



**Kenga v Bbox Capital Kenya Ltd (Cause 50 of 2020)  
[2022] KEELRC 3851 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3851 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 50 OF 2020  
CN BAARI, J  
JULY 28, 2022**

**BETWEEN**

**SOLOMON KAZUNGU KENGA ..... CLAIMANT**

**AND**

**BBOX CAPITAL KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant's Memorandum of Claim is one dated July 10, 2020, and filed in court on July 14, 2020. The Claimant seeks a declaration that his termination is unlawful and illegal, a declaration that the Respondent violated his constitutional rights under Article 27 of the *Constitution*, an order of compensation for violation of constitutional rights, 12 months' salary as compensation for unfair termination, three months' salary in lieu of termination notice, unpaid bonus, a certificate of service and costs of the suit.
2. The Respondent entered appearance through the Firm of Kieti Advocates LLP on August 3, 2020, and thereafter filed a reply to the statement of claim on October 15, 2020.
3. The case came up for hearing on January 26, 2022. The Claimant testified in support of his case and adopted his witness statement dated July 10, 2020 as his evidence-in-chief. He further produced his bundle of documents of even date, as exhibits in the matter.
4. The Respondent called a Mr Vincent Chege to testify in support of her case. He adopted his witness statement dated December 1, 2021, and produced the Respondent's bundle of documents dated September 24, 2020.
5. Both parties filed written submissions in the matter.



## The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent on May 8, 2019 on a permanent basis for the post of Human Resources Generalist at an annual gross salary of Kenya Shillings One Million Two Hundred Thousand (Kshs 1,200,000.00).
7. The Claimant avers that following his appointment, he was posted to the Respondent's offices in Kisumu County in line with Clause 3.1 of the Contract of Employment between him and the Respondent dated May 8, 2019.
8. The Claimant avers that he worked for the Respondent for about one year and that he performed his duties with impeccable diligence and professionalism. He further states that he has never been subject of any disciplinary hearing and/or action nor has he ever received any warning letters in relation to his performance until January 31, 2020, when the Respondent issued him with a Notice to Show Cause Letter evenly dated.
9. The Claimant avers that the notice to Show Cause was in relation to the recruitment and employment of Ruth Nyadzual Mwangome, his wife and Hellen Waitherero Gichia, the Human Resource Intern's wife. The Claimant further states that the Respondent through the show cause letter, made allegations of favouritism by the Claimant notwithstanding that his wife and the Human Resource Intern's wife, were hired by independent and impartial interview panels.
10. The Claimant avers that he responded satisfactorily and substantially to the Notice to Show Cause through his letter of February 5, 2020, and further avers that the two ladies were purely hired on merit as established by the panelists who interviewed them.
11. The Claimant avers that he was part of the interview panel that interviewed Hellen Waitherero Gichia and that the interview panel constituted two other panelists; the Call Centre Manager (Newton Otieno Onyango) and the Call Centre Supervisor (Marydith Akinyi Odero). He states that there was no possibility that he could have influenced the recruitment of Hellen Waitherero Gichia in the presence of other panelists given that each panel member individually and independently assessed the candidate.
12. The Claimant avers that he was never part of the panel that interviewed Ruth Nyadzua Mwangome, his wife, and that the interview panel constituted of the Call Centre Manager (Newton Otieno Onyango), Call Centre Supervisor (Munyao Kimanthi) and HR Intern (Denis Buni Ezama). It is his case that there was no possibility that he could have influenced her recruitment.
13. It is the Claimant's case that the Respondent invited him for a disciplinary hearing through a letter dated February 10, 2020, requiring him to attend a disciplinary hearing on February 14, 2020. It is his further case that he attended the hearing.
14. The Claimant states that the Respondent on March 16, 2020, unlawfully and illegally terminated his contract on account of gross misconduct, and in particular alleged "nepotism" in the hiring of Hellen Waitherero Gichia and Ruth Nyadzua Mwangome, the Human Resource Intern's wife and his wife respectively.
15. The Claimant avers that he appealed against the decision terminating his services through a letter dated March 16, 2020, wherein, he reiterated his response to the Show Cause letter and further stated that he did not in any way influence the recruitment and eventual employment of two employees subject of the disciplinary process.
16. The Claimant avers that the Respondent's Human Resource Policies and Procedures Manual provides for Equality of Employment, and in particular it provides that the Respondent promotes a policy



- of equality in employment and non-discrimination on the basis of race, creed, gender, ethnicity, nationality, marital status, health status and disability in all its employment policies, procedures and practices.
17. The Claimant avers that he disclosed to the panel that interviewed Ruth Nyadzua Mwangome that she is his wife and that he was not comfortable to be part of the interview panel. Thus, the issue of conflict of interest was discharged at that point, hence the Respondent's allegations that the Claimant might have influenced the hiring of his wife and the Human Resource Intern's wife are untenable.
  18. The Claimant avers that his termination was actuated by malice and discrimination on the basis of marital status which is contrary to both the Constitution of Kenya, 2010 and the Respondent's Human Resources Policies and Practice.
  19. On cross examination, the Claimant stated that he told the head of human resource that his wife was among persons being interviewed, but not at the level of the interviews. He further stated that he was replaced in the interview panel by Dennis who is the husband to one of the candidates appearing in his panel.
  20. The Claimant confirmed on cross-examination that there was a Human Resource Assistant who was senior to Dennis, who could have formed the interview panel.
  21. The Claimant states that he did not receive the Respondent's letter of April 2, 2020, communicating the outcome of his appeal.
  22. The Claimant further told the court that he was discriminated against as other employees of the Respondent have relatives whom they work with. He stated that he has not produced documents to confirm that the persons he named are actually related.

### **The Respondent's Case**

23. The Respondent states that the Notice to Show Cause letter dated January 31, 2020, called into question the Claimant's conduct in recruiting his wife Ruth Nyadzua Mwangombe (Ruth) and his Intern's wife Hellen Waitherero Gichia.
24. The Respondent states that the Claimant disregarded her recruitment process by colluding with his Intern to employ his wife and the intern's wife. It is the Respondent's further case that the manner in which the recruitment of the Claimant's and his Intern's wives were conducted was neither competitive nor did it afford an equal opportunity for employment as provided by the Respondent's HR manual.
25. The Respondent avers that the Claimant's response to the Show Cause letter, was insubstantial and insignificant to justify the controversies surrounding the recruitment process of his wife as he did not sufficiently explain why he allowed his intern to replace him in the interview panel that interviewed his wife or how his Intern sat in the interview panel, and why he failed to notify the head of the Human Resource Department that he had delegated his role to his intern given that the Claimant had earlier on conducted an interview in which his Intern's wife was recruited.
26. The Respondent avers that the recruitment of the Claimant's wife was unduly influenced by the Claimant. The Respondent further states that it is questionable why the Claimant holding a prestigious position as a Human Resource Generalist, would delegate his role in the interview process to an intern and fail to escalate the same to the Head of the Human Resource Department prior to the interview exercise.
27. It is the Respondent's case that with the Claimant's Intern being part of the panel conducting the Claimant's wife interview, the interview results could neither be held as credible nor non-aligned to



- the Claimant's interests. The Respondent avers that the overall conduct of the Claimant depicted partisanship in total disregard of the Respondent's policy to ensure a fair, transparent and independent recruitment process.
28. The Respondent states that the termination of the Claimant's employment was lawfully undertaken after due process being accorded to him. The Respondent further avers that she issued the Claimant with a comprehensive show cause letter which he responded to and thereafter invited him to a disciplinary hearing that culminated in his termination.
  29. The Respondent further states that the termination letter outlined sufficient and detailed reasons that led to the decision to terminate. The Respondent further states that the Claimant's conduct in undertaking a flawed recruitment process befouled with nepotism amounted to gross misconduct.
  30. The Respondent avers that the Claimant's appeal dated March 16, 2020, was considered by the Respondent's Appeals Committee on March 25, 2020, and a decision upholding the Claimant's termination was communicated to him in a letter dated April 2, 2020.
  31. The Respondent admits that Clause 3.1 of its Human Resource Manual embraces the Constitutional sentiments prohibiting any form of discrimination and advocates for equality in employment which principles were not upheld by the Claimant in the recruitment process of his wife.
  32. The Respondent avers that its policy provisions are not a refuge for the Claimant to undertake a flawed recruitment process tainted with favoritism and nepotism.
  33. The Respondent admits that it has employed several individuals who are related in one way or another, as its policy is against any form of discrimination. The Respondent further avers that the individual involved have not in any way influenced the recruitment process like the Claimant did.

#### **The Claimant's Submissions**

34. The Claimant submits that considering that Mrs Ruth Mwangombe and Mrs. Hellen Waitherero Gichia were formally engaged and allowed to perform their respective duties, the issues raised in the show cause letter forming the basis of the dismissal notice are remote and an afterthought on the part of the Respondent.
35. The Claimant submits that the Respondent had no valid reason to terminate his services considering that the affected interviewees had been formally engaged without the Respondent raising any queries on the manner the recruitment process was conducted and were issued with contracts and that the Respondent did not cancel their contracts. The Claimant had reliance in *Pius Machfu Isindu v Lavington Security Guards Limited* [2017] eKLR to buttress his position.
36. The Claimant submits that the reason for his termination is vague and/or invalid and as a consequence, the Respondent unfairly terminated his services without a proper reason.
37. The Claimant contends that the dismissal notice on account of his wife being employed by the Respondent is discriminatory and treated him unequally on account of his marital status to Mrs. Ruth Mwangombe. He sought to rely on the holding in *John Harun Mwau v the Independent Electoral and Boundaries Commission & Another* [2013] eKLR to support this position.

#### **The Respondent's Submissions**

38. It is submitted for the Respondent that the non-disclosure by the Claimant that his wife was among persons attending the interview at the point of recruitment resulted in the recruitment process



- being non-competitive and failed to promote equal opportunity for employment as provided in the Respondent's HR manual.
39. The Respondent submits that the close timing of the recruitment of the Claimant's wife by a panel in which the Claimant's Intern sat, and the recruitment of the Claimant's Intern's wife by a panel in which the Claimant sat provided a reasonable belief that the interview process.
  40. It is submitted for the Respondent that the Claimant being a Human Resource Practitioner with the requisite knowledge and experience he ought to have managed the conflict of interest or undertaken mitigating measures to ensure fairness in the recruitment of Hellen and Ruth. The Respondent sought to rely on the holding in *Teachers Service Commission v Kenya National Union of Teachers (KNUT) and Another* [2019] eKLR.
  41. It is the Respondent's further submission that she had put in place sufficient measures to ensure that disclosure of conflict of interest does not cause bias and that the Claimant's actions in failing to follow these laid down procedures and proceeding to disclose the conflict of interest to the interviewing panel actually caused bias in Ruth's interview panel.
  42. It is submitted that the Respondent had sufficient grounds for terminating the Claimant's employment since the Claimant violated the terms in his Contract. The Respondent further submits that the Claimant brought the Company and himself into disrepute by failing to promote objectivity, impartiality, transparency, and fairness in recruitment, and negligently performing his duties by failing to follow laid down procedures on the disclosure of conflict of interest and which resulted in him promoting his interests which were adverse to the interests of the company.
  43. The Respondent submits that it met the procedural threshold set in the *Employment Act* and in the Court of Appeal case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR required in the termination of employment.

### **Analysis and Determination**

44. I have considered the rival pleadings, the witnesses' oral testimonies and the submissions filed for both parties. The issues that fall for determination are:
  - a. Whether the Claimant's termination was unfair
  - b. Whether the Claimant was discriminated against
  - ii. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant's termination was unfair**

45. A determination of the fairness or lack thereof of a termination is depended on the employer's adherence with the twin issues of procedure and substantive justification. These aspects are determined by examining the employer's compliance with Sections 41,43, 45 and 47 of the *Employment Act*, 2007.
46. To determine whether a termination meets the procedural fairness test, the court's focus is on the Employer's compliance with the requirements of Section 41 of the *Employment Act*, 2007. Section 41 states:

“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.”

47. This section obligates an Employer to show as a matter of factual evidence that it explained to the employee the reason(s) it is considering termination, allow an employee to be represented by a representative of his choice and hear and consider any explanations by the employee. In *Angela Wokabi Muoki v. Tribe Hotel Ltd* (2016) eKLR, the court held that the process of hearing and ensuring that an employee is given a fair chance to know the allegations against him, is a mandatory requirement of the law.
48. The Court of Appeal further affirmed this position in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, also cited by the Respondent, where the Court stated:

“Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.”
49. It is not disputed that the Claimant was issued with a show cause which he responded to, and was thereafter invited for a disciplinary hearing where he was informed to appear with a fellow employee. The Claimant attended the hearing though no indication was given by both parties as to whether the Claimant was represented.
50. The Court in *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017)eKLR expounded the provisions of Section 41 as follows:-

“To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms.”
51. The evidence before court clearly shows that the Respondent complied with the requirements of Section 41 in terminating the Claimant. The termination is found to be procedurally fair.
52. The next limb in making a determination of a fair termination is whether the reasons given for the Claimant’s termination were fair, valid and justified.
53. The Respondent’s letter to the Claimant to show cause dated 31<sup>st</sup> January, 2020, indicated the reason for the show cause is that the Claimant disregarded company recruitment policy by conniving with an Intern working with him and proceeded to offer employment to his wife and the Interns wife.
54. The termination letter of March 11, 2020 stated the reason for the termination as nepotism, for having failed to disclose to his Head of department before or after the interviews, that there was intention to recruit the Claimant spouse.
55. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR the Court stated:-

“It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment.”



56. Reasons for termination have generally been agreed to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee. Courts have held that the decision to dismiss ought to be hinged on an objective test, such as whether a reasonable employer in similar circumstances, would have dismissed the employee. In *British Leyland v Swift* (1981) I. R. L.R. 91, Lord Denning describe the test of what a reasonable employer could or could not do in the following words:

“The correct test is: was it reasonable for the employers to dismiss? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair.....”

57. The Respondent through her witness, told the court that the Human Resource Policy does not indicate the point at which an employee should make a disclosure of conflict of interest, and further that the Claimant made the disclosure after the internal audit of interview processes.

58. The contract of employment between the Claimant and the Respondent does not have a provision on handling of conflict of interests. The Respondent’s Human Resource Policy and Procedure Manual at clause 2.9, provides for conflict of interest as follows:

“To avoid actual conflict or the appearance of conflict of interest, a staff member shall not engage in remunerated activities in any field related to the company’s line of work without prior authorization by the M D. In the case of the Senior Management Team, the board will provide such authorization.”

59. The policy does not provide for the kind of conflict brought out in the case before court and is only concerned with staff intending to engage in remunerated activities. The Policy as correctly submitted by the Claimant, does not say how, at what point and to whom the conflict of interest in a recruitment process is to be declared.

60. Human Resources Manuals are authored by employers, and hence are automatically held accountable for the standards established in the manuals.

61. Having said that, it is not lost on this court that the recruitment process subject of this suit was without a doubt marred by irregularities. That the Claimant interviewed the Intern’s wife and the Intern interviewed his wife, is by all means a rare coincidence, especially that there were other employees available to form the interview panels. In *Teachers Service Commission v Kenya National Union of Teachers (KNUT) and Another* [2019] eKLR, the court had this to say on conflict of interest;

“...in the concept of conflict of interest, avoidance of the conflict of interest is desirable but in practice the primary focus is not avoidance but managing or handling situations of conflict of interest through measures such as declaration of interests; disqualification where appropriate; and undertaking remedial or mitigating measures as appropriate.”

62. For reason that the Respondent’s Human Resource Policy and Procedure Manual left gaps on the management and handling of the conflict of interest of the kind described in this case, I find and hold that the Claimant’s termination does not meet the substantive justification test. The termination is unfair.



### **Whether the Claimant was discriminated against**

63. The Claimant raised an aspect of discrimination based on the provisions of Article 27 of the Constitution of Kenya and Section 5 of the Employment Act. The Claimant contended that the dismissal notice on account of his wife being employed by the Respondent is discriminatory and that he was treated unequally on account of his marital status to Mrs Ruth Mwangombe.
64. The Respondent admitted that it has employed several individuals who are related in one way or another, as its policy is against any form of discrimination. The Respondent further told the court that the individuals involved have not in any way influenced the recruitment process like the Claimant did.
65. The Claimant was without a doubt in the mix of the recruitment process that culminated in the recruitment of his wife. Nothing shows that the Respondent's employees who are said to be related, took part in the recruitment of their kin, or in any other way influenced the process of recruited so as to confirm the element of discrimination against the Claimant.
66. I find the Claimant's claim of discrimination unfounded, and is hereby dismissed.

### **Whether the Claimant is entitled to the reliefs sought**

67. The Claimant seeks a declaration that his termination is unlawful and illegal, a declaration that the Respondent violated his constitutional rights under Article 27 of the Constitution, an order for compensation for violation of constitutional rights, 12 months' salary as compensation for unfair termination, three months' salary in lieu of termination notice, unpaid bonus, a certificate of service and costs of the suit.

### **Months' Salary as Compensation for Unfair Termination**

68. The court having declared the Claimant's termination substantively unfair, entitles him to compensation per sections 49 and 50 of the Employment Act. (See Benjamin Langwen v National Environment Management Authority (2016) eKLR.)
69. The Supreme Court in Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR noted as follows:

“When giving an award under Section 49 of the Employment Act, a court of law is expected to exercise judicial discretion on what is fair in the circumstances.”
70. The Claimant was in the employ of the Respondent for close to ten months. Considering the period the Claimant was in the service of the Respondent (See Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR) and the fact that he largely contributed to his termination, I deem an award of Three months (3) months' salary sufficient compensation for the unfair termination, and it is hereby awarded.

### **Three months' salary in lieu of termination notice**

71. The employment contract between the parties herein, provides for a one month termination notice or payment in lieu of the termination notice. The termination letter indicated the accrued terminal benefits payable to the Claimant at the time of termination to include one-month notice pay.
72. Nothing shows that the pay in lieu of termination notice was made. It was incumbent upon the Respondent to prove that it paid the Claimant his full entitlement at the time of separation. The claim succeeds, and the Claimant is hereby awarded one month's salary in lieu of termination notice.



**Compensation for violation of Constitutional rights**

73. The court held that no constitutional right violation was established. The claim fails and is dismissed.

74. In whole judgement is entered for the Claimant against the Respondent as follows:-

- a. A declaration that the Claimant's termination is substantively unfair.
- b. Payment of Three (3) months' salary as compensation for unfair termination at Kshs 300,000/-
- c. One month's salary in lieu of termination notice at Kshs. 100,000/-
- d. Costs of the suit and interests until payment in full.

75. Judgment of the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH DAY OF JULY, 2022.**

**CHRISTINE N BAARI**

**JUDGE**

**Appearance:**

**Mr Lesaigor present for the Claimant**

**Ms Mugenyu h/b for Mr Odhiambo for the Respondent**

**Christine Omollo- C/A**

