



**Birgen v Eldoret Water and Sanitation Co. Ltd (Cause 26 of 2020)
[2022] KEELRC 1173 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1173 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 26 OF 2020
NJ ABUODHA, J
MAY 9, 2022**

BETWEEN

MIRIAM CHOGE BIRGEN CLAIMANT

AND

ELDORET WATER AND SANITATION CO. LTD DEFENDANT

JUDGMENT

1. By the amended memorandum of claim filed on March 4, 2020 the claimant alleged among other that she was engaged by the respondent through a letter dated May 16, 2016 as a Human Resource Administration Manager.
2. The remuneration pegged to the said position was a consolidated sum of Ksh.199,651/72 inclusive of allowances. According to the claimants she served the respondent diligently and with dedication. However, on April 20, 2020 the respondent caused her to be issued with a show cause letter based on allegations among others that:
 - (a) It had been reported to the Managing Director's office that while undertaking her private affairs at Eldoret Club on 15th February, 2020 she was drunk, disorderly, used abusive language and conducted herself indecently.
 - (b) The same caused an embarrassment to the patrons and members of the public who were present at the time.
 - (c) The said allegations bordered on gross misconduct. She was required to show cause why action should not be taken against her on the charges within 7 days from the date of the letter.
3. The claimant responded to the show cause letter on April 24, 2020 stating among others that:



- (a) Confirming that on the said date she was at Eldoret Club having been officially identified by the respondent to represent it during the “Lady Captain” Tournament which was being sponsored by it;
 - (b) She had been included in part of the program which she conducted and discharged her mandate in a professional manner to conclusion;
 - (c) She recalled that on the 17th February, 2020 during the morning hours the respondent’s Managing Director had called her to inform her that H.E. the Governor Hon. Jackson Mandago had called to complain about a conversation between her referred to as a “junior” staff at the Club which she explained;
 - (d) The official trip to Sweden she was meant to go for had been cancelled;
 - (e) She was not an official member of Eldoret Club and could not have been conducting private affairs as alleged and the Club reserved the right to raise an official complaint in case of such behavior;
 - (f) She confirmed that at no point was she drunk and disorderly, she neither used abusive language against anyone nor behave in an indecent manner as alleged.
4. The respondent subsequently issued the claimant with a suspension letter making reference to the allegations against her in the show cause letter and further stating that the claimant being a public officer was in contravention of section 20(1) of the *Public Officers Ethics Act*.
 5. The claimant averred that the suspension from employment was unfair and unlawful.
 6. The claimant further averred that by a ruling of the Court on her interlocutory Motion on August 3, 2020 it was found in her favour and her suspension set aside. The respondent on August 26, 2020 wrote to the claimant lifting the suspension and directed her to perform her core responsibilities and that her withheld salary would be refunded in the next payroll.
 7. On December 16, 2020 the claimant received a handwritten note from the Managing Director asking her to attend a meeting on December 22, 2020 at 8:30 am. The claimant attended the meeting before the chairman of the Finance and Administration Committee at the special meeting on the December 22, 2020 and during the meeting the said chairperson asked the claimant to inform her about the events of the February 15, 2020 at Eldoret Club.
 8. The claimant inquired whether it was disciplinary hearing and was informed that it was an informal inquiry session over the events of February 15, 2020 at Eldoret Club.
 9. According to the claimant, after a brief discussion with the Chairperson, she left and returned to her duties. On January 25, 2021, while in the course of discharging her duties the respondent gave her a letter dated January 19, 2021 signed by its Managing Director terminating her employment. The claimant averred that the termination from employment was unfair and unlawful for reasons among others that the claimant did not commit any disciplinary offence documented in section G2 of the respondent’s Human Resource Policy and Procedure Manual and that the respondent breached the principles of fair administrative action embodied in article 47 of the Constitution and *Fair Administrative Action Act*.
 10. The claimant therefore sought a declaration that her termination from employment was unfair and unlawful and further sought damages and compensation for unlawful termination of service.
 11. The respondent in response to the claim pleaded among others that.



- (a) On 20th April, 2020 the Claimant was issued with a letter requiring her to show cause why disciplinary action should not be taken against her following a report that had been made to the office of the respondent's Managing Director against the Claimant's conduct.
- (b) It had been reported that on the 15th February, 2020, the claimant while at Eldoret Club was drunk, disorderly, used abusive language and conducted herself indecently.
- (c) The above actions by the claimant amounted to gross misconduct which was clearly done in contravention to Clause 10(ii)c and f, of the Claimant's letter of appointment, Section G of the Respondent's Human Resource Policy & Procedure Manual, terms & Conditions of Service, March, 2017, Section 20(1) of the *Public Officer Ethics Act*, the Leadership and Integrity Act and Chapter 6 of *the Constitution* of Kenya.
- (d) The claimant was given seven (7) days within which to respond to the show cause letter.
- (e) On 24th April, 2020 the claimant responded to the show cause letter whereby she expressly admitted her presence at the Eldoret Club on February 15, 2020, but denied being drunk and disorderly, and using abusive language, or having behaved in an indecent manner as alleged in the show cause letter.
- (f) The respondent considered the claimant's response to the show cause letter and found the explanations herein to be unsatisfactory and consequently suspended the claimant from duty via a letter dated May 8, 2020, so as to pave way for effective and efficient investigations noting the managerial position that the claimant held with the respondent. The suspension was done in line with the provision of clause G.4 of the Respondent's Human Resource Policy and Procedural Manual, 2017.
- (g) That the claimant facilitated a company sponsored ladies Golf Tournament which was held at Eldoret Club.
- (h) In the course of the event, the claimant became drunk and disorderly, used abusive language against the patrons and conducted herself indecently.
- (i) The respondent through its managing Director's office received complaints in respect of the claimant's conduct, which was done by the claimant while in the course of executing official duties outside office premises.
- (j) The said conduct by the claimant amounted to gross misconduct that would justify summary dismissal of an employee for lawful cause of provided under Section 44(3)(b)&(d).
- (k) Suspension from work/duty is part of the Respondent's disciplinary process specifically on allegations or accusations of gross misconduct warranting summary dismissal and thus the claimant's suspension was not in any way unlawful, unfair or actuated by malice and or ill-will.
- (l) It was imperative for the claimant to be kept away from the work place so as to facilitate objective investigations considering the claimant's seniority in the organisation. Some of the informants in the investigation were individuals who ordinarily would report to the claimant and thus the possibility of being easily intimidated from offering the requisite information necessary to determine the culpability or otherwise of the claimant.
- (m) The claimant filed this claim together with an interlocutory application dated May 20, 2020, seeking among other orders that:



- i. The suspension letter of May 8, 2020 be set aside and the claimant does resume work as usual with full pay and all other benefits attached to her position pending hearing and determination of the said application and the claim; and
 - ii. An interlocutory injunction do issue against the Respondent to restrain it from conducting any intended investigations or continuing with the same as against the claimant as communicated in the letter dated May 8, 2020, pending hearing and determination of the application and the claim.
- (n) The said application was considered by Court through written submissions filed by counsels for both parties, and delivered its Ruling on August 3, 2020, in which it set aside the letter of suspension dated May 8, 2020 pending hearing and determination of the main suit.
 - (o) In obedience of the Court Order, the Respondent lifted the Claimant's suspension through a letter dated August 26, 2020, whereby the claimant was required to resume her duties with effect from September 1, 2020, and all her withheld salaries during the suspension period would be refunded in the next payroll cycle. The respondent ensured full compliance.
 - (p) Being that the prayer for injunction to stop the ongoing investigation as against the claimant was not granted by Court, the Respondent continued with the same to conclusion and the claimant was invited to a disciplinary hearing.
 - (q) The respondent's Managing Director verbally informed the claimant of an intended disciplinary hearing slated for December 22, 2020, which was to be conducted during a Special Meeting of the Finance and Administration Committee which also doubles up as the Disciplinary Committee of the respondent.
 - (r) The meeting was held as scheduled with the claimant in attendance. The claimant was given an opportunity to present her case upon her being informed of the charges that had been leveled against her in respect of the events of February 15, 2020, at the Eldoret Club.
 - (s) The committee, upon concluding the disciplinary hearing, made recommendations to the Board of Directors of the Respondent (the Board) for further deliberations. The Board upon due deliberations and consideration resolved that the claimant be dismissed on grounds of gross misconduct pursuant to Section G of the respondent's Human Resource Policy and Procedural Manual, 2017.
 - (t) The final decision of terminating the claimant's employment was duly communicated to the claimant on January 19, 2021.
12. In her oral evidence in Court, the claimant stated that she used to work for the respondent as Human Resource Manager and that she recorded her statement on March 3, 2021 which she adopted as her evidence in chief.
13. According to her, after the Court lifted the suspension, she worked well until she was terminated in January, 2021. In her view the procedure followed was unfair. She had requested to go for a training in December, 2020 and received a reply on a sticky note requesting her to attend a special Board Meeting on Finance and Administration. There was no official communication that it was a disciplinary meeting. She was therefore surprised when she was told it was one and if she came with a witness. She informed the meeting she had no such information.



14. According to her, the chair asked her what transpired at Eldoret Club on February 15, 2020 and she explained and thereafter asked to leave and would be communicated to. On 19th January, 2021 she was issued with a termination letter.
15. In cross-examination she stated that she had worked for about four and a half years. She further stated that she was issued with a show cause letter and that she responded to the same. It was further her evidence that she would attend Finance and Administration meeting when called upon to present Human Resource matters. This was usually communicated early enough to enable her prepare. According to her no earlier memo had been issued. It was just a stick note. When she attended the meeting, she was told it was a disciplinary hearing. She never asked for more time because she received no prior communication about it.
16. About the Eldoret Club incident she stated that they were several colleagues at the event and that the event ended around 1.00am and that she left the club around that time. When shown the minutes, she stated that she had no earlier notice of the minutes and that she never apologized as the minutes purported. Her apology was over running late. She came in the morning and left for a funeral that was the reason she was late.
17. It was further her evidence that staff with disciplinary cases were given fourteen days to ensure they received their letters and were informed to come with a person of their choice at the meeting.
18. The claimant's second witness Mr. John Maina stated that he worked for the respondent as customer service clerk and that he wrote witness statement on May 20, 2020 which he adopted as his evidence in chief.
19. It was his evidence that on February 15, 2020 there was an event at Eldoret Club which the respondent sponsored. As a customer care officer, he was present. In the evening there were presentations and later there was supper. People were thereafter free to leave at pleasure. After supper people were enjoying themselves and some stayed up to 3.00am. He later came to realize that there was an allegation that the claimant was drunk and disorderly. He never saw that. According to him the claimant left in her vehicle and that he was among the last to leave the club.
20. In cross-examination he stated that he had worked for the respondent for twenty nine years. It was further his evidence that the claimant was at the club in the morning but left and came back later.
21. The function ended at 6.00pm then there was supper and people were offered drinks and were dancing. As a customer care officer, he just watched and that he did not drink.
22. According to him he learnt of the allegations against the claimant when she got suspended.
23. The respondent's witness Ms. Jane Tanui stated that she worked for the respondent and that she was a member and Chair of Finance Committee. She also sat in the respondent's Board of Directors. She adopted her witness statement which she wrote on July 26, 2021 as her evidence in chief. She also relied on the list of documents which she filed on June 9, 2021.
24. It was her evidence that on February 15, 2020 there was a golf tournament at Eldoret Club. She was the host as the Lady Captain. The respondent sponsored the tournament and the staff came to facilitate the event. She played and finished around 2.00pm. she then started to coordinate the evening event. At around 7.00pm the presentations started. The respondent's Managing Director was there. Speeches and presentations were done and after that the sponsor invited golfers and guest to dinner. After dinner guests were to leave at their pleasure and that most people left after dinner.



25. It was Ms. Tanui's evidence that the claimant was present throughout the event. After dinner she (Ms. Tanui) left and did not know what happened after that. It was her evidence that the respondent received a letter from County Public Service Board about disorderly conduct at the club. It was that the claimant was drunk and used abusive words. She however could not confirm the incident. According to her, the official event ended at 10.00 pm but the allegation took place around 2.00 am.
26. Concerning termination, it was her evidence that due process was followed. The claimant was suspended, a special committee was constituted to investigate the issue. The Court lifted the suspension and the claimant resumed duties but the investigations continued. The claimant was called before the Finance and Administration Committee and presented her case. She admitted the allegations and asked for forgiveness.
27. According to Ms. Tanui the Committee recommended either transfer to another department or summary dismissal. It was her evidence that she sat in the full Board and the Board recommended summary dismissal.
28. In cross-examination she stated her statement was conclusive of what she came to testify. According to her a report was received from the County Public Service Board Chairman and further that there were Senior County Officials when the incident took place. She however could not remember the names of the County Public Service Board Officials. Present also were the Management of the Golf Club. The Governor was also present. These people were not called as witnesses in the case. It was further her evidence that the incident took place after the official closure of the event and further that there was no formal complaint from Eldoret club over the incident.
29. Ms. Tanui further stated that the show cause letter did not mention suspension and that the claimant responded to the show cause letter and denied the allegations. She further stated that she was not involved in the disciplinary process. It was an operational issue. She further stated that she was before the Court to represent the Board and that the letter inviting the claimant to the disciplinary hearing was not before the Court. The claimant was in attendance before the Finance and Administration Committee and that she was not required to sign the minutes.
30. Regarding the complaint from the County Public Service Board, it was her evidence that the same was presented before the Finance and Administration Committee but was not before the Court.
31. In re-examination she stated that she was present at the disciplinary Committee meeting of December 22, 2020.
32. In a claim for unfair termination of employment or wrongful dismissal, the burden of proof that such termination is unfair or dismissal wrongful is on the employee while the responsibility to justify the reason or reasons for dismissal or termination is on the employer.
33. Secondly, even if the employer proves or justifies the reasons for termination or dismissal, it must in addition show that before the dismissal or termination was carried out, the employee was subjected to fair administrative process. That is to say, the employee must be called upon to show cause why disciplinary action should not be taken against him or her and heard before disciplinary panel upon reasonable notice.
34. It was common ground that on February 15, 2020 the respondent sponsored a Golf Tournament at Eldoret Club and that the claimant was among the staff that were involved in facilitating and overseeing the event.
35. It was further common ground that after the golf tournament at around 6.00pm, there were speeches and presentations and thereafter guests were invited to dinner. There was drinking and dancing



- however guests were free to leave at their pleasure after dinner. There was common evidence by both the claimant and respondent that the formal event ended at around 10.00pm however guests stayed on, some as late as 2.00 am when the alleged incident took place.
36. According to the claimant she left Eldoret Club around 1.00am. her witness, Mr. John Maina, informed the Court that the claimant left in her vehicle and that he was among the last people to leave the venue.
 37. The respondent's witness Ms. Jane Tanui stated that she was at the venue and that the event was her's being the Lady Captain and that the respondent was the sponsor.
 38. It was further her evidence that the claimant was present throughout the event but that she (Tanui) left after dinner and did not know what happened after that. She however informed the Court that the respondent received a letter from the County Public Service Board accusing the claimant of the allegations that eventually led to her dismissal from employment. Whereas Ms. Tanui stated that the letter in issue from the County Public Service Board was before the disciplinary Committee, it was however not produced before the Court for perusal.
 39. The Court however noted from Ms. Tanui's evidence that the letter alleged that the claimant at the material time became drunk and disorderly and used abusive language towards guests. Ms. Tanui further stated that those present at the time of the incident occurred were Senior County Officials, members of the County Public Service Board and the Governor of Uasin Gishu. None of these people Ms. Tanui conceded, were called as witnesses either before the disciplinary Committee or before the Court.
 40. As was noted in the Court's ruling delivered on August 3, 2020 setting aside the claimant's suspension, the events subject matter of this suit took place away from her place of work while she was conducting her private affairs. These alleged events were however considered by the respondent to be inconsistent with the Senior Office the claimant held in the respondent hence in their view brought the respondent as an organisation to embarrassment and disrepute.
 41. The Court further noted earlier in the judgment that the events the claimant was accused to have been involved in that led to her dismissal were alleged to have taken place quite late mostly estimated to be at around 2.00 am. It was further common ground that at the event, guests, were treated to food and alcoholic drinks. It is therefore reasonable to presume that any person awake and was at the event at that wee hour of the morning and imbibing drinks could not be said to be sober enough to make a reasonable and objective assessment of events and issues. Even if this were possible, which the Court doubts, it was the more reason why the respondent should have brought forward the claimant's accusers to accord her an opportunity to cross-examine them.
 42. It was not enough for the respondent to receive an unspecified complaint from the County Public Service Board and confront the claimant with it to defend herself. It is noteworthy that the respondent's witness Ms. Jane Tanui stated that those present when the alleged incident took place included members of the County Public Service Board that ended up accusing her. The Court further noted that the allegations against the claimant by the County Public Service Board although allegedly produced before the disciplinary committee was never produced before the Court for perusal.
 43. As observed earlier, section 47(5) of the *Employment Act* places the burden of proof or justification of the grounds for the termination of employment or dismissal on the employer. Section 43(2) further provides that the reasons for termination of a contract of employment 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 service of the employee.



44. From the analysis of the evidence and facts presented to the Court by the respondent and considering their only witness Ms. Jane Tanui told the Court that these events took place after she left hence, she could neither confirm nor vouch for them, it is difficult to tell on what basis the respondent genuinely believed these events to have occurred to become the basis for terminating the claimant's service.
45. To this extent, the Court finds and holds that the respondent has failed to discharge the burden cast upon it by Section 47(5) of the *Employment Act* hence there existed no justification and or valid reason for terminating the claimant's service.
46. Regarding the procedure followed in terminating the claimant's service, the Court having found that there existed no justifiable reason for terminating the claimant's service, will not dwell much on this. However, it is important to note that although the claimant was issued with a show cause letter to which she respondent, no satisfactory evidence was tabled before the Court to demonstrate that the claimant was properly invited for a disciplinary hearing and informed of her right to attend with a witness. The sticky note sent to the claimant attached to her letter seeking approval to attend a training was not a proper letter of invitation to a disciplinary hearing.
47. The respondent is a public body hence bound by the principles of public service stipulated under article 232 of *the Constitution* and Public Service Act. Under section 69(4)(a) of the Public Service Act, no penalty shall be imposed against a public officer unless the officer has been notified in writing of the particulars of the misconduct as preferred including the applicable provision of *the constitution*, legislation or code of conduct allege to have been breached.
48. Further under subsection 4(b), the officer has to be given a reasonable opportunity to respond to the allegations and subsection 4(c), the allegations have been investigated by a public officer senior to the officer subject to the proceedings or by any other lawful authority and the findings are such that the public officer has committed the misconduct alleged.
49. No material or evidence was tabled before the Court to show the respondent complied with these clear provisions of the Public Service Act as well as section 41(2) of the *Employment Act*. On this score as well, the court finds and holds that the respondent did not accord the claimant procedural fairness while terminating her service.
50. Termination of employment is a significant event in an employee's life. Considering that most of employee's time is spent serving the employer in return for salary or wages. An employee's life therefore rotates around his or her employment. Loss of employment thus has serious ramifications including loss of income and status and the onset of demands by creditors for repayment of loans and facilities enjoyed while in employment. This is the reason why the *Employment Act* and Public Service Act in the case of public servants, provide an elaborate framework which needs to be observed before termination or dismissal of an employee.
51. The claimant herein was dismissed from respondents service on allegations by third parties outside her employment. She was accused of drunken and disorderly conduct by these third parties who as the Court observed earlier, considering the time the alleged incident took place, may have been compromised in their objective assessment of the situation and issues.
52. The respondent chose to believe them and without calling them as witness either at the impugned disciplinary hearing or before the Court, went ahead and dismissed the claimant based on their allegations against her without allowing her the benefit of cross-examining them to test the veracity or otherwise of their allegations.



53. Considering where, the circumstances and the time of the alleged incident, it is behoved the respondent to proceed carefully on the allegations and could have called the claimant's accusers at least to the disciplinary hearing to avail the claimant an opportunity to cross-examine them; this did not happen. In the circumstances the Court is persuaded that this is a proper case to award the maximum twelve months salary as compensation for unfair termination of service.
54. In conclusion the Court awards the claimant as follows:
- KSH.
- a. One month's salary in lieu of notice of termination of contracts 199,651/72
 - b. Twelve months salary as compensation for unfair termination of service 2,395,820.64
2,595,472.36
 - c. Costs of the suit.
 - d. Items (a) and (b) shall be subject to taxes and statutory deductions.
 - e. The respondent shall further issue the claimant with a certificate of service.
55. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

