



REPUBLIC OF KENYA



Taiti v Ericsson (K) Limited (Employment and Labour Relations Cause 216 of 2019) [2023] KEELRC 3213 (KLR) (7 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3213 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 216 OF 2019
B ONGAYA, J
DECEMBER 7, 2023**

BETWEEN

MOSES NDERITU TAITI CLAIMANT

AND

ERICSSON (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on April 3, 2019 through Okweh Achiando & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the claimant’s termination from employment was wrongful, null and void.
 - b. Maximum compensation for the wrongful termination.
 - c. An order directing the respondent to issue the claimant with a certificate of service (by consent order at hearing it had been already delivered).
 - d. General damages
 - e. Any other and further relief that this honourable court may deem fit and grant
 - f. Costs of this suit with interest
2. The response was filed on June 27, 2019 through Coulson Harney LLP Advocates. The respondent prayed that the suit be dismissed with costs.
3. The claimant’s case was that he was employed on or about September 9, 2008 and at the time of his termination he was earning a gross salary of Kes 462,395.85 per month.
4. The claimant held various positions, ranging from sourcing area manager, sourcing manager customer unit, sourcing manager hub east and sourcing business partner.



5. That between the years 2008 and 2011 the respondent carried out individual performance management on its employees and the claimant's performance was always found to be satisfactory.
6. Due to outstanding performance, in 2015 he was recognized as the most valued employee by the respondent and was issued with a recognition certificate dated December 10, 2015.
7. On April 6, 2017, the managing director of the respondent, Mr. Aakash Seghal informed the claimant that he would be suspended indefinitely pending investigations. The respondent withdrew his employee access security card on the same day and issued him a suspension letter dated March 24, 2017.
8. The respondent carried out investigations up to mid-November, 2017. The investigation panel consisted of South African investigators, Bowman's team and Tom Mboya, the respondent's security manager.
9. During the period of his suspension, the respondent issued him with a letter dated May 19, 2017 notifying him of a possible retrenchment.
10. That during the investigations, a total of 9 employees were suspended. However, 5 of the suspended employees were later recalled and continue to work for the respondent in various positions.
11. The claimant states that he was not given a copy of the investigative report to enable him prepare adequately for his defence.
12. On or about November 4, 2017, the respondent issued him with the first notification of a disciplinary enquiry setting the hearing for November 14, 2017. However, the claimant's immediate supervisor was not in the country and hence he did not sign it as is required. The respondent then issued him with the second notification on November 13, 2017 for hearing on November 22, 2017 but his immediate supervisor was still absent and did not sign it contrary to the respondent's regulations.
13. In both notifications, the charges against him were as follows:
 - a. Facilitation of the irregular appointment of Karwamba and Mwangi Associates a petty cash handling services provider for EKL.
 - b. Failure to conclusively follow up and recover Kes 7,096,597.75 that was irregularly paid to Coronett Solutions Limited on December 7, 2015.
14. On November 14, 2017, the respondent postponed the disciplinary enquiry to November 22, 2017. On the day of the hearing, the panel consisted of Basil Dickason the respondent's group legal manager, Albert Oosthuizen, the head of security and Betty Okello who was the respondent's human resource manager. The claimant states that the panellist were all foreigners without working permits and purported to carry out a function which was a nullity.
15. On 31.11.2017, the respondent notified the claimant of his dismissal from employment and was provided with a copy of minutes of the disciplinary hearing.
16. On December 5, 2017, the claimant appealed the decision of the disciplinary enquiry. The hearing was initially fixed for January 23, 2018 but was postponed to February 8, 2018.
17. The claimant states that he was shocked to find that the composition of the appeal panel and disciplinary enquiry was similar, the only difference being the chairperson had been replaced with another who was Swedish decent.



18. The claimant states that the charges levelled against him were a sham as the payment made to coronet solutions limited complied with all the requirements as all the approvals had been obtained. That coronet solutions limited had all the proper documentation that it presented before payment was done. That he was not aware that the payment was not proper, and that once it came to his attention, he asked the account payables to follow up on the credit notes as they were best placed to deal with the issue. As a sourcing business partner, he states he had no mandate to block a vendor and neither was he responsible for credit notes or payment.
19. The claimant states that the respondent never issued him with a termination letter and he only received the letter dated April 20, 2018 informing him of the computation of his final dues.
20. The claimant contends that there was no fair hearing as the panellist were the same and could not have reached a different verdict and hence the hearing of the appeal was merely cosmetic.
21. The claimant maintains that the respondent failed to consider his evidence and merely held the hearing to use it to unlawfully terminate him from employment.
22. On the part of the respondents, it is stated that the claimant was summarily dismissed from his employment on December 1, 2017 and the process leading to his termination was in line with Kenyan law as well as the respondent's internal disciplinary and termination process.
23. In or about early 2017, the respondent became aware that there had been what appeared to be, various payments made to various third parties, which appeared to be fraudulent or irregular.
24. A decision was made to have the claimant placed on suspension to allow for investigations to be undertaken, to establish the irregular transactions.
25. The investigations were undertaken by the respondent and as a result it was deemed necessary to have the claimant taken through a disciplinary process to enable him shed light on the irregular transactions.
26. By a letter dated November 2, 2017, the claimant was given notice to attend a disciplinary hearing on November 14, 2017 for the purposes of obtaining his views on the irregular transactions.
27. The meeting was then postponed to November 22, 2017, on which date the claimant attended the meeting in the company of his colleague Martin Anami.
28. Following the disciplinary hearing of November 22, 2017 and after hearing the claimant's representations, the respondent communicated to the claimant the findings and reasons by way of a letter titled "Enquiry Decision and Reason".
29. On November 30, 2017, a meeting was convened by the respondent, with the purpose of the meeting being to hear final representations from both the respondent and the claimant.
30. After hearing both parties, the respondent decided to terminate the claimant's employment. The decision to terminate the claimant's employment was communicated to him by a letter titled "Notification of Penalty" signed on November 30, 2017, which informed the claimant of the decision made to terminate his employment with effect from December 1, 2017.
31. Upon being notified of the reason to summarily dismiss him, the claimant appealed the decision. The claimant had a right to appeal the decision as an appeal process is provided for in the respondent's disciplinary code and procedure.
32. The appeal was heard on February 8, 2018, the claimant's appeal was not successful and as such the respondent did not change its decision to terminate his services with effect from December 1, 2017.



33. The respondent maintained that the termination of the claimant was fair and lawful.
34. The parties filed their respective submissions. The court has considered the parties' respective cases, evidence, submissions and makes finding as follows.
35. To answer the 1st issue, parties are in agreement that they were in a contract of service.
36. To answer the 2nd issue, the claimant's contract of employment was terminated by the notification of penalty dated November 30, 2017. The reasons for the dismissal were that the claimant facilitated irregular appointment of Karwamba & Mwangi Associates as petty cash handling service provider for the respondent; and, claimant's failure to conclusively follow up and recover Kes 7,096,597.00 million that was irregularly paid to Coronett Solutions Ltd (Coronett) on December 7, 2015, until the irregular payment was recovered. The dismissal was effective December 1, 2017.
37. The 3rd issue is whether the termination was unfair. It is submitted for the claimant that there was no termination letter with reasons but the court returns that the notification of penalty dated November 30, 2017 was sufficient dismissal decision as urged for the respondent and already found by the court. The notification stated that the penalty handed down was verbal warning; written warning, final warning, and dismissal. While against each charge penalty of dismissal was indicated, as submitted for the claimant the notification of penalty indeed enumerated all those possible penalties. As submitted for the claimant, the respondent's Disciplinary Code and Procedure at section 1.2.1 provided for the four types of punishments and the four types could not be imposed all at the same time as was done. As submitted, imposing the 4 penalties all at the same time was an unfair labour practice contrary to article 41 of the *Constitution*. While it was stated that a copy of the reasons for the imposed penalties was attached, the same was not attached at all. The claimant then appealed and his concern was that the evidence he gave at the disciplinary hearing had been disregarded. The Court finds that in such circumstances, first, the respondent cannot be said to have adopted a fair procedure as was envisaged in section 45 of the *Employment Act*. Second, it cannot be found that as at termination, the respondent had a valid reason per section 43 or a fair reason per section 45 in circumstances that in fact, no reason was provided to the claimant. The claimant's submissions are upheld. It is submitted for the respondent that the charges were stated and therefore there were valid and fair reasons. The respondent by evidence as at dismissal has not shown that the allegations as levelled were indeed verified to exist. While purporting to suspend, give hearing notice, holding a hearing and imposing all possible penalties, the respondent carefully failed to show the content of the hearing and the analysis of the claimant's exculpatory points thereby justifying the allegations as was levelled as established. The procedure as adopted by the respondent turned out to be an empty shell devoid of showing that the levelled allegations had been established.
38. Thus, the court has considered the claimant's administrative appeal. The claimant raised the following grounds:
 - a. The presiding officer had disregarded his evidence that prior to appointment of Karwamba & Mwangi Associates as petty cash handling service providers he had followed the respondent's sourcing procedures as the sourcing manager. He complied with respondent's sourcing directives. After 18 days of receiving supplier forms from Project Manager that and after inviting other prospective managers that he executed the forms awarding Karwamba & Mwangi Associates. He had presented documents showing approval of Karwamba & Mwangi Associates by Magnusson and Selly Rademaker. There was also pressure for the project to commence the work per emails provided to the presiding officer and as reason for the award.



- b. On charge 2, the presiding officer disregarded the claimant's evidence that it was the claimant who had flagged to senior sourcing managers that the email was to the wrong address. Also he had issued emails that the escalating the matter of failure to follow the procedure in generating documents leading to the payment. He had also reported compliance failures per prescribed respondent's Code of Business Ethic and as such he had acted in good faith. Further, he had shown that he no rights on the system to block further payments in that regard so as to recover erroneous payments in issue.
- c. He complained that all the 4 penalties had been imposed against him. Even if he had failed to follow rules per charge 1 but which he denied, in the policy the penalty would be final warning. Also, Priscah Wanjohi from accounts had similar charge as that in claimant's charge 2 and punishment imposed was warning and not dismissal. The claimant appealed that the imposed penalties were excessive
39. The court finds that the claimant's concerns in the administrative appeal remain not addressed or rebutted. The suspension was to pave way for investigations but no investigation report was relied upon at the disciplinary hearing, the appeal or even in Court. No investigation report was filed. The respondent's witness (RW) was Betty Okello-Omondong the respondent's People Business Partner whose role was to steer people. In her testimony in cross examination she confirmed that the claimant was not provided any investigation report at end of alleged investigations; the claimant had a clean record of service; she did not issue any show cause letter; while she recognised at the hearing the claimant was accompanied with a representative called Martin Anami, she had no written evidence and that only the claimant could confirm; and she confirmed all the four penalties were imposed. The court finds that the dismissal and the entire disciplinary procedure was an empty shell calculated to unfairly remove the claimant was confirmed when RW testified, and in a contradictory or incoherent fashion, thus, "He was given suspension letter. It was not for indefinite period. It was until further notice. While on suspension he was given retrenchment notice; while on suspension. It is correct that when retrenchment failed, he was given suspension and disciplinary process. I never issued show cause letter. He was invited to disciplinary hearing by notice. He was notified to come with witness of his choice...."
40. Taking the evidence and the findings into consideration, the court returns that the termination was unfair in substance and procedure.
41. The 4th issue is on damages. There were no submissions on general damages and the prayer is deemed abandoned. The claimant prayed for 12 months' salary for the unfair termination. RW confirmed the claimant had a clean record of service. The claimant had served for a long time of over 9 years and he had no previous disciplinary record. He had a flourishing outstanding performance. He was locked out on the intranet all of a sudden and the pretended investigation never took place. no investigation report was provided. The claimant has not been shown to have contributed to his termination. He was put on suspension for a long time undoubtedly occasioning him anxiety. The only mitigating factor is that the respondent paid the claimant throughout the suspension period. In that consideration he is awarded 10 months' salaries in compensation making $10 \times \text{Kes } 462,392.85 = \text{Kes } 4,623,928.5$. The respondent will pay costs of the suit.
42. In conclusion, judgment is hereby entered for the claimant against the respondent for:
1. The declaration that the termination of the contract of employment was unfair and unlawful.
 2. The respondent to pay the claimant Kes 4,623,928.50 less PAYE by February 1, 2024 failing interest to run thereon at court rates from the date of this judgment till full payment.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
THURSDAY 7TH DECEMBER, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

