



**Cheboron v Kenya Power & Lighting Co. Ltd (Cause E004 of 2021)
[2022] KEELRC 1619 (KLR) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1619 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E004 OF 2021
DN NDERITU, J
MAY 20, 2022**

BETWEEN

RAEL CHEBORON CLAIMANT

AND

KENYA POWER & LIGHTING CO. LTD RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by way of a statement of claim dated 26th January, 2021 praying for the following:-
 1. A declaration that the termination of employment was discriminative, unlawful and violation of the fundamental rights of the Claimant.
 2. A maximum compensation for wrongful termination as per Section 49(c) of the Employment Act-ie Gross salary earned X 12 months (Kshs.196,518.57 X 12) = Kshs.2,358,222.84.
 3. A certificate of service as per Section 51 of the Employment Act costs and interest.
 4. Costs and interest.
2. Accompanying the statement of claim is a verifying affidavit, written witness statement of the Claimant, a list of documents and copies of the listed documents which were produced as Claimant's exhibits 1 to 14.
3. In a memorandum of response dated 23rd February, 2021 the Respondent prays for dismissal of the claim with costs for lack of merits.
4. The Respondent also filed witness statements from RW1 and RW2 who testified during the hearing and also filed a list of 17 documents and copies thereof which were produced as Respondent's exhibits 1 to 17 during the hearing.



5. This cause was heard on 1st November, 2021 when the Claimant (CW1) testified alone in support of her claim, and on 7th December, 2021 when Matson Maina Njue (rw1) And Argwings Kodhek (RW2) testified in support of the Respondent's case.
6. Upon conclusion of the hearing, by consent, the Claimant's Counsel filed written submissions on 14th January, 2022 and Respondent's Counsel filed on 8th February, 2022.

II Claimant's Case

7. As far as this court can distill from the statement of claim, the oral and documentary evidence tendered, together with the written submissions by her Counsel, the Claimant's case is a hereunder.
8. The Claimant was employed by the Respondent on 19th September, 2011 as an accountant III earning a gross salary of Kshs.196,518.57/=as at the time of termination.
9. The Claimant states that she served well with a clear disciplinary record and good performance but that she was unlawfully and wrongfully terminated on 30th January, 2018 on allegations of receiving a sum of Kshs.149,300/= from a contractor contrary to Respondent's Code of Conduct and Ethics.
10. It is the Claimant's case that she was denied a fair hearing and that the Respondent had neither good nor justified reason(s) for terminating her. She is of the view that she was denied both substantive and procedural fairness against various provisions of the law.
11. It is on the basis of the foregoing that the Claimant prayed as per the statement of claim as reproduced in the introductory part of this judgment.

III. Respondent's Case

12. The Respondent's case, as expressed in the response to the claim, the oral and documentary evidence through RW1 and RW2, and the written submissions by its Counsel is as hereunder in summary.
13. In the response to the claim the Respondent has denied each and every allegation in the claim except for the descriptive parts.
14. However, and on without prejudice basis, the Respondent alleges that the Claimant was fairly and lawfully terminated and was afforded substantive and procedural fairness leading to the dismissal.
15. The Respondent alleges that the Claimant received a sum of Kshs.214,700/= from a contractor (L&T) contrary to the Respondent's Code of Conduct and Ethics and that it is on that basis that the Claimant was subjected to disciplinary hearing and subsequently terminated following a procedure that included a determination on appeal.
16. 16. The Respondent has therefore prayed that the claim be dismissed with costs.

IV. Issues For Determination

17. This court has gone through the pleadings, the oral and documentary evidence adduced by both sides, and the written submissions by Counsel for the parties, and therefrom the following issues commend themselves to this court for determination:-
 - (i) Was the termination of the Claimant by the Respondent unfair, wrongful, and unlawful?
 - (ii) If (i) above is in the affirmative, is the Claimant entitled to the reliefs sought?
 - (iii) Costs.



V. Termination

(A) Substantive Fairness

18. Section 43 of the *Employment Act*, 2007 (the Act) provides as follows:-
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination, shall be deemed to have been unfair within the meaning of Section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
19. It is this court’s understanding of the foregoing provisions of Section 43 of the Act that the employer ought to have reasonable cause to be deemed to have basis or ground(s) for terminating, or to be said to have proved such ground. It is not adequate for an employer to only suspect that the employee is guilty of misconduct and then apply such suspicion as the foundation for disciplinary action and subsequent dismissal.
20. The reason must be based on genuine and reasonable grounds based on strong and sound foundation. An employer should have solid prima facie evidence of misconduct based on credible investigation or other evidence based on due diligence.
21. Suspicion, no matter how strong or passionate an employer feels about it, cannot form good basis or foundation for disciplinary action and or termination. The emotions and whims of an employer should never be allowed to take hold of such a serious process that may lead to dismissal or termination of an employee, which ordinarily results in serious financial and social consequences not only to such particular employee but also to entire families and others who in one way or another relate to such an employee.
22. The foregoing paragraphs relate to what is ordinarily referred to as substantive fairness. In other words, an employer must have genuine, prima facie, well founded reasons(s) before taking action against an employee leading to termination or otherwise.
23. By way of a letter dated 13th December, 2017 the Respondent addressed to the Claimant as follows:-
- “Dear Rael,
- Explanation
- An internal investigation audit report No. 11 – 2017/2018 for Samcar Enterprises Limited – Kabarnet, Central Rift Region has revealed that you received Kshs.214,700.00 from L&T Contractor Company contrary to the company’s Code of Conduct and Ethics.
- Note that management views this as fraudulent activity which is a serious offence. However, before any action is taken, you are hereby given a chance to show cause why disciplinary action should not be taken against you for the offence.
- Your reply should be received within 72 hours from the date of this letter failure to which it will be assumed that you have none and management will institute appropriate disciplinary measures without further reference to you.”
- The letter was signed for the Respondent by the Regional Manager, Central Rift.



24. On 27th December, 2017 the Claimant responded to the above letter and in the material part of the reply raised four(4) issues as follows:-

“

That I never received the said amount from the said company, unless I get evidence of the same, from Samcar’s bank statement. That the money alleged to have been sent to me was from my colleague and longtime friend Charles Ogoti. That it was not in my knowledge that Charles was operating Samcar Enterprises Limited. I made this known to the Audit team when giving out my statement to them. They however framed their questions to make it look like I was in the picture that Charles was working under this company, to which my response was in the negative. The same team implied that this was a motivation for me to pay the firm, to which I said no, since documents are received at Finance after which they have been checked and verified at other departments. Further, there was no document for this contractor that bore my signature singly, hence it cannot be concluded that I influenced their payments in any way. I have been in a relationship with Charles since late 2014. The money he usually sends me was for my usual upkeep, in the capacity of our private lives, and this was not laid bare for the audit than to see at the time of giving out my statement.”

25. Subsequent to the above exchange between the Claimant and the Respondent, the Claimant was invited for a disciplinary hearing vide a letter signed by the Chief Finance Officer of the Respondent on 3rd January, 2018. The material part of the said letter states as follow:-

“The alleged (charges) against you is that you received Kshs.214,700.00 from L & T Contractor contrary to the company Code of Conduct and Ethics.

You have a right of interpretation and representation by a fellow employee of your choice.

You are requested to bring to the enquiry any evidence or witnesses you may have in support of your case.”

26. The disciplinary hearing was to take place on 5th January, 2018 at 11.00a.m. For reasons not brought to the knowledge of this court in evidence the disciplinary hearing was not held on 5th January, 2018 as indicated in the invitation letter but was held on 19th January, 2018.
27. As per minutes of the meeting the Claimant admitted that she had received a sum of Kshs.149,300/= from one Charles Ogoti, a colleague at work, and she had not received any money from Samcar Enterprises Ltd or any other person or company.
28. This court has carefully gone through the minutes of the disciplinary hearing and there is absolutely no evidence that was produced during that hearing to demonstrate that the Claimant had fraudulently received a sum of Kshs.204,700/= from either Samcar Enterprises Ltd or indeed any other person or company or agents.
29. It is the Claimant, in an honest gesture, who admitted that she had a love relationship with a colleague employee by the name of Charles Ogoti and that her lover sent her money occasionally in their private relationship.
30. There is no evidence that either the above named company or any other sent or paid any money to the Claimant. There is no evidence that the said Charles Ogoti was either a director, shareholder, or in any way related to or associated with the said company.
31. No employee or director from the said company was called as a witness to confirm that such payments were indeed made or that Charles Ogoti was related to or associated with the said company.



32. To make matters worse, in the letter of recommendation of termination by the Respondent dated 26th January, 2018 the Respondent's Personnel Manager, Central Rift, wrote that there was evidence that the Claimant had received a sum of Kshs.149,300/= from Charles Ogoti through one Caroline Kipchoge. The two named persons, Charles and Caroline, were not called as witnesses during the disciplinary hearing against the Claimant.
33. No nexus was established by the Respondent between Charles Ogoti, Caroline Kipchoge, and Samcar Enterprises LTD.
34. While the Respondent is not expected to have carried out the disciplinary hearing to the standard of a criminal or civil trial in a court of law, the standard of proof ought to have been reasonable and genuine. Mere allegations that are neither supported by evidence nor substantiated cannot suffice as grounds of a "conviction" even in such administrative hearings (actions) that require that the basic rules of natural justice be adhered to.
35. Unfortunately, and sadly so, what the Respondent did in the disciplinary hearing was to intrude into the private life of the Claimant concerning her alleged love affair with a colleague at work. That is not the way employers should handle and conduct investigations and disciplinary hearings against employees.
36. The Mpesa statements that were allegedly relied on during the investigations, which were presented to court during the hearing, were neither certified nor authenticated as coming from Safaricom Limited.
37. Having said all the foregoing, it is this court's view, opinion, and holding that the Respondent has failed to prove reason for termination as demanded of an employer under Section 43 of the Act.

(B) Procedural Fairness Act

38. Sections 41 and 45 of the Act provide for the steps and procedure that an employer ought to take before dismissing or terminating an employee. That process and procedural steps to be taken prior to the dismissal or termination is what is collectively known as procedural fairness.
39. Procedural fairness is also variously referred to as fair hearing. Fair hearing goes beyond the provisions of Sections 41 and 45 of the Act. Article 47 of *the Constitution*, Section 4 of the *Fair Administrative Actions Act*, and the Rules of Natural Justice apply as well.
40. The following is a sample list of some of the ingredients of fair hearing or procedural fairness:-
 - (a) The employer shall in writing inform the employee of the intention to take disciplinary action and inform the employee of the specific charges/allegations against the employee with clear and concise precision.
 - (b) The notice in (a) above shall inform the employee of the right to respond to the charges within reasonable time, and the possible outcomes/consequences/results of the hearing.
 - (c) If the employee seeks for more time or further and better particulars in response, the employer shall grant the employee reasonable time to respond and provide the particulars sought for by availing the evidence gathered to the employee to enable the employee to respond adequately and gather evidence to respond to the charges.
 - (d) If the employer, after considering the response from the employee, decides that the matter shall proceed to hearing, the employer shall issue a hearing notice informing the employee of the date, time, and place of the hearing.



- (e) The notice in (d) above shall inform the employee of the right to bring another employee of choice to the hearing and also a union member, if the employee is a member of a union.
 - (f) During the hearing the employer must present to the employee all the evidence available against the employee and avail any relevant witnesses in the matter for questioning by the employee. There shall be no ambush.
 - (g) The employee shall be informed of the right to call witnesses and be afforded an opportunity to tender evidence.
 - (h) Upon conclusion of the hearing the employer shall inform the employee of the outcome and the options available including the right of appeal.
 - (i) Once the appeal/review process is concluded, the employer shall issue and serve the employee with a notice of termination, if that is the result, even where the employer wishes to make payment in lieu of such notice.
41. The above list is not exhaustive but it serves to demonstrate how important procedural fairness is before dismissal or termination of an employee.
 42. Applying the above steps to the facts of this cause, the Respondent kicked off the process by way of a letter dated 13th December, 2017 which has been extensively quoted verbatim in an earlier part of this judgment.
 43. In that letter the Claimant was accused of receiving sum of Kshs.214,700.00 from an L&T Contractor contrary to the Respondent's Code of Conduct and Ethics. It is important to note that the company which allegedly paid the money to Claimant is neither named nor disclosed in the letter. Secondly the specific provisions of the Code of Conduct and Ethics that the Claimant had abused and or violated are also not disclosed.
 44. In her response dated 27th December, 2017 which has also been extensively quoted verbatim in an earlier part of this judgment, the Claimant sought further and better particulars of the charges and the evidence gathered against her.
 45. During the hearing of this cause in court the Claimant testified that the particulars sought were never supplied to her.
 46. The letter inviting the Claimant to the hearing dated 3rd January, 2018 reiterated that the Claimant was accused of receiving Kshs.214,700.00 from undisclosed contractor. However, during the hearing, as per the record of the proceedings availed by the Respondent in court, the figure kept on changing from Kshs.214,700.00 to Kshs.204,700.00, to Kshs.149,300.00 to 'about' 150,000.00 and so on and so forth.
 47. As concluded and held by this court in respect of substantive fairness, this court is unable to agree with the Respondent that the Claimant was subjected to procedural fairness. Where there is no reason or evidence to hold a disciplinary hearing the hearing held is of no consequence as the same is based on non-existent foundation.
 48. It is the view and holding of this court that the Claimant was denied procedural fairness for the reasons(s) that there was no reasonable cause for the disciplinary hearing, the charges against her were not communicated to her with the clarity, precision, and specificity required, no evidence was availed to her even after she requested for the same in her response, and no evidence was adduced against her during the hearing to support the alleged charges.



49. Disciplinary hearings are not court trials where strict rules and rules of procedure apply in adduction and presentation of evidence. However, in the very minimum, such disciplinary hearings are expected to adhere by the rules of natural justice as expressed in the guideline ingredients set out above in this judgment.
50. The importance of both substantive and procedural fairness has been expressed by this court (ELRC) in many a decision including *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
51. In conclusion this court finds and holds that the Respondent denied the Claimant both substantive and procedural fairness and hence the termination was unfair and unlawful.

VI. RELIEFS

52. The reliefs sought by the Claimant have been set out verbatim in part I of this judgment and this court shall now proceed to examine each prayer as hereunder.
53. Prayer 1 is for a declaration that the termination of the claimant by the Respondent was unlawful, discriminative, and a violation of the fundamental rights of the Claimant.
54. This court has already found that the termination was unlawful for lack of substantive and procedural fairness. Since no damages or compensation has been sought in respect of the discrimination and violation of the Claimant's fundamental rights this court shall not delve into that aspect.
55. However, this court must state that the unlawful termination is of its self a violation of Claimant's right to Fair Labour Practices under Article 41 of *the Constitution* and rights to own property under Article 40 of *the Constitution* (in the wider perspective that the employee's earnings are indeed property).
56. Further, the manner in which the Respondent intruded into the private affairs of the Claimant in respect of her private love life violated her dignity under Article 28, Freedom of Association under Article 36, and privacy under Article 31.
57. While employers have a right to manage the conduct of their employees at work, the employers must equally be careful not to infringe and or violate the rights of such employees in their private or public lives. Employers who violate such rights may be liable in damages if action is filed based on such violations, infringement, or threats to such rights and fundamental freedoms. I say no more on this issue.
58. Prayer 2 is for maximum compensation for wrongful and unlawful termination under Section 49(c) of the Act. The Claimant is asking for 12 months gross salary (Kshs.196,518.57 X 12 = 2,358,222.84).
59. The Claimant has not prayed for re-instatement or re-engagement.
60. It is by now clear from the foregoing that there was no reasonable cause for the Respondent to terminate the Claimant. The Claimant was denied both substantive and procedural fairness.
61. The evidence on record is that as at the time of termination the Claimant had worked for the Respondent for about seven (7) years having been employed in 2011 and terminated in 2018.
62. The Claimant testified that she has not found another job yet. The records of employment produced in court, including the letter of employment and her national identity card indicate that the Claimant was born on 28th December, 1978 and was hence 40 years of age when she was unlawfully terminated. This



implies that the Claimant would have worked for another 20 years were she to retire at the maximum age of 60 years.

63. This court has not received any evidence to suggest that the Claimant contributed to her termination in any way.
64. Considering all the circumstances as set out above and the factors set out in Section 49(4) of the Act it is the considered view of this court that this is a proper case for the award of the maximum compensation of 12 months gross salary, that is Kshs.196,518.57 X 12 months = Kshs.2,358,222.84. This amount is subject to statutory deductions as per Section 49(2) of the Act.
65. Prayer 3 is for a certificate of service under Section 51 of the Act. There is no reason whatsoever why the same should be denied to the Claimant or withheld by the Respondent. Since the termination has already been found to have been unfair and unlawful the Respondent is ordered to unconditionally issue and deliver the same within 30 days of this judgment.

VII. Costs

66. Costs follow event and the Respondent is condemned to pay the costs of this cause to the Claimant.

VIII. Gratitude

67. This court thanks Counsel for both parties, Mr. Oumo for Claimant and Ms Abobo for the Respondent for the work and effort put in conducting this matter. Your able submissions have been considered and appreciated and they added value to this judgment.

IX. Disposal

68. The final orders of this court are as follows:-
 - (a) A declaration be and is hereby issued, that the termination of the Claimant by the Respondent was unfair and unlawful for lack of both substantive and procedural fairness.
 - (b) The Claimant is awarded a sum of Kshs.2,358,222.84 being compensation for unfair and unlawful termination.
 - (c) The Respondent is ordered to unconditionally issue and deliver a certificate of service to the Claimant within 30 days of this judgment.
 - (d) The Claimant is awarded costs of this cause.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 20TH DAY OF MAY, 2022.

.....
DAVID NDERITU
JUDGE

