



**Omusamia v Stima Investment Co-operative Society Limited (Cause E583 of 2020) [2022] KEELRC 118 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 118 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E583 OF 2020**

**SC RUTTO, J  
APRIL 28, 2022**

**BETWEEN**

**MOSES OMUSAMIA ..... CLAIMANT**

**AND**

**STIMA INVESTMENT CO-OPERATIVE SOCIETY LIMITED .... RESPONDENT**

**JUDGMENT**

1. The employment relationship between the parties herein commenced on 1<sup>st</sup> March, 2011, with the claimant being employed as an ICT officer. The employment was based on fixed term contracts which were subject to renewal upon expiry. The contract that was in force prior to the claimant's termination was set to run for a period of three (3) years from 17<sup>th</sup> June, 2019 till 13<sup>th</sup> June, 2022. This was not to be as the claimant's contract of employment was terminated on 10<sup>th</sup> February, 2020 on grounds of poor performance and professional negligence. The claimant has contested the said termination through the instant suit and consequently seeks compensatory damages in the sum of Kshs 2,592,000.00 as well as a declaratory order to the effect that his termination was illegal, unlawful, unfair and inhumane.
2. The respondent challenged the claim and averred that the claimant's summary dismissal was due to unprofessionalism and gross misconduct which was detrimental to its operations and image. That the same was also contrary to his contractual terms and the *Employment Act*. Consequently, the respondent asked the court to dismiss the claim with costs.
3. The matter proceeded for trial on 25<sup>th</sup> November, 2021, with each side presenting one witness.

**Claimant's case**

4. At the outset, the claimant adopted his witness statement dated 17<sup>th</sup> August, 2020 as well as his bundle of documents to constitute part of his evidence in chief. He also produced the said bundle documents as exhibits before court.



5. It was the claimant's testimony that the respondent terminated his employment contract on grounds of poor performance and professional negligence. He denied the allegations and further testified that he was appraised by the respondent's Chief Executive Officer (CEO) in the month of December, 2019 but the results of his performance were not communicated to him formally. That he was placed on probation for two months hence the performance areas requiring his improvement were to be undertaken beginning December, 2019 all the way to January, 2020.
6. The claimant further told court that he reported to work on 10<sup>th</sup> February, 2020 and proceeded to the respondent's CEO's office to update him on some ongoing work. That it was then that he was served with his letter of termination and directed to handover and surrender his password. He averred that he was not taken through a disciplinary process and was not issued with a letter to show cause. That following his termination, he was issued with a letter asking him to show cause why the respondent should not deduct the costs it had incurred in restoring its system, from his terminal dues. He denied owing any money to the respondent as he had helped restore the system prior to his termination.

### **Respondent's case**

7. The respondent presented oral evidence through its CEO, Mr. Jonathan Kinyenze. He also adopted his witness statement and bundle of documents filed on behalf of the respondent to constitute part of his evidence in chief. The documents were also produced as exhibits before court.
8. Mr. Kinyenze stated in his testimony that the claimant had been involved in various disciplinary issues in the course of his employment. That the same were in respect of his performance and were in the nature of professional negligence. That the claimant's negligence had resulted in the respondent sustaining losses to the tune of Kshs 554,700.00. That indeed, the respondent almost deferred its AGM on account of loss of data. That further, the audit from August, 2019 to February, 2020 could not be undertaken as the data in respect of that period was lost on account of the claimant's negligence.
9. In further testimony, Mr. Kinyenze told court that the claimant was placed on probation to allow him improve his performance. He went on to state that the claimant acted negligently by failing to alert him that the respondent's ASL license had expired, thus leading to its email and web portal being suspended. That further, the claimant failed to activate the respondent's antivirus software hence its system was attacked by ransomware virus resulting in the crashing of two (2) computers, corruption and loss of data. It was Mr. Kinyenze's further testimony that the claimant was also negligent by storing the key to the respondent's cloud system in the server hence there was no back up to its system. That despite the losses sustained by the respondent, the claimant was not surcharged.

### **Submissions**

10. The claimant submitted that the reasons for his termination were not valid in that he had not been cited for gross misconduct during his nine (9) years of employment with the respondent. That further the allegations of poor performance were not proved as he was not subjected to any performance evaluation and appraisal. The claimant cited several authorities in support of his case including; *Everline Kagendo vs Statpack Industries Limited, Industrial* Cause No. 2081 of 2011; *Jane Samba Mukala vs Ol Tukai Lodge Limited Industrial Cause* No. 823 of 2010; *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR and *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* (2014) eKLR.
11. It was the claimant's further submission that the respondent's CEO was the complainant against him, the investigator, the witness, the prosecutor and the judge. That as such, the summary dismissal process was unfair and against the principles of natural justice. He placed reliance on the case of *Msagha vs Chief Justice & 7 others Nairobi* HCMCA No. 1062 of 2004; *Janet Nyandiko vs Kenya Commercial*



*Bank Limited* (2017) eKLR; *Kenfreight (EA) Limited vs Benson K. Nguti* (2016) eKLR and *Abraham Gumba vs Kenya Medical Supplies Agency* (2014) eKLR.

12. On its part, the respondent submitted that there were substantive reasons for the claimant's summary dismissal as his professional negligence, instances of insubordination and poor work performance had cost it its data. The respondent further submitted that the claimant was accorded procedural fairness in all the instances he had been cited for poor performance and professional negligence. It placed reliance on the cases of *National Bank of Kenya vs Samuel Nguru Mutonya* (2019) eKLR and *Patrick Abuya vs Institute of Certified Public Accountants of Kenya (ICPAK) & another* (2015) eKLR.

### **Analysis and determination**

13. Upon evaluation of the issues arising from the pleadings, the testimonies before court and the submissions on record, this court is being called upon to resolve the following questions: -
- a. Was there a valid and fair reason for the claimant's termination?
  - b. Was the claimant's termination in accordance with fair procedure?
  - c. Is the claimant entitled to the reliefs sought?

### **Valid and fair reason for termination?**

14. Pursuant to Section 43(1) of the *Employment Act* (hereinafter the Act), an employer is required to prove the reason or reasons for the termination of an employee and in default thereof, such termination is deemed to have been unfair within the meaning of section 45. In line with this, Section 45 (1) and (2) (a) and (b) of the Act provides as follows;
- (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove—
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason—
      - (i) related to the employee's conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
15. It therefore follows that for a termination employment to pass the fairness test, an employer ought to demonstrate that there was a valid and fair reason(s).
16. Having set out the applicable law, it is now time to apply the same to the facts of the instant case.
17. The claimant was terminated on grounds of poor performance and professional negligence as can be discerned from his letter of termination which reads in part:-

We regret to inform you that the board has not been satisfied with your performance and as such your employment contract for the position of ICT Manager has been terminated due to poor performance and professional negligence on your duties. Some of the areas of concern to the board are;

1. Data clean up. Since June 2019, you have not been able to coordinate and organize with the System developer to ensure that the Society data is reorganized and reconciled to ascertain the correct position of some of the Society projects.



Your actions above have seriously affected the Society's data integrity subjecting the society Management and the board to the risk of make wrong decision for relying on wrong data from the system

2. Professional negligence. The board noted the following which amounts to professional negligence on your duty.
  - a. Failure to renew the Society SSL Certificate on time even after getting alerts on expiry of the licenses from the service provider. On 10<sup>th</sup> January 2020, the Society emails and the web portal were all suspended due to expiry of the license on the same. This caused the operations of the Society emails to be down for over one week.
  - b. Failure to Activate the Society Antivirus software. On 13<sup>th</sup> January 2020 Society network was attacked by a virus which lead to crushing of two computers and corruption of the data saved at the server leading to loss of Society data.
  - b. Failure to carry out and monitor daily backup of the Society data both in hard drive and cloud (DRM). The board has also noted that you have not been carrying out daily backup of Society data as stipulated in your performance contract. This was confirmed when the Society was restoring the data after the virus attack and realized that the only available backup was dated 08<sup>th</sup> August 2019.

Your actions above have seriously affected the Society operations translating to huge cost which the Society has to incur to repost the data as from 09<sup>th</sup> August 2019 to date...”

18. What triggered the claimant's termination was the incident of 14<sup>th</sup> January, 2020, when the respondent's network was attacked by a ransomware virus. As per the incident report on record, the machines affected by the ransomware was at the customer care and the finance department. As such, users were not able to access the MS Navision system and email communication was also affected. The report which was authored by the claimant, further states that despite removing the virus from the registry sections of the computer, they were not able to decrypt the files.
19. The respondent attributed this ransomware attack on failure by the claimant to activate the antivirus.
20. The incident report further states that the respondent's website had been suspended on 7<sup>th</sup> January, 2019 due to non payment of the service hence the web portal was not accessible to members. As noted herein, one of the grounds for the claimant's termination was failure to renew the SSL license despite receiving alerts to that effect from the service provider.
21. The claimant was also cited for failing to carry out and monitor daily backup of the data both in hard drive and cloud and as such, the respondent averred that the only available data backup was dated 8<sup>th</sup> August, 2019. That this was ascertained at the time the system was being restored after the ransomware attack.
22. To put the issue into context, it is necessary to revisit and interrogate the claimant's duties and responsibilities as the ICT Manager. These included; designing, installing and configuring IT systems



- and upgrading servers; maintaining, upgrading and system administration of antivirus products to secure the respondent's network from virus attacks; implementing programmes for safeguarding integrity and security of ICT systems; undertaking daily backup operations, routine audits of systems, evaluating and modifying system's performance.
23. Upon evaluation of the claimant's duties and responsibilities outlined above, it is apparent that the lapses in the respondent's system were within his docket as the ICT Manager hence the buck stopped with him.
  24. It is also notable that at the time the claimant was terminated, his performance appraisal for the period running August 2019 to December, 2019, had been undertaken and from the report on record dated 17<sup>th</sup> December, 2019, he had scored a total weight of 47%. As the appraisal was ongoing, the claimant was under probation and the same had been extended on 16<sup>th</sup> December, 2019.
  25. Prior to this, the claimant had been cited for insubordination as several anomalies had been noted in communication through SMS to the respondent's members in respect of an open day. In this regard, the claimant had owned up to the mistake and apologized.
  26. Further, the claimant had been cited for insubordination for failure to attend a Board meeting on 23<sup>rd</sup> February, 2018. This had been preceded by a warning which had been issued to the claimant on 18<sup>th</sup> July, 2017 on account of negligence and insubordination; and a caution for failure to meet the 2016 performance targets.
  27. Judging from the foregoing cited incidences, the employment relationship had not been all smooth sailing and had its ups and downs. It is therefore apparent that the attack of the respondent's system by the ransomware virus was the straw that broke the camel's back. Ultimately, the respondent resolved to terminate the claimant's contract of employment.
  28. It bears to note that the claimant did not refute the claims by the respondent. He admitted in cross examination that he was in charge of the backups to the system and ensuring that intruders did not intrude into the respondent's system, although he maintained that the ransomware attack was not as a result of the antivirus. He further admitted that the data in the cloud system was also corrupted as it was stored in the server and that there was no physical backup for its data. Further, the claimant did not refute the respondent's allegations that he had failed to undertake daily backups hence the only available data backup was dated 8<sup>th</sup> August, 2019. The foregoing lends credence to the respondent's assertions that the claimant was negligent by failing to ensure adequate backup to its system thus resulting in the loss of its data.
  29. It is therefore evident that by his own actions and omissions, the claimant had availed the respondent reasons to terminate his employment. The respondent thus had a valid and fair reason to terminate the claimant's employment.
  30. Having determined as such, I now turn to consider whether the claimant was subjected to a fair process prior to his termination.

### **Fair procedure?**

31. Pursuant to section 45 (2) (c) of *the Act*, an employer is required to subject an employee to fair procedure prior to terminating his or her employment. Section 41 of the *Employment Act* provides in



an elaborate fashion the requirements to be complied with in order to achieve fair process. It's in the following manner: -

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

32. As stated herein, the claimant has contended that his termination was not in compliance with the principles of natural justice and fair process. Prior to the claimant's termination, he was on probation. He has contested his placement on probation, for the reason that the same is only for new employees.
33. As regards the probation, it is notable that the claimant's contract dated 13<sup>th</sup> June, 2019 had provided for an initial probation of six (6) months. The *Black's Law Dictionary* (10<sup>th</sup> Edition) defines a probationary employee to mean “A recently hired employee whose ability and performance are being evaluated during a trial period of employment”.
34. It is therefore apparent that the probation period is normally meant to be served by newly recruited employees so as to establish their ability to perform in their new role at work. It is also time for discovery and assessment of compatibility of an employee with the new employer.
35. In this regard, the claimant had been in the respondent's employment for a period close to nine (9) years. He had served as the ICT Manager under a previous contract. This was therefore not a new assignment as to warrant probation. There was nothing left for discovery. By then the respondent was well aware of the claimant's ability at work.
36. The foregoing notwithstanding and despite the fact that the respondent had placed the claimant on “probation”, it was bound to accord him a fair hearing. The claimant was protected and was entitled to all safeguards under section 41 of the *Employment Act*. See *Monica Munira Kibuchi & 6 others vs Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR.
37. Despite the respondent's assertion that it subjected the claimant to a fair process, it did not present evidence to back up this assertion. First, there is no evidence that the claimant was notified of the reasons for which the respondent was considering terminating his employment. Similarly, there is also no evidence by the respondent, inviting the claimant to tender an explanation or response to the allegations leveled against him either in writing or through a disciplinary hearing.
38. What is apparent in this case is that the termination seems to have been abrupt and no process was applied at all. The respondent simply let go of the claimant without further reference to him.
39. It is also notable that the process applied by the respondent in the previous incidences against the claimant cannot suffice in the disciplinary issue that led to his eventual termination. The previous incidences despite contributing to his termination, were on account of different transactions, which had come and gone.



40. The claimant was now being confronted with another disciplinary issue hence the respondent was under an obligation to subject the claimant to a fair process based on the fresh allegations prior to termination.
41. On account of lack of evidence by the respondent to prove that it subjected the claimant to a fair process prior to his termination, it is at fault to that extent and the termination process was flawed hence unlawful within the meaning of section 45 (2) (c) of *the Act*.
42. Having determined as much, what reliefs then avail the claimant?

### **Reliefs**

43. As the Court has established that the claimant's termination was procedurally flawed hence unlawful, the Court awards him compensatory damages equivalent to two (2) months gross salary. This award has taken into account the claimant's own contribution to the termination of his employment.

### **Orders**

44. To this end, I enter Judgment in favour of the claimant against the respondent in the sum of Kshs 432,000.00.
45. The amount shall attract interest at court rates from the date of Judgement until payment in full.
46. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**STELLA RUTTO**

**JUDGE**

### **Appearance:**

For the Claimant Mr. Magua

For the Respondent Mr. Kamau

Court Assistant Barille Sora

### **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

