



**Irungu v Smoothtel & Data Solutions Limited (Cause 268 of 2016)  
[2022] KEELRC 31 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 31 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 268 OF 2016  
NZIOKI WA MAKAU, J  
APRIL 26, 2022**

**BETWEEN**

**JOSEPHINE WANJIKU IRUNGU ..... CLAIMANT**

**AND**

**SMOOTHTEL & DATA SOLUTIONS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted the suit vide a Memorandum of Claim dated 3<sup>rd</sup> February 2016 against the Respondent for the alleged unlawful and unfair termination of her employment and refusal to pay her terminal dues. She avers that the Respondent employed her as a Human Resource Manager in Nairobi Kenya on permanent basis from 8<sup>th</sup> October 2014 and that her salary per month was Kshs. 110,000/-. The Claimant avers that in the course of carrying out her duties, the Respondent's CEO verbally sent her on compulsory suspension from 25<sup>th</sup> November 2015 without any letter or formal communication to that effect and further, without a reason. The Claimant avers that she gave her written response to the same accepting to stay away from work and also raising concerns of how the said CEO was treating her work docket and failing to enable her achieve her targets. The Claimant avers that she was invited via an email of 30<sup>th</sup> November 2015 to a disciplinary hearing scheduled for 1<sup>st</sup> December 2015. She avers that meeting was meant to consider an allegation of misconduct against her. The Claimant avers that the said invitation however never informed her of the particular charges she was facing so that she could prepare for the hearing and make an appropriate response to the charges. The Claimant avers that she delivered a letter to the Respondent requesting the Respondent to issue her with charges that were facing her but the Respondent replied via email indicating that her refusal to attend the hearing would be construed as being absent from work without authority. The Claimant avers that she responded to the email communication indicating she was ready to attend a disciplinary hearing once she was made aware of the charges against her and that she was also ready to report back if the Respondent lifts the order suspending her. The Claimant avers that on 3<sup>rd</sup> December 2015 she was invited to another disciplinary hearing to be held on 8<sup>th</sup> December 2015 and that she once again communicated to the



Respondent's Assistant HR Officer that she needed to be furnished with the charges. The Claimant avers that however the Respondent's CEO responded via email that she had no case to answer and that she would either meet the CEO and the Chief Operations Officer together or the CEO alone, for the said meeting. The Claimant avers that on 8<sup>th</sup> December 2015 she went to meet them both accompanied by a person of her choice but was kept waiting at the Respondent's reception before the meeting was eventually postponed to 9<sup>th</sup> December 2015 because the Chief Operations Officer had failed to attend. The Claimant avers that the meeting and several other scheduled hearings thereafter never took off again and she was never given any reasons.

2. She avers that it was therefore a surprise when the Respondent called her on 22<sup>nd</sup> December 2015 to collect her termination letter without having taken her through a disciplinary process or informing her of her offences. The Claimant avers that she had to sign the termination letter so as to receive her payment which she desperately needed to feed her children but wrote the words "WITHOUT PREJUDICE" against her signature on both pages of the letter. The Claimant avers that these words angered the CEO who refused to pay until she signed another letter without the 'offending' words and that the following day she was thus given another termination letter dated December 23, 2015 to sign on. It is the Claimant's averment that she signed the termination letters under duress in desperation for money. The Claimant avers that when her advocates wrote to the Respondent seeking to negotiate an out of court compensation for her unfair termination of employment as per the recognized shop floor industrial relations machinery, the Respondent replied stating it had followed procedure in terminating her services.
3. The Claimant further avers that there is no warning letter in her personnel file for any misconduct while working with the Respondent and that she has neither had any disciplinary issue with the Respondent during her tenure of service. She contends that misconduct is wide and should have been broken down for her to understand what exactly she had done, considering the specific details as to the charges against her have never been given to her. That if indeed she had committed any offences as alleged, the Respondent should have taken her through the due process of the law and take disciplinary action against her. That she should have been given all her money since she had already cleared with all the departmental heads at the Respondent's offices. The Claimant prays for:-
  - i. An order declaring that the Respondent's actions towards the Claimant amounted to unfair and unlawful termination.
  - ii. An order for the Respondent to issue a certificate of service to the Claimant.
  - iii. An award of Kshs. 1,440,000/- made up as follows;
  - iv. 12 months compensation for unfair and unlawful termination Kshs.1,320,000/-
  - v. Kshs. 10,000/- deducted from her payment on 23<sup>rd</sup> December 2015
  - vi. 1 month's salary in lieu of notice Kshs. 110,000/-
  - vii. Costs of the suit
  - viii. Any other relief that the court may deem fit to grant.
4. In reply, the Respondent filed a Response dated 29<sup>th</sup> March 2016 denying that it unfairly terminated the Claimant's employment. It avers that it informed the Claimant of all issues and particulars regarding her conduct at a meeting held on 25<sup>th</sup> November 2015, discussed with her the said issues and gave her a fair hearing. The Respondent avers that the Claimant is therefore aware of the issues which led to her dismissal from employment and that it also paid her dues except for Kshs. 10,000/- as she



has to not cleared with the COO and CEO of the company to date. The Respondent further avers that the Claimant waived her right to make any claim against the company when she fully discharged the Respondent from any further liability on 23<sup>rd</sup> December 2016 and that this suit is therefore an afterthought. It is the Respondent's averment that it followed the express terms for termination of employment as contained and stipulated in the Claimant's appointment letter.

5. The hearing took place and only the Claimant testified and parties were directed to file written submissions. In her submissions, the Claimant submits that the Respondent did not follow the laid down procedure in line with Sections 41 and 45 of the *Employment Act*, 2007 and that she relies on the case of *John Mwaura Ngugi v Safaricom Plc* [2019] eKLR in which adherence to Sections 41, 43 and 45 of the *Employment Act* was emphasized. She submits that the Respondent did not have a substantive reason for terminating her employment as she was never issued with a show cause letter or a list of charges to respond to and that making her attend over 8 meetings which never took place was meant to punish and tire her until she resigns. It is the Claimant's submission that having established that the Respondent did not have a substantive reason for terminating her employment and that it did not follow due process, her evidence remains uncontroverted as the Respondent did not call any witness. She relies on the case of *Chrispine Otieno Caleb v Attorney General* [2014] eKLR wherein the High Court while quoting various decided authorities, held that the evidence tendered by the plaintiff stands uncontroverted where no witness is called on behalf of the defendant and further, where a party has filed pleadings but does not call evidence in support thereof, the pleadings remain mere statements of facts as they have not been substantiated. The Claimant submits that she thus merits the reliefs sought in full and further considering the malicious manner in which the Respondent treated her and that the Respondent should be condemned to meet the costs of this suit.
6. The Respondent submits that the Claimant was terminated procedurally and for a valid reason, considering the business needs of the Respondent and that she was suspended on grounds of gross misconduct, also indicated in her termination letter. The Respondent submits that the charges against the Claimant were duly spelt out to her but that she demonstrated lack of cooperation in the process as evidenced by the numerous email invites it sent to her. The Respondent submits that the Claimant ultimately deliberately chose not to attend the disciplinary hearings as shown in appendix 7 of Claimant's list and bundle of documents dated 3<sup>rd</sup> February 2016. The Respondent relies on the Court of Appeal case of *Judicial Service Commission v Gladys Boss Shollei & Another* [2014] eKLR where the Court discussed the respondent's conduct as evidencing an attitude that she was not answerable to anyone. It submits that the Claimant having waived her right to attend the disciplinary hearings and instead ambushing it at its offices with an advocate, its decision cannot be faulted as it was the only available recourse to take against the Claimant. The Respondent submits that it adhered to the provisions of Section 41 of the *Employment Act* 2007 by inviting her for a disciplinary hearing and on this submission it relies on the Court's statement on procedural requirements of Section 41 in the case of *Felix Odhiambo Owuor v Electoral Institute for Sustainable Democracy in Africa* [2020] eKLR. The Respondent further submits that as noted in the *Felix Odhiambo Owuor case* (supra), a claim that the reasons for the termination were unfair cannot arise where the employee fails to attend the disciplinary hearing such as in the instant case. The Respondent submits that the Court in *Mathew Lucy Cherusa v Poverelle Sisters of Belgamo T/A Blessed Louis Palazzalo Health Centre* [2013] eKLR dismissed the claimant's case for unfair termination while relying on the decision in *Jackson Butiya v Eastern Produce Kenya Limited* (Industrial Court Cause No 335 of 2011) where the court stated:

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the Court to supervise the internal



grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.”

7. The Respondent submits that similarly in *Paul Wanyangab v Market Development Trust t/a Kenya Markets Trust* [2017] eKLR, the court stated that the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing. It is the Respondent’s further submission that in addition to waiving her claim by not attending the disciplinary meetings, the Claimant also waived her right to claim against the Respondent when she obtained her final dues as admitted in her Memorandum of Claim. The Respondent submits that the Claimant never pleaded to set aside the final dues or plead particulars of duress and that the ELRC has considered and found that the effect of an employee signing a discharge is a binding contract. The Respondent cited the decision by O. N. Makau J. in *Felix Mutie Musango v Tin Can Manufacturers Limited* [2020] eKLR where he held: “It is now trite law that a settlement agreement like the said Discharge Certificate is binding contract between the parties involved and the court cannot interfere with it unless it is vitiated by any relevant factors that vitiates an ordinary contract at Common Law.” The Respondent further cites the case of *Gilbert Mugambi v Michimikuru Tea Factory Limited* [2018] eKLR where the Court found the suit to be misplaced in light of the waiver given to the claimant, holding that an employee who is dismissed cannot simply receive some payment so as to move on while suggesting that there is a remedy beyond the waiver given. The Respondent submits that the Claimant’s evidence is not uncontroverted as alleged in the Claimant’s submissions because the Respondent stated it relies on the evidence already on record and the Respondent’s Counsel also cross-examined the Claimant in Court on November 15, 2021 proving its case. The Respondent submits that it was incumbent upon the Claimant to prove unfair termination but which she has failed to do whereas the Respondent followed the law as required in Section 41 of the *Employment Act* as read together with Section 44. The Respondent submits that it did not have control over the Claimant’s deliberate failure to attend the disciplinary meetings despite numerous invites and which actions substantiated the allegations of gross misconduct against her. It submits that the Claimant having additionally waived her claim against the Respondent by accepting her final dues, this Honourable Court should dismiss her claim with costs. The Respondent submits that if this Court is however convinced to award quantum to the Claimant, it should consider her negative conduct and insubordination to the Respondent during the disciplinary process and the fact that she had only worked for the Respondent for 13 months prior to her dismissal. The Respondent submits that to this end the Court should award her two months’ pay as compensation.
8. The Claimant was terminated unfairly. The Court makes this determination based on the emails exchanged between the parties indicating the Claimant was not given a list of charges to respond to, the fact that meetings would be called on the eve of the proposed hearing and would often not take place. The Respondent cannot assert the Claimant deliberately failed to attend meetings whereas the Claimant failed only on account of the Respondent’s persistent failure to accord her a fair hearing as envisaged by Section 41. The Respondent is urged to undertake a review of its internal policies and have a proper disciplinary process in place. It is curious the Respondent relies on the decision in *Felix Mutie Musango v Tin Can Manufacturers Limited supra* when it was the CEO of the Respondent who coerced the Claimant to sign the discharge voucher without the words ‘without prejudice’. The contract alleged to have waived her rights was thus obtained through coercion and cannot stand the scrutiny of validity. The Claimant had worked for about 13 months and as such the Court would be inclined to award her 9 months compensation due to the egregious conduct of the Respondent. Had the Respondent followed the law in termination the hammer of justice would not have fallen on it so heavily.



9. In the final analysis I enter judgment for the Claimant against the Respondent for:-
- i. 9 months salary as compensation for the unfair and unlawful dismissal – Kshs. 990,000/-;
  - ii. Kshs. 10,000/- which remains outstanding as admitted by the Respondent;
  - iii. Interest at court rates on i) above from the date of judgment till payment in full;
  - iv. Interest at court rates on ii) above from the date of filing suit till payment in full.
  - v. Costs of the suit.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL 2022**

**NZIOKI WA MAKAU**

**JUDGE**

