these provisions of law require the employer to uphold the principles of natural justice in decision making at the workplace.
27. Article 41 of *the Constitution* guarantees employees the right to fair labour practices. This provision is actualized through sections 41, 43, 45 and 47 of the *Employment Act* which obligate the employer to justify the decision to terminate an employee's contract of service by demonstrating that there were substantive grounds to justify the decision and that the decision was arrived at in accordance with due process.
28. Article 47 of *the Constitution* entitles an employee who is facing disciplinary action to the right to fair administrative action. This right is actualized through the provisions of the *Fair Administrative Action Act*.
29. Under section 4 of the *Fair Administrative Action Act*, a decision maker is obligated to ensure that any administrative action that is taken against another person is expeditious, efficient, lawful, reasonable and procedurally fair. Specifically, subsection 3 thereof provides, in part, as follows:-
- “Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-
- a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.”
30. Together, these various requirements anchor the elements of natural justice. Therefore, the Claimant's plea regarding the Respondent's failure to uphold natural justice must be evaluated against this background.
31. In cross examination, the Respondent's witness confirmed that the Claimant was not served with a notice to show cause. He further stated that Ruth Okwach and Peter Mbogo who were allegedly assaulted by the Claimant did not appear before the DC to testify in person. The witness stated that the evidence of these individuals was produced in the form of written statements that had been attached to the investigation report.
32. The witness further confirmed that the deliberations and conclusions of the DC were not produced in evidence in order for the court to evaluate the process of the hearing before the said DC. Whilst



- acknowledging that the Claimant had asked for the minutes of the DC, the witness averred that they (the minutes) were not supplied to her. In one of the letters that was authored by the Respondent's CEO and which was produced in evidence, it was contended that the minutes were confidential.
33. I have examined this evidence against the requirements of the law on fair termination of a contract of service. As outlined earlier, sections 43, 45 and 47 of the *Employment Act* require the employer to demonstrate that he upheld due process whilst processing the release of the employee from employment. This requires the employer to demonstrate that he accorded the employee a fair hearing before the decision to terminate his (the employee's) contract is made.
 34. Further, the *Fair Administrative Action Act* requires the employer to supply the employee with material that the employer will rely on at the disciplinary hearing beforehand. In addition, this statute obligates the employer to accord the employee the opportunity to cross examine his accusers.
 35. The Claimant states that she was not enabled to adequately prepare for her defense. She has accused the Respondent of withholding from her the witness statements by Peter Mbogo and Ruth Okwach, the victims of the alleged assault. It is the Claimant's case that she only came across these statements during the DC hearing.
 36. Further, the Claimant states that the two individuals (Peter Mbogo and Ruth Okwach) were not presented to testify before the DC. Yet, they were the primary witnesses in the events that informed the decision to dismiss her from employment. According to the Claimant, the decision not to call the two as witnesses denied her the opportunity to cross examine them thus prejudicing her case.
 37. In addition, the Claimant asserts that she was not allowed the opportunity to cross examine the Respondent's CEO. Yet, it is this officer who prepared and produced before the DC the investigation report on the incident in question and the written statements by Peter Mbogo and Ruth Okwach. The Claimant contends that it is this untested evidence that was relied on by the DC to convict her.
 38. The Claimant further accuses the Respondent's CEO of having pre-determined her fate in the dispute. She accuses him (the CEO) of having made up his mind to get rid of her long before the DC sat to determine her fate. Further, she avers that the said CEO acted as accuser, witness and prosecutor in the cause against her. She accuses him of having prepared a skewed investigation report on the matter with the sole intention of prejudicing her position before the DC. The Claimant asserts that the CEO's actions were motivated by bad faith.
 39. The record shows that the Respondent's CEO was all-pervading in the disciplinary process that resulted in the termination of the Claimant's employment. It is evident that this officer assumed the roles of complainant, investigator, witness and adjudicator all at the same time.
 40. Besides being omnipresent at the DC, the CEO also participated in the appeal process against the DC's decision. It is on record that it is him (the CEO) who communicated the Appeal's Committee's decision rejecting the Claimant's appeal.
 41. Although it is possible to argue that the officer was merely discharging his mandate as the Respondent's CEO, it is difficult to explain why he found it necessary to singularly discharge all these functions. Is it that the Respondent had no other functional offices that could have executed some of these tasks if only to remove the possibility of bias in the process? Whatever the justification and motivation for his actions, the overbearing presence of this officer in the process that resulted in the Claimant's dismissal from employment casts aspersions on the fairness of the entire disciplinary process.
 42. According to the correspondence that was produced in evidence, investigations against the Claimant were opened by this same officer. The record shows that it is him who wrote to the Claimant on 11th



- October 2018 asking her to record a statement explaining what had transpired between her and Ruth Okwach. The record also shows that it is this same CEO who suspended the Claimant from duty as from 12th October 2018 pending investigations into her case.
43. The record further shows that the same officer wrote to the Claimant on 9th November 2018 inviting her for the disciplinary hearing. He also scheduled the disciplinary session for 15th November 2018.
 44. The record further shows that at the time that the said officer wrote to the Claimant on 9th November 2018 asking her to appear before the DC on 15th November 2018, investigations on the matter were yet to be concluded. This is evident from the fact that the Investigation Report on the incident was signed off and issued on 12th November 2018, days after the Claimant had been summoned for the disciplinary hearing. Curiously, it is the same CEO who signed both the letter to the Claimant dated 9th November 2018 inviting her for disciplinary hearing and the subsequent Investigations Report dated 12th November 2018.
 45. It is difficult to decipher why the said officer would set up a DC to hear the Claimant's case and appoint a date for the disciplinary session even before investigations into the matter had been concluded. This conduct only lends credence to the Claimant's contention that the officer's actions were suspect and that he appeared to have predetermined her fate.
 46. The Claimant has further stated that at the DC, it is this same CEO who assumed the role of the Respondent's witness instead of Ruth Okwach and Peter Mbogo, the alleged victims of her (the Claimant's) assault. At the same time, she averred that the said officer tabled before the DC a report and statements which had not been given to her beforehand.
 47. The Claimant also accused the officer of having incorporated in the Investigation Report irrelevant character evidence against her with the aim of prejudicing her case before the DC. Indeed, a perusal of the Investigation Report shows that apart from material on the alleged assault incident, the CEO went out of his way to dig up the Claimant's past for unclear reasons. As such, it is not possible to rule out the Claimant's fear that this evidence was tendered with ulterior motive. As the record shows, this assertion was not controverted by the defense.
 48. Despite the CEO's overarching involvement in the process that led to the Claimant's dismissal from employment, she (the Claimant) contends that she was denied the opportunity to cross examine him. This contention has not been cogently controverted by the defense.
 49. The several issues that the Claimant has raised go to the root of the fairness of the proceedings before the DC and the Appeals Committee. Despite these complaints, the Respondent did not place before the court minutes of the DC and Appeal's Committee to debunk the Claimant's assertions.
 50. The minutes would have demonstrated whether the Claimant was granted a chance to cross examine the Respondent's CEO who evidently played a prominent role in the process that resulted in the termination of her contract. The minutes would also have demonstrated whether the Claimant was supplied with the evidence that was tendered by the Respondent against her beforehand.
 51. The foundation of the Respondent's case against the Claimant at the DC was the allegation that she (the Claimant) had assaulted Ruth Okwach and Peter Mbogo. These two were the Claimant's co-employees.
 52. It has not been suggested by the defense that at the time of the DC, the two employees (Ruth Okwach and Peter Mbogo) were no longer in the Respondent's service. At the same time, no explanation was given why the two did not appear before the DC to be cross examined by the Claimant on their



- assertions against her. Similarly, there was no explanation why the Respondent's CEO presented their written witness statement (Ruth Okwach and Peter Mbogo) to the DC in their absence.
53. From the evidence on record and absent cogent explanation for his over involvement in the process, the CEO's overarching role in the disciplinary proceedings raises questions regarding its (the process's) fairness. Evidently, he acted as accuser, investigator, and witness all at the same time. His overarching involvement in the process certainly left an aura of partiality in it (the process).
 54. Similarly, the failure by the DC to supply the Claimant with the various materials and witness statements that were used to convict her prejudiced her defense. As well, the unexplained failure to call the alleged victims of the assault to the DC deprived the Claimant of her right to cross examine them.
 55. As a result, the court is unable to arrive at the conclusion that the proceedings against the Claimant were conducted in accordance with the requirements of justice and equity in line with section 45 of the Employment Act. For the aforesaid reasons, I declare the Respondent's decision to terminate the Claimant's contract of service as procedurally unfair.
 56. The second issue for determination relates to whether the Claimant is entitled to the reliefs that she has sought through her pleadings. Having found that the decision to terminate the Claimant's contract of service was procedurally unfair, I find that she is entitled to compensation for unfair termination.
 57. However, under section 49 of the Employment Act, the court is obligated to take into account the extent to which the Claimant's conduct contributed to the decision to terminate her contract of service. As noted earlier, the Claimant's decision to directly confront Ruth Okwach over the misuse of her computer was inappropriate. It is this action that triggered the events that led to the loss of the Claimant's employment.
 58. Taking this factor into consideration and having regard to her length of service, I am minded to award the Claimant compensation that is equivalent to her salary for five (5) months, that is to say Ksh. $104,750.00 \times 5 = \text{Ksh. } 523,750.00$.
 59. The Claimant has prayed for notice pay for a period of four months. But for the procedural anomalies that have been highlighted above, the Respondent would have validly summarily terminated the Claimant's services for acting in a disorderly manner whilst at the workplace. Therefore, this is not a case where the court would have arrived at the conclusion that all factors remaining constant, the Respondent ought to have handed the Claimant a normal termination as opposed to summary dismissal. For this reason, I decline to make an award for notice pay.
 60. The Claimant has also prayed for salary to cover the period that she was on suspension. Clause 5 of the Terms and Conditions of Service for Non-Unionisable Staff for the Respondent that was produced in evidence by the Claimant stipulates what is payable to employees who are on interdiction or suspension. The provision indicates that employees on suspension are not entitled to pay during the period of suspension.
 61. The Respondent was entitled to suspend the Claimant to enable investigations into the allegations against her. Therefore and in view of the foregoing clause, the Claimant's prayer for salary during the period that she was on suspension is not merited. It is declined.
 62. The Claimant has further prayed for salary until her age of retirement. In the court's view, this prayer is bad in law. As has been emphasized time and again, there is no guarantee that an employee will work until retirement age. Other factors could potentially bring the contract to a close before retirement age.
 63. Besides, to require the employer to pay an employee until her retirement would be tantamount to sanctioning payments for services that have not been rendered. Such order will be unjust and



inequitable (see Kenya Wine Agencies Ltd v Murungu (Appeal E 016 & E 019 of 2021 (Consolidated)) [2022] KEELRC 13413 (KLR)). As such, I decline the Claimant's prayer to be paid salary until her retirement age.

64. I award the Claimant interest on the amount awarded herein at court rates from the date of this decision.
65. The above award is subject to the applicable statutory deductions.
66. I award the Claimant costs of the case.

Summary of the Award

- a. The Respondent's decision to terminate the Claimant's employment is declared procedurally unfair.
- b. The Claimant is awarded compensation that is equivalent to her monthly salary for a period of five months, that is to say Ksh. 104,750.00 x 5 = Ksh. 523,750.00.
- c. I award the Claimant interest on the aforesaid amount at court rates from the date of this decision.
- d. The above award is subject to the applicable statutory deductions.
- e. The prayer for notice pay is declined.
- f. The prayer for salary to cover the period that the Claimant was on suspension is declined.
- g. The prayer to cover pay for the Claimant until her retirement age is declined.
- h. I award the Claimant costs of the case.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....**for the Claimant**

.....**for the Respondent**

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

