



**Ooro v Kenya Red Cross Society (Cause 59 of 2019)
[2022] KEELRC 106 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 106 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 59 OF 2019
CN BAARI, J
JUNE 9, 2022**

BETWEEN

JANE ADHIAMBO OORO CLAIMANT

AND

KENYA RED CROSS SOCIETY RESPONDENT

JUDGMENT

Introduction

1. This suit was lodged by way of a Statement of Claim dated July 20, 2020 and filed on August 13, 2020. The Claimant prays for Judgment against the Respondent for a total of Kshs. 4,064,650.00 comprising of unpaid leave, Acting allowance, termination dues, salary in lieu of notice, Audit review allowance, daily subsistence allowances and a certificate of service.
2. The Respondent entered appearance on September 14, 2020 and filed a Statement of Response on November 2, 2021 with the leave of the court.
3. The Claimant testified in support of her case, adopted her witness statement and produced a bundle of documents filed in the claim.
4. The Respondent presented three witnesses namely, Hellen Cheruto, Sandra Mukhana Mwala and Amos Mburi Muthiani to testify on her behalf. They adopted their witness statements and produced documents filed in the case in support of the Respondent's case.
5. The Respondent filed submissions. The Claimant did not.

The Claimant's Case

6. The Claimant's case is that she was appointed by the Respondent to the position of Project Officer vide a letter dated January 10, 2017, earning a monthly consolidated gross salary of Kshs. 77,000/= . She



- states that she accepted the appointment and was subsequently posted to HomaBay County to coordinate the Respondent's project in both HomaBay and Migori Counties.
7. The Claimant states that she served the Respondent as project officer for two years while at the same time acting as a County Coordinator for Homabay and Migori Counties. She avers that the Respondent later confirmed her to the position of county coordinator, but failed to pay her acting allowances for the period she served in acting appointment.
 8. It is the Claimant's case that she took her annual leave on January 2, 2019, and that while on leave, she fell ill and was admitted at Madiany Sub-County Hospital and was not discharged until 15th January, 2019.
 9. The Claimant states that the Respondent's Regional Manager appointed her replacement, one Kevin Ondieki, on the basis that she had absented herself from duty.
 10. It is the Claimant's further case that an audit report was conducted which indicated loss of iron sheet and cement from the Respondent's ware houses, but which report, was never availed to her for her interrogation and comment even after requesting for it.
 11. The Claimant states that she was issued with a show cause letter on February 13, 2019, to show why disciplinary action should not be taken against her, and which letter further invited her for a disciplinary hearing slated for the February 19, 2019.
 12. The Claimant states that her services were terminated on 31st May, 2019, without reason or justifiable cause. The Claimant further states that the reasons given for her termination were not sufficient to warrant termination.
 13. It is the Claimant's assertion that she was neither given termination notice nor paid in lieu thereof. She contends that she was not given a fair hearing as required under the *employment Act, the Constitution* and the Society's policy and procedure guidelines.
 14. It is the Claimant's case that she was on official leave at the time the goods were alleged to have been lost.
 15. It is the Claimant's further case that she worked overtime and that she was not compensated. She further states that she did not take her leave for the two years she served the Respondent and nor was she paid in lieu of her remaining leave days.
 16. The Claimant states that upon her termination, she was not paid her full terminal dues contrary to the provisions of the *employment Act*, 2007.
 17. The Claimant stated that she had two contracts of employment with the Respondent, one that ran between January to December, 2017, and the second one from January, 2018 to December, 2019. She further stated on cross-examination, that she did not file nor produce the second letter of contract before court. The Claimant further stated that she had two contracts of employment running concurrently.
 18. The Claimant clarified on cross exam that the contract that was terminated was the one for County Coordinator. She further stated that the contract for project officer was not terminated.
 19. It is the Claimant's case that although the donor funding the project she was employed under pooled out in March, 2018, and all employees in the project terminated, she was asked to remain behind and her salary continued to be paid from the Respondent's headquarters.
 20. The Claimant states that the termination and the show cause/disciplinary process were unrelated. She further states that the show cause was in relation to the Shelter project that was sponsored by



the National Government and the Respondent was a partner in the project and the Claimant was representing the Respondent in the project.

21. The Claimant states that the reason for her termination from the Shelter project was negligence; specifically, failure to maintain the integrity of the project, which allegations she denies.

The Respondents' Case

22. The Respondent's case is that she employed the Claimant as a project officer on a renewable contract of one year beginning January, 2017 to December 2017, and which contract was extended for a further three months ending in March, 2018.
23. The Respondent states that the Claimant at the end of her contract entered into a local arrangement with the County Government of Migori to act as a coordinator with effect from 1st April, 2018. The Respondent denies that the Claimant served in this latter position for a period of two years.
24. It is the Respondent's case that the Claimant left her place of work without obtaining the necessary approvals for leave from her superior, and cut off communication with her supervisors leaving her station unsupervised. The Respondent further states that although the Claimant unilaterally appointed a Mr. Peter Ossome to hold fort at the county branch, her appointee did not take up the assignment leaving the Respondent with no option but to appoint one Kevin Ondieki to act in the Claimant's position.
25. The Respondent states that the Claimant's allegations of having been ailing are not true as she never disclosed to her employer where she was hospitalized until much later.
26. The Respondent states that the Claimant was taken through a disciplinary process as required by the principles of natural justice. The Respondent further states that the Claimant was issued with a show cause letter on February 13, 2019, and subsequently, a disciplinary meeting was held on February 28, 2019, where the Claimant was presented with the allegations against her and allowed to defend herself, hence her allegations of summary dismissal are untrue.
27. It is the Respondent's case that the Claimant utilized a total of 32 leave days on various dates between March 12, 2018 to May 15, 2019. It is the Respondent's case that attempts to recall the Claimant back to work failed for reason that she was deliberately unavailable.
28. The Respondent states that she paid the Claimant all her terminal dues, and which dues were received through the Claimant's bank account held with Co-operative Bank of Kenya Limited.
29. On cross examination, the Respondent witness (RW1) told the court that the Claimant was terminated from the position of County Coordinator for Migori County for reason of fraud revealed by an internal audit conducted by the Respondent's internal audit department. She further told the court that the Claimant was paid her terminal dues
30. RW2, a Human Resources officer of the Respondent told the court that at the time the Claimant was terminated, she was serving as a County Coordinator, her earlier contract as project officer having lapsed in March, 2018. RW2 further stated that the Claimant's contract as county coordinator determined on 31/5/2019.
31. RW2 further told the court that the Claimant was terminated based on an audit report conducted by the Respondent's audit department. She states that she has seen the audit report but did not have it in court.



32. RW3 an internal Auditor of the Respondent, told the court that he conducted the audit in relation to the Claimant's case and which audit progressed from a normal audit to a forensic audit. He states that he did not share the audit report with the Claimant prior to the disciplinary hearing and that the audit report was not filled before court.
33. It is RW3's evidence that the audit showed that 14 beneficiaries of cement that was being distributed by the Respondent received 19 bags instead of the required 20 bags. He further stated that the list of the beneficiaries was not before court and did not form part of the audit report for reason of confidentiality.
34. The Respondent states that she does not owe the Claimant any money and prays that the claim be dismissed with costs.

The Respondent's Submissions

35. It is submitted that the Respondent had valid and fair reasons to dismiss the Claimant premised on the fact that she left her station unattended, therefore resulting in the beneficiaries of the Respondent's programme not receiving crucial construction materials.
36. It is submitted for the Respondent that the Respondent adhered to the tenets of procedural fairness having issued the Claimant with a show cause letter and thereafter, afforded her an opportunity to be heard in response to the allegations leveled against her. They sought to rely on the holding in the case of *R v National Land Commission & 2 others Ex-parte Arch. Diocese of Nairobi Registered Trustees* [2018] eKLR
37. The Respondent further submitted that the Claimant is not entitled to the remedies sought as she collected all her dues with the exception of her certificate of service which she has not bothered to collect.

Analysis and Determination

38. I have considered the pleadings, the witness' testimonies and the submissions filed by the Respondent. The issues for determination are as follows:
 - i. Whether the Claimant was an employee of the Respondent and if so, whether her contract was fairly terminated.
 - ii. Whether the Claimant is entitled to the remedies sought.

Whether the Claimant was an employee of the Respondent and if so, whether her contract was fairly terminated.

39. The Claimant's case is that she first came into the employ of the Respondent as a project officer vide a contract issued on January 10, 2017 and which lasted to March, 2018. The Claimant further told the court that during her term as project officer, she was assigned the position of County coordinator which she held in an acting capacity concurrently with her substantive position, until she was confirmed to the position upon the expiry of her contract as project officer.
40. The Respondent's position is that upon expiry of the Claimant's contract in March, 2018, the Claimant, then managing the Respondent's projects in HomaBay and Migori Counties, entered into a local arrangement with the Board members of Migori County-KRCS branch to act as a County Coordinator to their branch with effect from April 1, 2018. This to me, is an attempt by the Respondent to deny having engaged the Claimant after the expiry of her first contract in March, 2018,



as the Respondent's witnesses confirmed that indeed the Claimant was terminated from the service of the Respondent on May 31, 2019.

41. The Respondent could not terminate a person it had not employed and so therefore, this court agrees with the Claimant that she continued in the service of the Respondent as County Coordinator after the expiry of her initial contract as project officer. To this point, the court is convinced that the Claimant continued in the service of the Respondent after her initial contract expired.
42. I find and hold that the Claimant was an employee of the Respondent up until May 31, 2019, when she was terminated.
43. The next issue for this court to determine is whether or not the Claimant's termination was fair. The question of whether or not termination is fair, is depended on adherence or lack thereof by an employer of the twin requirements of procedure and substantive justification.
44. Section 41 of the *Employment Act* states as follows in regard to termination procedure:

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
45. Further, Section 4 of the *Fair Administrative Actions Act, 2015*, provided as follows in respect of termination procedure:
 - (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
 - 3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b) an opportunity to be heard and to make representations in that regard.”
46. It is not denied that the Respondent issued the Claimant with a show cause letter enumerating the various charges levelled against her. The Claimant admitted having responded to the show cause letter though the response was not produced before court. It is also not disputed that the Claimant was invited for a disciplinary hearing before she was issued with a termination letter.
47. The procedure adopted culminating in the Claimant's termination in my view, met the threshold stipulated under Sections 41 of the *Employment Act*, 2007 and Section 4 of the Fair Administrative Actions Act. The Respondent in my analysis, adhered to the principles of natural justice set out in the case of *Loice Otieno v Kenya Commercial Bank Limited* Cause No 1050 of 2011.
48. I find and hold that the procedure adopted by the Respondent in terminating the Claimant, met the procedural fairness test.



49. On the question of substantive justification, Sections 43, 45 and 47(5) of the *Employment Act* demands 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.
50. The Respondent's show cause letter dated February 13, 2019, to the Claimant, lists a total of five (5) charges against the Claimant, and subsequently invites her to the disciplinary hearing which the Claimant admitted attending on February 19, 2019.
51. The Claimant also confirmed on cross-examination that she responded to the show cause letter but did not present her response before court, and hence the court cannot tell what her response to the show cause was.
52. The audit report subject of the show cause letter was not produced before court. The Deputy County Commissioner vide his letter of February 14, 2019, confirmed that some beneficiaries of the cement subject of the disciplinary proceedings, allocated themselves more bags than they were entitled, and a general confusion and mishandling of the distribution process.
53. The Claimant's position is that she took her leave and while on leave, fell ill and hence did not resume duty on the day she was supposed to resume. The Claimant's failure to report her indisposition or take sick leave as required under the Respondent's human resources policy, was an act of negligence of duty as she denied the Respondent chance to assign another employee the work that she could not handle due to illness.
54. In my view, the Respondent had valid and justifiable reasons to terminate the Claimant based on the exposure arising from the Claimant's neglect of duty. 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.
55. I find and hold that the termination of the Claimant met the substantive fairness test, and hence her termination was not unfair.

Whether the Claimant is entitled to the remedies sought

56. The Claimant's claim is for unpaid leave, travelling and subsistence allowances, terminal dues, salary in lieu of notice, audit review and audit meeting allowances, transport allowances and reimbursement, per diems and coordinating meeting allowances, a certificate of service and costs of the suit.
57. The Respondent has not rebutted the Claimant's claim for the allowances. Nothing shows that the Claimant was paid the amounts claimed or evidence that the amount is not owed. The only prove of payment produced before this court relates to payment of pension, and which the Claimant did not claim.
58. The documents produced before this court show that the Claimant is owed per diem at Kshs.424,350.00/-, Hearing allowances of Kshs.49,800.00/-, Audit review Allowances of Kshs.8,950.00/-, Audit meeting allowances of Kshs.18,950.00/-, Transport costs of Kshs.2400.-00/- and allowances for coordinating meetings at Kshs.17,000.00/-.
59. The monies owed to the Claimant before her termination, is a benefit that had crystalized and cannot be lost for reason that she left the service of the Respondent. The Respondent ought to have fully paid the Claimant her dues at the time of her termination. The amounts herein are awarded as prayed.



60. The claims of acting allowances and unpaid leave was not proved as no evidence was adduced to show how much the acting allowance and the unpaid leave were or whether they were owed at all. The claims are dismissed.
61. In conclusion, Judgment is entered as follows:
- i. A declaration that the Claimant's termination is not unfair.
 - ii. That the Respondent shall pay the Claimant Kshs.531, 450.00/-
 - iii. The Respondent shall issue the Claimant with a certificate of service
 - iv. The claim having partially succeeded, the Claimant is awarded half the costs of the suit.
62. 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:

Mr. Oduol present for the Claimant

N/A for the Respondent.

Christine Omollo- C/A

