



**Bett v Lake Victoria North Water Services Board (Cause
59 of 2018) [2022] KEELRC 1094 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1094 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 59 OF 2018**

CN BAARI, J

JUNE 9, 2022

BETWEEN

PETER KIPLAGAT BETT CLAIMANT

AND

LAKE VICTORIA NORTH WATER SERVICES BOARD RESPONDENT

JUDGMENT

1. The Claimant lodged this suit vide a Statement of Claim dated 16th January, 2018 and filed in court on 9th March, 2018. The Claimant prays for unconditional reinstatement without loss of benefits, compensation for the time lost when out of employment or in the alternative, compensation for unfair, unlawful and wrongful termination from employment, the attendant benefits and the costs of the suit.
2. The Respondent entered appearance through the Firm of B. O. Akango & Advocates on 12th April, 2018, and subsequently filed a Response to the Claimant's claim dated 25th April, 2018 and filed on 26th April, 2018.
3. The Claimant testified during the hearing in support of his case. He adopted his witness statement dated 16th January, 2018, and produced his bundle of documents as exhibits in the matter.
4. The Respondent presented Ms. Elizabeth Kiasyo, her corporation Secretary and Ms. Jackline Wanjala, to testify on her behalf. The two witnesses adopted their respective witness statements and produced documents filed in the matter in support of the Respondent's case.
5. Both parties filed submissions in the matter.



The Claimant's Case

6. The Claimant states that he was first employed as a Supplies Officer at National Water and Pipeline Corporation on 3rd October, 1997. It is his case that he was later deployed to the Respondent as the procurement manager on 3rd February, 2005.
7. The Claimant states that around 27th March, 2017, he was issued with a letter to show cause why disciplinary action should not be taken against him for allegedly failing to provide an Evaluation Report for Consultancy Services for Ellegrini Water supply and a National Construction Authority (NCA) certificate for Chesikaki Contractors. The Claimant states that the show cause further alleged that he lied to the Respondent's Board Audit and Risk Committee that the evaluation report was ready, but when asked to submit the report, he submitted a different report.
8. The Claimant states that he responded to the show cause letter, wherein, he explained that he instructed his junior staff to supply the report to the internal auditors, but they supplied the wrong report, and when he discovered, he immediately availed the correct report to the Auditors.
9. The Claimant states that he appeared before the Respondent's Board of Directors for the disciplinary hearing on 24th May, 2017 and explained the circumstances under which the internal auditors were given wrong reports.
10. It is the Claimant's case that there were various reports for consultancy services provided by Ellegrini water Supply, and that they were all procured above board and approved by the World Bank.
11. The Claimant states that he explained to the Board during the hearing that he was asked to avail the NCA certificate for Chesikaki Contractors and that he did avail the report even though that it was not his duty to confirm if contractors had valid certificates, but that of the Evaluation Committee.
12. It is the Claimant's further case that on 25th May, 2017, he was issued with an interdiction letter for allegedly failing to respond to the show cause letter within the stipulated time, dishonesty and failure to avail the NCA certificate to the internal auditors.
13. The Claimant states that he was thereafter on 21st July, 2017, issued with a letter of summary dismissal on the basis that he failed to respond to the show cause letter within the duration provided.
14. It is the Claimant's case that the Respondent in terminating his services, flouted *the Constitution* and the *Employment Act*, having fully responded to issues subject of the show cause letter.
15. On cross examination, the Claimant stated that he delivered his response to the show cause letter on 6th April, 2017, and handed it to one Jackline Wanjala.
16. The Claimant confirmed on cross-examination that he failed to attend a meeting held on 4th April, 2017, and further states that the Respondent's Managing Director was aware that he was absent from office on the day of the meeting and hence had been excused from the meeting.
17. The Claimant confirmed on cross exam that the Respondent had an evaluation committee in place and that he was the Secretary to the committee by virtue of his position as the Procurement Manager. The Claimant further confirmed that as the procurement manager, tenders are received at his office, but that he does not do pre-evaluation, instead, tenders are submitted to the evaluation committee which does the evaluation.
18. The Claimant states that he is not aware and did no inquire whether the Respondent had an appeal procedure in place at the time of his dismissal.



The Respondent's Case

19. The Respondent states that the Claimant was dismissed from service for failure to cooperate with the audit team, and failure to avail documents that were required in the audit exercise that the Respondent was undertaking.
20. The Respondent further states that the Claimant failed to attend a finance committee meeting or send a representative, which action made it difficult for the Board to transact its business. The Respondent further states that the Claimant was negligent in his duties for failing to properly guide the Respondent's committee on evaluation, leading to a tender being awarded to a non-compliant tenderer.
21. The Respondent further states that although it issued the Claimant with a show cause letter on the charges against him, he failed and/or neglected to respond to the charges within the time stipulated in the letter. It is the Respondent's case that the Claimant responded to the show cause letter two months later and even tried to influence the secretary who received the letter to back date the stamp to show that the letter was received earlier than it actually was.
22. It is the Respondent's case that the Claimant had earlier on been interdicted in the year 2015, which interdiction resulted in him being issued with a warning letter dated 14th October, 2016. The Respondent states that the Claimant denied having had disciplinary issues before the disciplinary hearing, but later admitted receipt of the warning letter.
23. The Respondent states that the termination of the Claimant was legal, justified and in compliance with her Human Resource and Procedure Manual and the laws of the land. The Respondent further states that the Claimant was accorded a fair disciplinary process before the decision to terminate his services was arrived at.
24. It is the Respondent's case that the Claimant's response to the show cause letter was not satisfactory as it did not proffer any rational and convincing explanation on the audit concerning the procurement of consultancy services for Ellegrini water supply project and the NCA certificate for Chesikaki contractors.
25. The Respondent states that the Claimant in his response to the show cause letter did not sufficiently explain breaches arising from his department, where internal auditors were given wrong documents, a fact that the Claimant admitted in his statement of claim.
26. It is the Respondent's case that the Claimant was summarily dismissed under Section 44 of the [Employment Act](#), 2007, which does not require issuance of notice or warning letters. The Respondent further avers that the claimant's dismissal was within the law and the terms of the Claimant's contract of service.
27. The Respondent prays that the claimant's suit be dismissed with costs.

The Claimant's Submissions

28. It is submitted that the Claimant was unlawfully and unfairly dismissed as he was not given an opportunity to respond to the results of the investigation carried upon his interdiction. It is submitted that the immediately the Claimant was interdicted, the interdiction was followed by a letter of summary dismissal as opposed to an investigation of the matters subject of the interdiction and if an investigation ever happened, the results were not made available to the Claimant. The Claimant had



reliance in the holding in *Fredrick Saundu v Principal Namanga Mixed secondary School & 2 Others* to support this position.

29. It is further submitted for the Claimant that his dismissal from the service of the Respondent is unfair for reason that the grounds upon which the dismissal is premised are not those that were raised in the letter of show cause, which letter the Claimant responded to. The Claimant sought to rely in the holding in *Daniel Mutuku Njuguna v Kenya Institute of Mass Communication* [2021]eKLR
30. It is submitted for the Claimant that the Respondent did not call any witness(es) to substantiate the allegations levelled against the Claimant or produce evidence to show that the reasons for the Claimant's dismissal were valid and justified. They sought to rely on the case of *Obonyo O. Waringa & 3 Others v New Kenya Co-operative Creameries Limited* [2015]eKLR.

The Respondent's Submissions

31. The Respondent submitted that it has on a balance of probability proved that the reasons for the Claimant's dismissal are valid reasons. The Respondent submits that it had reasonable grounds for concluding that the Claimant had improperly performed the work that was his duty to perform carefully and properly contrary to their human resources policy and procedure manual.
32. It is submitted for the Respondent that the Claimant was informed of the allegations levelled against him and accorded an opportunity to respond to the charges and appear before a disciplinary panel as required under Section 41 of the Employment. It is further submitted that the Claimant having been accorded due procedure was fairly and lawfully dismissed.
33. It is further submitted for the Respondent that the Claimant has failed to prove a case of unlawful termination against the Respondent and has not discharged the burden of proof and is thus not entitled to the reliefs sought.

Analysis and Determination

34. I have considered the pleadings herein, the witnesses' oral testimonies and the written submissions by both parties. The issues for determination are:
 - i. Whether the Claimant was unfairly dismissed
 - ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly dismissed

35. A determination of whether a dismissal is fair or wrongful, is depended on adherence or lack thereof by an employer of the twin requirements of procedure and substantive justification.
36. On the issue of procedural fairness, it is not disputed that the Claimant was issued with a show cause letter outlining the allegations levelled against him. The Claimant told the court that he did respond to the show cause letter, and even appeared before a disciplinary panel of the Respondent's Board to plead his case against the allegations.
37. The Respondent on their part, admitted having received the Claimant's response albeit late. The Respondent further told the court that the Claimant was invited to a disciplinary hearing where he made his oral representation.
38. Section 41 of the *Employment Act*, 2007, demands that an employer considering terminating/dismissing an employee, must explain to the employee, in a language the employee understands,



- the reason for which the employer is considering termination/dismissal, and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. This position was affirmed in the case of *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR where the Court held that the *Employment Act* has made it mandatory by virtue of Section 41 of the Act, for an employer to notify and hear any representations an employee may wish to make whenever termination/dismissal is contemplated by the employer and is entitled to have a representative present.
39. For an employer to meet the standard set in Section 41 of the *Employment Act*, the employer must ensure fair treatment of an employee, and avoid conduct that may be read as humiliating to an employee.
 40. It is not disputed that the Claimant was issued with a show cause letter, he responded to the show cause and has admitted appearing before the Respondent's disciplinary panel. The invitation to appear before the disciplinary panel informed the Claimant of his right to be accompanied by a representative of his choice during the hearing. This goes to confirm that the Claimant was afforded an opportunity to state his defence.
 41. This leads this court to the conclusion that the Respondent applied fair procedure in dismissing the Claimant, and I so hold.
 42. On the question of substantive justification, Sections 43, 45 and 47(5) of the *Employment Act* respectively, demand that an employer must prove the reasons for termination/dismissal, prove that the reasons are valid and fair and prove that the grounds are justified. This position was again affirmed in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR.
 43. Section 45 of the *Employment Act* states that no employer shall terminate the employment of an employee unfairly. To meet the threshold set under this section, the employer must prove both the validity and fairness of the reasons for dismissing the employee.
 44. It has widely been held that to determine validity of reasons for termination, it must be shown that the employer must believe at the time of termination, that the employee is guilty of the allegations against him and that the employer had reasonable grounds to sustain that believe.
 45. The Claimant was issued with a show cause letter detailing two grounds for which his termination was being considered. The show cause letter is dated 27th March, 2017. The Claimant responded to the show cause vide his letter dated 6th April, 2017, wherein, he admits having asked junior officers in his department to supply tender documents to the internal auditors then auditing the Respondent's processes and who supplied the wrong documents.
 46. The question for this court is whether the reasons upon which the Claimant's dismissal is premised are valid, fair and justifiable. In the case of *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR, it was held that the Court looks into the validity and justifiability of the reasons for termination.
 47. A look at the show cause letter spelling out the charges against the Claimant, and the Claimant's response to the show cause letter, shows that indeed the Claimant admitted to both charges and proceeded to explain why the auditors were given the wrong documents, as well as a confusion as to which file related to which contract/consultancy.
 48. The Claimant was the Respondent's procurement Manager, and it follows that he cannot blame his juniors for supplying auditors with the wrong documents, and likewise by virtue of his position, he knew or ought to have know the various tenders awarded by the entity, and should have been in a position to tell one file/contract from another. These are serious acts of neglect of duty



49. I agree with the Respondent that the explanation/response the Claimant gave to the allegations against him, was not satisfactory.
50. I find and hold the Claimant's dismissal was based on valid, fair and justified reasons hence the dismissal is not unfair.

Whether the Claimant is entitled to the remedies sought

51. The Claimant in his claim seeks unconditional reinstatement without loss of benefits, compensation for the time lost when out of employment or in the alternative, compensation for unfair, unlawful and wrongful termination from employment, the attendant benefits and the costs of the suit.
52. The reliefs sought are all tied to a finding of unfair dismissal. The dismissal of the Claimant has been held to be both procedurally and substantively fair. Consequently, I find and hold that the Claimant is not entitled to the remedies sought.
53. The upshot is that the Claimant's claim is dismissed with costs to the Respondent.
54. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF JUNE, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Mwangi h/b for Mr. Banda for the Claimant

N/A for the Respondent

Christine Omollo- C/A

