



**Kirui v Kenya Trade Network Agency (Cause 1429 of 2018)
[2022] KEELRC 4030 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4030 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1429 OF 2018
M MBARÚ, J
JULY 29, 2022**

BETWEEN

WILLY KIRUI CLAIMANT

AND

KENYA TRADE NETWORK AGENCY RESPONDENT

JUDGMENT

1. The claimant is a male adult. The respondent a state agency under the national treasury with mandate to facilitate cross border trade and establish, manage and implement the national electronic single window system.
2. On September 27, 2013 the respondent employed the claimant as the contact centre assistant.
3. On January 25, 2018 the claimant was issued with a notice to show cause on the grounds that on January 10, 2018 one of the respondent's clients had raised a complaint with regard to some alterations that had been done to its Kentrade It system account without the client's knowledge.
4. On January 30, 2018 the claimant was interdicted on the grounds that new and different charges were introduced. He was placed on half salary.
5. The respondent formed an investigations committee that was mandated to investigate the alleged abuse of IT system by the claimant. The committee confirmed that it could not authoritatively establish if the claimant was responsible for the actions that he was being accused of. The committee also confirmed that the respondent did not lose any monies and therefore the allegations of fraud and wilful misuse of the system remained unproved and in bad faith.
6. Despite the Committee findings, the respondent formed a disciplinary committee against the claimant which was manifestly unfair on the grounds that the clamant was not issued with any warning letter, the show cause notice of January 25, 2018 had different allegations from the one before the disciplinary



- committee, the claimant was not allowed to see the evidence submitted and failed to consider the investigations committee report and its decision that the allegations made had no basis.
7. The disciplinary committee also failed to appreciate the evidence used against the claimant and the fact that the mails system can only audit up to 180 days hence at that time could not show whether the claimant's email account was abused during the period which was under investigation. The system security officer's evidence was disregarded when he testified that the actions alleged to have been performed by the claimant may have been performed by another person who might have accessed the system either through the backend or other vulnerable means outside the organisation.
 8. The claim is also that the statement of the initial complainant Jenifer Mwende the user of t001978 exonerated the claimant which matter was overlooked by the disciplinary committee. There was no evidence in form of an email or records from the client in question which meant that no relationship existed between the claimant and the user of the account.
 9. The source of the complaint Charles Gichuri did not record a statement and all other companies whose accounts were affected did not record statements or lodge complaints with the respondent and the respondent failed to take into account some of the alleged irregular activities that took place when he was on leave and therefore it was not possible for him to access and manipulate the system as alleged.
 10. It was the duty of the respondent to ensure the IT system was devoid of any penetration and sabotage and to attribute the system lapses on the claimant was unfair and without justification.
 11. The decision to terminate employment was unfair and without justification. The claimant was not accorded the right of appeal and the disciplinary process was left incomplete.
 12. The claimant is seeking the following:
 - a. Payment of his full salary withheld during the period of interdiction for 7 months;
 - b. An order of reinstatement;
 - c. An order that there was discrimination against the claimant;
In the alternative,
 - d. compensation for wrongful termination of employment; and
 - e. Costs of the suit.
 13. The claimant testified that upon employment by the respondent he worked diligently until January 25, 2018 when he was issued with notice to show cause following complaints by clients that some alterations had been done to their Kentrade account without their knowledge. On January 30, 2018 the claimant was interdicted and for the next 7 months he was subjected to back and forth without the disciplinary matter being concluded against the set 6 months.
 14. The claimant testified that the respondent formed an investigations committee which cleared him on the allegations made and when he was invited to the disciplinary hearing, the respondent went on to ignore the evidence before it especially the fact that the alleged complainant one Jenifer Mwende exonerated him from any fault and other alleged clients with complaints did not make any statements. The respondent also failed to consider the fact that the subject emails where the claimant was alleged to have altered were not made available to the investigations team since these could not be available after the lapse of 180 days and some of the alleged accounts alterations took place while the claimant was on annual leave and he had no access to the system so as to make any alterations.



15. Between 5th July to July 25, 2018 the claimant requested for investigations report and witness statements but these were not supplied to him. He wrote to the respondent and made a request for these documents and only the investigations report was issued on he same day of the disciplinary hearing. This was prejudicial to his case.
16. Had the respondent considered all the evidence before it, it would have been apparent that the claimant was not to blame and was being victimised at the expense of the respondent failing to create a full-proof system that could not be accessed.
17. The claimant also testified that one senior member in the disciplinary committee one Helen Wasike intimated to the claimant that he should be looking for another job even before the disciplinary process was complete which was clear that the respondent was keen to do everything to terminate his employment even where there was nothing wrong.
18. The chairman of the disciplinary committee informed the claimant that they were not keen to follow the proper procedure and only interested in the facts before them with the goal to dismiss the claimant from his employment.
19. The disciplinary process was therefore just but a formality to justify the termination of employment. The statements, investigations reports were not supplied to the claimant until the eve of the hearing and which denied him a fair chance to interrogate and use in his defence which led to unfair termination of his employment.

Response

20. In response, the respondent's case is that the claimant was confirmed in the position of contact centre assistant on November 7, 2017 but on January 25, 2018 he was issued with notice to show cause after grossly violating his terms of contract. He was then issued with letter of interdiction to allow the respondent carry out investigations into alleged illegal transactions that compromised the accounts of other system users.
21. The respondent had received a complaint implicating the claimant in a scheme where his password gadm049 was used to create unauthorised accounts t001978, manipulate existing customer accounts, switch users, make unauthorised alteration and transaction on the respondent's platform without authorisation and facilitating illegal and applications for permits through the respondent business platform.
22. Investigations into the claimant's conduct was necessary because he facilitated unauthorised users to conduct transactions including applying for permits for KEBS, CD and UDFs while circumventing the process and this caused loss of business and was an affront to integrity and reputation to the respondent.
23. The claimant was taken through the disciplinary process which was fair and the claimant was allowed to call his witnesses. His claim is only meant to subvert the truth since he was not diligent. Upon investigations, it was established that the claimant had committed acts and omissions contrary to section 44 of the *Employment Act* read together with section 11.16.1(iii), (ix) and (xxii) of Ken Trade HR manual, Section 8(1) and (2) of the Code of Conduct and Ethic and the *Leadership and Integrity Act* which allowed the respondent to terminate his employment and the claims made should be dismissed with costs.
24. In evidence, the respondent called Edwin Wanyama Gero the manager and who testified that he has been in the ICT department of the respondent and attended the claimant's disciplinary hearing.



25. The claimant was designated as contact centre assistant with a username gdm049 and a password to access the tradenet system. For security and integrity of the system the respondent's ICT policy restricted sharing of credentials to allow tracing of action within the system as the same can be used to made unauthorised changes in the respondent's system. The system is configured to prompt the user whenever there are changes to the account and including when there is reset of password. The configurations are used to track activities like change of password in the system.
26. Following investigations evidence was obtained to the effect that the claimant's account gadm049 expired 5 times during this period which meant that the account was reset 5 times by either the claimant or someone he had shared his password with. There was no report to the ICT department with regard to suspicious activities or any abnormal activities to the claimant's user account which related to different companies and permits through user t001978.
27. There was a conclusion that the claimant was in breach of the respondent's ICT policy and procedures leading to termination of employment.
28. Wanyama also testified that in the disciplinary panel there was no one from the contact centre to establish the workings of the department. The complaint against the claimant related to a user who had created a document and upon analysis it was established the claimant had made alterations. The claimant's line manager was called to explain how the system worked. The disciplinary panel was able to go through the investigations report which concluded that it could not establish that the claimant's account had been used and that further forensic investigations were required. No further investigations were conducted.
29. The second witness called by the respondent was Hellen Wasike who testified that she is the human resource administration manager and attended the disciplinary hearing which related to the gross misconduct of the claimant. He had been issued with a notice to show cause and investigations conducted and in the fact finding it were found that his account gadm049 was used to make alterations. The claimant's account had not been tampered with and he had full control and nothing had been reported to ICT manager
30. The claimant had used account t00978 which he updated and issued 45 permits in breach of policy and the disciplinary committee found him culpable of gross misconduct and recommended termination of employment. Due to the nature of the respondent's business it would have been improper trading and compromise of operations to allow the claimant in his conduct.
31. Wasike also testified that in the investigations report, the committee recommended that further forensic investigations be conducted since the claimant was not found culpable but this was not done. Her department of human resource was responsible for disciplinary matters and termination of employment was effected before further investigations.
32. The 3rd witness for the respondent was Bernard Milewa the legal affairs and corporation secretary and who testified that the respondent has a procedure of appeals. When the claimant was issued with the letter terminating his employment he was required to lodge an appeal to the Board and the policy manual has no timeframe.
33. On September 6, 2018 the claimant lodged his appeal and he got a response that the respondent board was not fully constituted and directed him to wait for the same but he proceeded and filed suit and later when his appeal was heard, there was communication that the appeal had no merit.
34. At the close of the hearing both parties agreed to file written submissions but only the claimant complied.



35. The claimant submitted that during trial he expounded on the key recommendations made by the investigation team whose report did not conclusively lay blame on him and even called for a forensic audit to be able to conclusively discharge its mandate. he argued that he had no disciplinary issues with the respondent prior to the alleged respondent's system manipulations through his account. That the respondent having based his eventual termination of employment on the said investigation report but failed to adhere to its recommendations means that it did not accord him a fair trial. He submitted that the respondent conducted a flawed disciplinary process against the dictates of section 41 of the [Employment Act](#) and that its action amounted to constructive dismissal and unfair labour practice.
36. In the case of [Sabina Mutua v Amedo Centre Kenya Limited](#) [2017] eKLR, the court stated that to take oral submissions of the employee without allowing the employee to interrogate any material, evidence and witness statements would be denying the employee the crucial element of cross-examination and or interrogation of any reports or instigations made against them, and thus offend the procedural requirements of the law.
37. In the case of [Elinathan G Kairu v Nakumatt Holdings Limited](#) [2017] eKLR, the court restated the holding the sabina mutua case that sections 41 and 44 of the [Employment Act](#), 2007 ultimately require that where an employee has misconducted herself or grossly misconducted herself, there must be a hearing with guaranteed mandatory safeguards.
38. Where an employee's attractiveness to potential employers is diminished as a result of an employer's actions in the process leading to termination of employment, the Court could grant damages to compensate the lost employability. In Nairobi Industrial Court Cause No 1073 of 2012, [Abraham Gumba v Kenya Medical Supplies Authority](#) [2014] eKLR, the court while considering additional damages and quoting Industrial Court Cause No 1227 of 2011 between [GMV v Bank of Africa Kenya Limited](#) [2013] eKLR, found that the court has latitude to award beyond the statutory 12 months' salary where constitutional, contractual and statutory violations are proved.
39. The claimant prayed that the court sets aside the respondent's actions leading to termination of his employment and reinstate him to his position and grade with full benefits. In the alternative, that the court awards him as pleaded and in particular: maximum compensation for the constructive unfair and unlawful dismissal or termination of employment; and costs of the case.

Determination

40. The claim is that on January 25, 2018 the claimant was issued with a notice to show cause with regard to allegations that through his tradenet system user account gadm049 he carried out transactions that compromised the accounts of other system users and on the basis that;
 1. Through your account gadm049 you modified account t00978 (registered as Jennifer Mwendu Sammy and is associated to rabi agency ltd) to allow him/her to apply for permits in seven (7) different companies contrary to laid down procedures. These companies are: ...
 2. Consequently, the user t001978 applied for permits under the above mentioned companies' accounts despite her not being a bona fide employee in any of those companies.
41. These amounts to violation of the hr manual and customer service and contact centre procedures manual: ...
42. Both counts/allegations/matters refer to different user accounts. One account t00978 and the other user account t001978.



43. Was the respondent keen in formulating these allegations or the intention was one and the same? The court was denied this clarity.
44. Following the notice to show cause, the claimant was directed to respond by February 2, 2018.
45. On January 30, 2018 the claimant was interdicted from his employment on the grounds of abuse of the Kenya TradeNet system and that;

The agency received a complaint from Trade Base Co Ltd a user of the Kenya Tradenet System concerning some IDFs that had been lodged in the system without the company's knowledge. Preliminary investigations into the matter indicate that a user id gadm049 belonging to you made the following transactions in the Kenya TradeNet System. The transaction relate to the complaints raised by TradeBase Co. Ltd. ...

46. An employer in its nature has the prerogative to issue an employee with a notice to show cause following any alleged misconduct and to allow the subject employee to give his response as part of the due process mechanisms under section 41 of the *Employment Act*, 2007 (the Act).
47. Also an employer has the undisputed discretion to interdict the employee facing possible disciplinary action. Such action is meant to remove the employee from the shop floor. The employer must however give the employee the reasons for removal from the shop floor.
48. In *Lamu County Government & another v Muhammed Ali Shee* [2021] eKLR the court held that;

... a preventive interdiction which is issued in order to facilitate a hearing does not violate any rights of an employee so long as the employee is ultimately heard on the charges that resulted in the interdiction. Such interdiction only serves to trigger the disciplinary process. In this case, the letter of interdiction was clear that it was the first step to an administrative process that would result in the Respondent being heard.
49. On various dates the claimant's interdiction was extended. All these were meant to allow the ongoing investigations complete.
50. The claimant was eventually invited to a disciplinary hearing whereupon he requested for the documentary evidence against him.
51. During the disciplinary hearing, the claimant persisted and requested for the investigations report. This was supplied on the day of the hearing.
52. The investigations report is particularly thorough. It is detailed with terms of reference, challenges, observations and recommendations.
53. Of interests to this case are the noted challenges. The investigators noted that;

The design of the TradeNet System user management module makes it cumbersome to register and manage users. The process is lengthy and inefficient owing to having three (3) disparate systems that a user has to interact with to register or maintain users. Moreover, the user registration process requires substantial security improvements to ensure the integrity of System users' data and prevent misuse by unscrupulous users who may want to capitalise on any loopholes to misuse the system.
54. Why is this investigation important in this case?



55. The purpose of the report is imperative to relate to. It related to the work of a taskforce;
... set up to review and provide recommendations to clean up the Kenya TradeNet System user management module and process. It also contains recommendations of the Taskforce.
56. In this regard, when the committee was called before the disciplinary hearing to testify in the claimant's case at paragraph 29 of the panel findings it was noted that;
the committee did what is practically possible. It does not add value for the committee to pretend that it can get to the technical details of the case when it lacks important skills such as forensic audit or ability to establish which specific computer IP/IPs were used to transact. This information would be able to unlock the situation by clearly establishing which device was used to effect the transaction.
57. From the investigations report, it was clear that the claimant was not culpable or that the respondent needed to undertake a thorough forensic audit by a systems expert to ascertain the veracity of the matters and allegations made against the claimant. This evidence was supported by Mr Wanyama for the respondent when he testified that the disciplinary committee considered the investigations report and its recommendations that it could not be ascertained that the claimant's account had been used to do the alternations and a further forensic audit was required. He also confirmed that such further forensic audit was never conducted.
58. Before the disciplinary committee, the system security officer created doubts when he testified that the actions alleged to have been performed by the claimant may have been performed by another person with access to the system through backend or other vulnerable means outside the organisation.
59. It is also clear to the court that before the disciplinary committee there was evidence that the systems/ emails audit could only go up to 180 days and hence this could not show whether the claimant's emails had been abused for the period of investigations and more fundamentally the complaint Ms Jeniffer Mwende the user of t001978 the complainant in his case did exonerate the claimant.
60. What then was the source of the compliant and matters facing the claimant to justify the disciplinary hearing and termination of employment?
61. The burden of prove of the reasons for termination is on the employer. Section 43 of the Act provides that where an employer fails to prove reasons for termination, the termination shall be deemed unfair. Bare denials and putting the employee to strict proof as is always the case in other civil cases does not stand for employment claims.
62. The question for this court then become whether these are valid and fair reasons for an employer to terminate an employee. Section 43(2) of the Employment Act defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee.
63. In the case of British Leyland UK Ltd v Swift (1981) IRLR 91 the court described the test of reasonableness in the following words;
The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite



reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.

64. In this case, the respondent as the employer had taken the trouble to interdict the claimant to allow for investigations running from January to June, 2018. There is a report with regard to the investigations. The findings are that a forensic audit was required as a more definite audit.
65. No forensic audit was undertaken.
66. A reasonable employer faced with the investigations report and the employee whose employment was at risk ought to have been certain before taking the sanction of termination of employment.
67. Termination of employment in this case was premature, went contrary to the respondent's own investigations report and findings/recommendations and therefore has no justification and led to unfair termination of the claimant's employment.
68. Of interests in dealing with the claimant's case is the view the respondent took with regard to his appeal. That the claimant had to wait for the constitution of the Board which was required to hear his appeal. This took time and led to the claimant filing suit. Later his appeal was heard and dismissed. This went contrary to the provisions of section 45(5) (a) of that *Act* which requires that part of the fair procedures in addressing a disciplinary case, the employer must be clear with regard to the procedure(s) adopted in reaching a decision to terminate employment. If such procedure do not favour the employee at any material time, such must work to the benefit of the employee and not the other way round;
 - (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - (a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
69. The claimant is seeking an order of reinstatement.
70. Employment terminated on August 28, 2018. It has since been over 3 years.
71. The court guided by the provisions of section 12 of the *Employment and Labour Relations Court Act*, 2011 and section 49 of the Act, the remedy of reinstatement though being primary cannot issue based on the time lost.
72. The claimant is seeking alternative remedies in notice pay and compensation which are available pursuant to section 45 and 49 of the *Act*.
73. The claimant was last earning a gross salary of ksh.180, 000 being Basic pay plus House allowance plus telephone and commuter allowances. Notice pay is hereby awarded in terms of section 35 of the act at ksh.180, 000.
74. On the findings that termination of employment was unfair; the court finds compensation of 3 months gross salary as appropriate in the circumstances of this case all at ksh.540, 000.
75. As the claim has succeeded, the claimant is entitled to his costs.
76. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;



- a. A declaration that employment terminated unfairly;
- b. Compensation ksh.540,000;
- c. Notice pay ksh.180,000;
- d. Costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 29TH DAY OF JULY, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

