



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**ELRC SUIT NO. 300 OF 2020**

**(C/ E015 OF 2020)**

**ANNE KAROKI.....CLAIMANT**

**VERSUS**

**KENYA HOSPITAL ASSOCIATION**

**T/A THE NAIROBI.....RESPONDENT**

**JUDGMENT**

1. The suit was filed on 10<sup>th</sup> July, 2020 by the claimant seeking the following reliefs:-

- (a) A declaration that the termination of the Claimant's employment was unfair, wrongful and unlawful.***
- (b) Payment of a salary for 12 months as compensation for unfair termination of employment at Kshs 2,789,184/= (231,662\*12).***
- (c) Payment in-lieu of two (2) months' notice @ Kshs 231, 682/= per month hence Kshs.463, 364.***
- (d) General damages for unlawful, unfair and wrongful termination of the Claimant's employment and for injury to her reputation.***
- (e) Costs of this suit; and***
- (f) Interest on b, c, d and e above.***

2. The respondent was granted leave to file a statement of response dated 11<sup>th</sup> May, 2021 vide a Ruling dated 29<sup>th</sup> April, 2021 in which formal proof proceedings were set aside and the matter was to proceed afresh based on sworn statements of evidence filed by the parties dated 1<sup>st</sup> December, 2020 and 11<sup>th</sup> May, 2021 respectively. Both parties relied on their list of documents filed on 10<sup>th</sup> February, 2020 and 11<sup>th</sup> May, 2021 respectively and written submissions dated 22<sup>nd</sup> January, 2021 and 11<sup>th</sup> May, 2021 respectively.

**Facts of the Claim**

3. The claimant was employed by the respondent as a Procurement Controller by a letter dated 5<sup>th</sup> February, 2016. The employment commenced on 7<sup>th</sup> March, 2016. The claimant was paid Kshs 210,620 monthly salary.

4. The claimant worked diligently until 10<sup>th</sup> March, 2017 when the respondent elevated her to the position of Acting Head of Procurement and Stores Department by a letter of the even date.

5. Subsequently, claimant's salary was enhanced by 10% as acting allowance to Kshs 231,082. The claimant continued to work in acting capacity until 20<sup>th</sup> February, 2018, when she received a notice to show cause from the Chief Executive officer requiring her to show cause why disciplinary action should not be taken against her.

6. The letter dated 20<sup>th</sup> February, 2018 partly read:-

***“As the Acting Head of Procurement and Stores, it is your responsibility to ensure that laid down procedures for procurement***

***are understood, communicated and followed by all parties involved. This break down in supervision has caused the hospital grave reputational loss with our vendors. “***

7. This followed an award of tender being a Purchase Requisition (PRO) No. P017108 to Servtel Communications Limited on 20<sup>th</sup> December, 2017 despite as was alleged the fact that the company was not recommended to be awarded as per analysis of the bids and that the Local Purchase Order (LPO) raised was below their quoted price of Kshs 1,965,817.06.
8. The Chief Security Officer had prior to the tender process been authorized to install 19 new CCTV cameras at a cost of Kshs 1,691,024.80 and that the lowest quotation was by Icom Technologies.
9. The claimant responded to the notice to show cause on 21<sup>st</sup> February, 2018, and stated that on 18<sup>th</sup> December, 2017, a person by the name Stephen Gichohi from the office of the Chief Security Officer rushed to the office of the claimant demanding that the claimant sign three documents which were urgently needed by the Chief Security Officer.
10. That the claimant hurriedly perused the said documents and noted that the documents included a purchase request, purchase order and justification and a budget approval. That the claimant did not notice that the order was made to Servtel Communications Limited instead of Icom Technologies that had been approved to supply the security cameras.
11. The claimant states that she did not notice the error until 7<sup>th</sup> February, 2018 when, she discussed the honest mistake precipitated by the urgency with which those documents were required.
12. That on 26<sup>th</sup> February, 2018 the claimant received an internal memo to attend a disciplinary hearing on 28<sup>th</sup> February, 2018. That the claimant attended the venue but no hearing was conducted at all. That the claimant enquired about the matter but no response was forthcoming.
13. That on 1<sup>st</sup> March, 2018, the claimant received letter of termination of employment from the Respondent which according to the claimant was unprocedural, unlawful and unfair since the claimant was not accorded opportunity to defend herself.
14. The claimant appealed the decision to the Chief Executive Officer by a letter dated 7<sup>th</sup> March, 2018 but she did not receive any response.
15. That the other three signatories to the LPOs the claimant signed were never dismissed from employment nor was any disciplinary action taken against them which is a demonstration of the respondent's unfairness. That the termination was a witch-hunt and based on malice.
16. That the claimant be awarded as prayed.
17. Maurice Mayende, the respondent's Human Resource Officer relied on his sworn statement as his evidence in chief.
18. Maurice confirms the employment particulars of the claimant as set out in paragraph 5 of the Statement of Claim.
19. Maurice testified that the claimant acted without regard to the clear guidelines of the respondent by approving a Purchase Recognition to Servtel Communications Limited despite there being a recommended awardee.
20. That the claimant was through the show cause letter dated 20<sup>th</sup> February, 2018 informed of her responsibility as the Acting Head of Procurement and Stores to ensure that laid down procedures for procurement are understood, communicated and followed by all parties involved.
21. Maurice denies that directions were issued by the Chief Security Officer through Mr. Stephen Gichohi or at all. Maurice denied that the claimant was required to sign documents that were termed as urgent by the said Mr. Stephen Gichohi.
22. Maurice testified that the claimant could not accept responsibility on account of an alleged mistake and acting in a hurry. Maurice states that the claimant admits that the order was issued to the wrong entity thus exposing the respondent to substantial loss and damage.
23. That the claimant was taken through a disciplinary hearing on 28<sup>th</sup> February, 2018 and a termination letter issued on 1<sup>st</sup> March, 2021 after the hearing where the claimant was accorded a hearing and a chance to defend herself.
24. That the reasons given by the claimant were unsatisfactory hence the termination. That the termination was fair and justified. That the suit be dismissed with costs.

#### Determination

25. The respondents filed written submissions and the issues for determination are as follows:-

***(a) Whether the termination of the employment of the claimant was for a valid reason following a fair procedure.***

***(b) Whether the claimant is entitled to the reliefs sought.***

26. The main issue in dispute herein is whether the claimant was subjected to a disciplinary hearing on 28<sup>th</sup> February, 2018 as alleged by Maurice and denied by the claimant.

27. The claimant confirmed that she was invited to attend a disciplinary hearing on the said 28<sup>th</sup> February, 2018 but to her surprise and dismay, no disciplinary hearing took place.

28. In terms of Section 41, read with Section 43(1) and (2) and Section 47(5), once an employee claims that the termination of the employment was wrongful, the onus shifts to the employer to demonstrate that it had a valid reason to terminate the employment and in doing so, it followed a fair procedure.

29. Maurice produced minutes of an alleged disciplinary hearing held on 1<sup>st</sup> March, 2018. Maurice is not one of the persons who attended the alleged meeting. Both Mr. Maurice and the claimant are in agreement that the disciplinary hearing was scheduled for 28<sup>th</sup> February, 2018 and that the claimant received a letter of termination dated 1<sup>st</sup> March, 2018.

30. The claimant produced before Court the internal memo dated 26<sup>th</sup> February, 2018 through which the claimant was invited to attend a disciplinary hearing on 28<sup>th</sup> February, 2018, by one Irene Gikemi. The respondent did not tender any evidence that the meeting scheduled for 28<sup>th</sup> February, 2018 was postponed to another date. Indeed, the letter of termination dated 1<sup>st</sup> March, 2018 refers to a disciplinary hearing held on 28<sup>th</sup> February, 2018.

31. Clearly, Maurice tendered false documentary evidence before Court of an alleged disciplinary hearing, which he did not attend and allegedly took place on 1<sup>st</sup> March, 2018 the date the claimant received the letter of termination.

32. It is therefore without hesitation that the Court finds that the evidence by Maurice is false and is incapable of believe by the Court. Accordingly, the Court finds that the respondent held no disciplinary hearing to afford the claimant opportunity to defend herself and/or tender mitigation in her defence regarding the circumstances that led to the award of a CCTV Tender to Servtel Communications Limited. The respondent clearly lost opportunity to establish a valid reason to terminate the employment of the claimant following a fair procedure.

33. It is not lost to the Court that the claimant held the substantive position of Procurement Controller from 5<sup>th</sup> February, 2016 and no evidence was tendered before Court that she had any adverse record regarding that substantive position.

34. It is also not in dispute that the claimant held the Acting position of Head of Procurement and Stores from 10<sup>th</sup> March, 2017, a period of about a year to the time of her termination on 1<sup>st</sup> March, 2018.

35. The respondent did not tender any evidence to counter the testimony by the claimant that it was the office of the Chief Security which presented the procurement documents to the claimant in a hurry and that all the signatories to those tender documents except for the claimant were not disciplined or had their employment terminated.

36. The respondent did not also counter the testimony by the claimant that she had made an honest mistake in signing the documents in a hurry.

37. The respondent did not tender any evidence why the Procurement Process was concluded despite the apparent error, alleged by the respondent. The respondent did not also demonstrate alleged substantial loss to the respondent as a result of the award made.

38. The Court has considered the case of Mary Chemweno Kiptui –vs- Kenya Pipeline Company Limited [2014] eKLR in which the Court held that the employee must be given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee.

39. Nothing would have been easier than for the respondent in this case to adduce evidence by the panel that allegedly heard the case of the claimant on 1<sup>st</sup> March, 2018 and the reasons why they deemed the termination justified.

40. In Moses Gachihi Wathira –vs- SGS Kenya Limited [2019] eKLR, the Court emphasized

***“Flowing from the express provision of the procedure for oral hearing set out by Section 41 of the Act and the cited precedent, I return that granting the claimant an opportunity to show cause is not equal to according him a fair hearing. The Respondent must accord the employee an oral hearing in the presence of another employee or shop floor union official of his choice unless the employee has expressly admitted the offence in his reply to the show cause letter or he has waived the right to be heard in terms of the said mandatory statutory procedure”***

41. The Court finds that the response by the claimant to the show cause letter did not amount to an admission of the alleged omission.

42. Accordingly, the Court finds that the claimant violated Section 41, 43, and 45 of the Employment Act and the termination of her employment was unfair and unlawful.

43. The claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Act.

44. In this respect, the claimant lost a good career advancement opportunity on account of the unlawful conduct by the respondent. The claimant had a good record at the workplace.

45. That the claimant did not receive any compensation for the loss of her employment. The claimant had served the respondent for a period of two years and had prospects of a long career advancement with the respondent. The career path of the claimant was unjustifiably tainted by the termination. The respondent did not pay notice pay in terms of the substantive letter of appointment.

45. Having considered all the above, and the case of **Moses Gachihi Wathira -vs- SGS Kenya Limited [2019] eKLR** and the case of **Mary Chemweno Kiptui -vs- Kenya Pipeline Company Limited [2014] eKLR**, the Court awards the claimant the equivalent of five (5) months' salary in compensation for the unlawful and unfair termination of employment in the sum of **Kshs (231,682 x 5) 1,158,410**.

46. In addition, the claimant is entitled and is awarded one month salary in lieu of notice in the sum of **Kshs 231,682**.

47. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows:-

*(a) Kshs 1,158,410 in compensation.*

*(b) Kshs 231,682 notice pay.*

**Total award 1,390,092.**

*(c) Interest at Court rates from date of judgment till*

*Payment in full.*

*(d) Costs of the suit.*

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF APRIL, 2022**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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, this judgment has been delivered to the parties online with their consent. 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 has 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearance**

Mr. Kago for claimant

Mr. Jomo for Respondent

Ekale: Court Assistant