



**Rono v East African Wildlife Society (Cause 1905 of 2017)  
[2022] KEELRC 3862 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3862 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1905 OF 2017**

**JK GAKERI, J**

**JULY 26, 2022**

**BETWEEN**

**DOMINIC KIPLETING RONO ..... CLAIMANT**

**AND**

**EAST AFRICAN WILDLIFE SOCIETY ..... RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim dated 25<sup>th</sup> September, 2017, the Claimant sued the Respondent seeking compensation for unlawful and unfair termination of employment.
2. The Claimant prays for;
  - i. A declaration that the Respondent's action to terminate the Claimant from employment was unfair, illegal and unprocedural.
  - ii. Kshs.840,000/= being 12 months salary compensation for unfair and wrongful termination.
  - iii. General damages for unfair termination.
  - iv. Costs of this claim.
  - v. Interests at court rates.

**Claimant's case**

3. The Claimant avers that he was employed by the Respondent by letter dated 2<sup>nd</sup> November, 2016 as a Systems and Web Administrator under Pensionable terms from November 7<sup>th</sup> 2016 and confirmed on 21<sup>st</sup> February, 2017 after three months' probation at a monthly salary of Kshs.70,000/=.
4. That he was a devoted and diligent employee with no record of misconduct.



5. It is further avered that on 20<sup>th</sup> July, 2017 at about 4.00 p.m, the Respondent terminated the Claimant's employment in violation of the provisions of the Employment Act, 2007.
6. It is the claimant's case that he was summoned by the respondent's Executive Director, Head of Communications and Human Resource Manager and was informed that a decision had been made to terminate his employment and a termination letter of even date was issued.
7. The Claimant further avers that the termination of employment did not comply with the mandatory procedure, in that no reason for termination was given and no notice to show cause or hearing.

### **Respondent's case**

8. It is Respondent's case that the meeting held on 20<sup>th</sup> July, 2017 was a disciplinary hearing to discuss the claimant's performance.
9. That the charges the claimant was facing were poor performance and failure to carry out his duties and he had been notified that termination of employment was being considered.
10. It is avered that claimant was requested to make representations in response to the allegations. That he explained that he was dealing with personal issues which affected his performance.
11. That the respondent found the claimant's representations unmerited and resolved to terminate the contract of employment.
12. The respondent avers that the termination of employment was conducted in accordance with the prescribed procedure and the claimant had been given numerous opportunities to address the issues that led to his termination including updating of content in the website and members data base.
13. It is further alleged that the claim was rude and argumentative, evasive and shifting blame to others.
14. It is the respondent's case that on 13<sup>th</sup> March, 2017, the claimant was requested to work on the website to address issues relating to the payment portal for donations and membership following a complaint to the Managing Editor of SWARA Magazine on inability to subscribe for the online version.
15. It is the respondent's averment that in May 2017, the claimant was tasked with the restructuring of the website to make it more user friendly but did not take any action despite a 7<sup>th</sup> June, 2017 deadline.
16. That at a meeting held on 12<sup>th</sup> June, 2017 discussed issues of;
  - i. Uploading downloadable version of SWARA Magazine on its website making it available to the public free of charge had affected revenue.
  - ii. Delays in uploading stories in the website.
  - iii. Usability of the website.
  - iv. Absence of updates on the restructuring of the website.
  - v. Claimant's laxity in the performance of his tasks and attitude.
17. That the claimant promised to conclude all website issues by 27<sup>th</sup> June, 2017.
18. It is avered that the issue of poor performance by the Claimant arose during a meeting with the Head of Communication Fund Raising and Advocacy and the Public Relations Communications Officer on 6<sup>th</sup> June, 2017 and the claimant acknowledged his poor performance and failure to restructure the



website but promised to provide an update in a week's time as confirmed by an email of even date from the claimant.

19. The respondent contends that on 19<sup>th</sup> July, 2017, the Head of Communication Fund Raising and Advocacy requested for the website design and content changes the claimant had updated but the claimant had not updated the website and admitted that he had not used the details of the website content and structure document prepared by the Public Relation and Communication Officer and forwarded to the claimant.
20. That the Respondent subjected the claimant to a disciplinary process on 20<sup>th</sup> July, 2017.
21. Finally, the Respondent avers that it had not occasioned the claimant any suffering or mental anguish and acted in consonance with its Employment Hand book and the Laws of Kenya.

### **Claimant's evidence**

22. The claimant adopted the witness statement dated 7<sup>th</sup> September, 2017 which generally rehashes the contents of the memorandum of claim.
23. The claimant testifies that he was neither given a notice to show cause nor opportunity to be heard and was not paid terminal dues.
24. On cross-examination, the claimant confirmed that he was aware of how the respondent earned its income through membership and it had a membership data base.
25. That his duties included maintenance of the database, website by uploading data provided by the Communications Department.
26. The witness further confirmed that membership fees was paid physically and there was no online payment by the time he left employment.
27. On the appraisal for confirmation of employment, the claimant confirmed that website updates were not done on time though the overall performance was good and subsequently received a pay rise which he attributed to inflation and was given to all employees.
28. The witness stated that his supervisor was the Executive Director and had complained about the claimant's performance regarding updating of the website.
29. The witness further confirmed that he had a meeting with the Executive Director, Mr. Julius Kamau on March 2017 regarding updating of the Website and the membership database.
30. The claimant also confirmed that Mr. Felix Otiato the Head of Communications had raised the issue of lateness in uploading content in the website.
31. It was the claimant's testimony that the organization was implementing a payment portal to enable members pay subscription online and he had requested for 3 months from March 2017 to complete coding by the end of July 2017.
32. That he was unaware of the challenges members were facing on payment of subscription.
33. That the claimant suggested that the website ought to be made more user friendly and the idea was accepted and he was the one responsible for the changes and received partial content from the Communications Department.
34. The witness confirmed that he had not implemented the changes envisaged by 19<sup>th</sup> July, 2017.



35. Finally, the witness testified that he was informed that his termination was being considered but was not given an opportunity to rebut the allegations and had not disclosed that he had personal issues.
36. On re-examination, the witness testified that the salary increment he received was based on inflation and performance which was rated between satisfactory and outstanding.

### **Respondent's evidence**

37. RW1, Freda Mung'athia adopted the lengthy written statement and was cross-examined.
38. The witness testified that the claimant had issues relating to the updating of the website and poor attitude towards work. That it took long to have content uploaded on the website.
39. On cross-examination, the witness stated that she participated in the meeting held on 20<sup>th</sup> July, 2017 which discussed the Claimant's performance and confirmed that the salary increment was based on inflation and performance according to the letter dated February 2017.
40. That the email on page 9 from Felix Otiato to the Executive Director Mr. J. Kamau was written before the salary review.
41. The witness further testified that the disciplinary procedure applicable depended on the magnitude of the misconduct and the claimant was dismissed under clause 23 (iv) of the Respondent's Human Resource Policy, October 2016 and a warning had been issued to the claimant.
42. That the Respondent invited the claimant for the meeting held on 20<sup>th</sup> July, 2017 by a call and was given the termination letter the following day.
43. The witness admitted that she did not issue a notice to show cause to the claimant and the claimant had neither made a written representation nor had he been notified that he had the right to be accompanied by a fellow employee.
44. It was RW1's testimony that the respondent had no minutes of the meeting of 20<sup>th</sup> July, 2017 and the termination letter did not inform the claimant that he had the right of appeal.
45. It was her testimony that the claimant was responsible for the website and the buck stopped with him on all website matters according to Clause 9 of the Employment Contract dated 2<sup>nd</sup> November, 2016.
46. Finally, the witness confirmed that she had no evidence that the respondent lost any money.
47. On re-examination, the witness testified that all employees had access to the Human Resource Policy. That the claimant made representations at the meeting held on 20<sup>th</sup> July, 2017.

### **Claimant's submissions**

48. According to the claimant's counsel, the only issue for determination is whether termination of the claimant's employment was substantively and procedurally fair.
49. Section 45(2) and 43 of the *Employment Act*, 2007 are relied upon to urge that the employer must prove that the termination of employment was in accordance with a fair procedure and that the employer had a valid reason to do so.
50. Section 41 of the Act is relied upon to urge that the prescribed procedure must be complied with.



51. The decision in *Peter Kamau Mwaura and another v. National Bank of Kenya Ltd* (2020) eKLR is cited to urge that where poor performance is the reason for termination of employment, the employer's burden of proof is higher.
52. Further, the decision in *Felix Mutiso V Beiertsdof East Africa Ltd* (2019) eKLR is relied upon to urge that the respondent was determined to terminate the claimant's employment.
53. It is the claimant's contention that the termination of employment was unlawful and the reason was unjustified.
54. The Claimant submits that the grounds set out in the letter of termination implicated the claimant's performance yet he testified that he was diligent in his work as his results for the appraisal conduct on 21<sup>st</sup> February, 2017 rated him between satisfactory and outstanding and had a salary increment in June 2017.
55. It is submitted that the email on record showed that the Claimant was facing hurdles regarding the upgrading of the website in relation to SWARA Magazine and was never invited to explain his performance as required by section 41 of the *Employment Act*.
56. That the employer did not demonstrate that it had policies and mechanisms for evaluating performance as explained in *National Bank of Kenya V Samuel Nguru Mutonya* (2019) eKLR citing *Jane Samba Mkala V Ole Tukai Lodge Ltd* (2010) LLR 255, and as a consequence the respondent did not justify the reason for termination.
57. As regards the procedure employed by the respondent, it is submitted that the Human Resource Manager should not have participated in the activities leading to the claimant's dismissal because she was not qualified under the provisions of section 29 of the *Human Resource Management Professionals Act*, 2012.
58. That the Human Resource Policy of the respondent provided for three (3) warnings before dismissal and none was issued to the claimant.
59. That the witness confirmed that the respondent did not issue a notice to show cause to the claimant nor the evidence against him.
60. It is the claimant's submission that the reasons for termination of the claimant's employment had already been determined and a termination letter written and the claimant was not given an opportunity to defend himself.
61. Finally, the claimant submits that since the respondent did not comply with the prescribed procedure, the claimant is entitled to the 12-month compensation.

### **Respondent's submission**

62. By 28<sup>th</sup> June, 2022 when the court retired to write this Judgement, the respondent had not filed its submissions.

### **Analysis and determination**

63. After careful consideration of the pleadings, evidence on record, submissions by counsel and the law, the issues for determination are;
  - i. Whether termination of the claimant's employment by the respondent was fair.



ii. Whether the claimant is entitled to the reliefs sought.

64. As regards termination of employment, the provisions of the *Employment Act*, 2007 prescribe the basic infrastructure to be complied with for termination of employment to pass muster.
65. Under section 45(2) (b) and (c) of the *Employment Act*, the employer must demonstrate that it had a valid and fair reason to terminate the claimant's employment and did so in accordance with fair procedure.
66. The duty to prove the reason for termination is reinforced by section 43 (1) of the Act.
67. As regards procedure, section 41 of the Act prescribes the minimum standards to be complied with.
68. The essence of these provisions was explained by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.
69. The essence of the statutory framework on termination of employment or dismissal is to ensure that the process is substantively justifiable and procedurally fair as explained by Ndolo J. in *Walter Ogal Anuro v. Teachers Service Commission* (2013) eKLR as follows;
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
70. Similar sentiments have been expressed by the Court of Appeal in a catena of decisions such as *Naima Khamis V Oxford University Press EA Ltd* (2017) and *Jenny Luesby V Standard Group Ltd* (2017) eKLR among others.
71. I will now proceed to examine the facts of the instant case in the context of the provisions and propositions of law above.

### **Reasons for termination**

72. The letter of termination dated 20<sup>th</sup> July, 2017 identifies six reasons for termination of the claimant's employment. The letter states in part;
- “Your employment has been terminated for the following reasons;
- a. Failure and complete disregard to act upon requests passed through within set deadlines eg Website updates, E-Swara, On-line payment platform, flip book and general requests.
  - b. Failure to update and design the website on various occasions.
  - c. Lack of support to other departments on IT support such as printer connections and office setups.
  - d. Laxity and poor altitude to work
  - e. Complaints of lack of not offering support to other departments on IT related matters.
  - f. Failure to exhibit and justify work done and plan to what to do.”



73. The letter further states;
- “The reasons stated above amount to incompetence, neglect and omission to perform duties assigned to you as per your employment contract. This calls for dismissal for cause without notice provided for under Section 23(c) (iv) of the EAWLS HR Policy.”
74. It is not disputed that the claimant’s job description annexed to the letter of employment dated 2<sup>nd</sup> November 2016 itemised the salient duties of the claimant as Information Technology, Database Management, Web Management and Digital Products. Each responsibility identifies the specific tasks the claimant was to discharge. For instance as regards Digital Products, the claimant was required to maintain and update the electronic SWARA application as well as the mailing list. Secondly, design, publish and send the digital/electronic SWARA Magazine to subscribers.
75. He was also to develop and maintain an Online Payment Application that accepted and processed Credit Card Payments and other forms of online payments.
76. According to the respondent, the claimant’s employment was terminated for neglect duty, incompetence and omission to perform duties assigned to him.
77. Although the grounds of termination of employment implicate performance generally and attitude to work, the claimant is accused of having neglected or omitted to discharge specific duties assigned to him and his response was that there were hurdles and he was a diligent employee.
78. By an email dated 20<sup>th</sup> March, 2017 at 12.11 pm, Mr. Felix Otiato wrote to the Claimant on the need to work on the payment portal for both donations and membership and states as follows “please conclude the work on go live with the donations page especially targeting international prospects.”
79. This email underlines the fact that the respondent did not have an on-line payment system by March 20<sup>th</sup> 2017.
80. Second, by an email dated 19<sup>th</sup> May, 2017 at 2.57 p.m, one Edwin Shivo forwarded the website content details and new structure for the claimant’s attention and confirmed having done to one Fridah Mung’athia (RW1). The content details were attached.
81. Third, by a lengthy email message dated 20<sup>th</sup> June, 2017 at 6.16 p.m, John Nyaga, the Swara Magazine Editor, requests the Claimant to;
- i. Let him know if the technical issues that had prevented the circulation of an actual “read only” E-Swara had been resolved.
  - ii. Advise him on the progress of the website restructuring plan shared by Edwin a month earlier and provide an update on the issues by close of business.
82. On Wednesday 21<sup>st</sup> June, 2017 since the deadline was 7<sup>th</sup> June 2017, the Claimant responded by email dated 21<sup>st</sup> June 2017 at 15.36 stating that I and III ie web and paypal would be up and navigable on web by close of business on 27<sup>th</sup> while II menu updating would be worked on after the others were in place. The claimant promised to keep the Editor updated on progress.
83. Fourth, by an email dated 21<sup>st</sup> June, 2017 Julius Kamau, the Executive Director requested the claimant to develop an outline for Edwin to proceed with the rest.
84. By an email message dated 21<sup>st</sup> June, 2017, the claimant informed John Nyaga that Board members and management had been left out of the menu. This is in response to an email by John Nyaga earlier on demanding an explanation of point No. 2 of the claimant’s email dated 21<sup>st</sup> June, 2017 at 15.36.



85. Fifth, by an email dated 7<sup>th</sup> July, 2017 at 16.41, the Executive Director notified the Claimant and one Lawrence Njenga about a complaint by the wife of one of the board members about the website content and navigation.
86. Sixth, by an email dated 19<sup>th</sup> July, 2017 at 3.55 p.m, one Lawrence Njenga demanded progress from the claimant and a detailed explanation on what had been concluded and what was been worked on as the contents and notes had been shared by Edwin over a month earlier and states “Basically we cannot keep on talking about the same thing and having the same answers over and over again”.
87. The Claimant responded by an email message dated 19<sup>th</sup> July, 2017 at 16.07 stating inter alia;
- “As you may have noticed am working on the mobile layout as at now, the mobile platform is not as responsive as it should be. The document sent by Edwin will be acted upon once am through with all the layout requirements . . . The process involves a lot of Syntax, organising the layout, testing and trouble shooting.
- I am trying my best to have it work out in the shortest time possible as it is easy to work on a stable layout.”
88. On the morning of 19<sup>th</sup> July, 2017, Lawrence Njenga by email at 8.08 am asked the claimant to avail the website design and content changes update as this was the 3<sup>rd</sup> week after the Claimant had asked for more time. He requested for a link to review the same.
89. The Claimant responded by an email message at 15.50 p.m stating “I am having it worked on as planned, will keep you posted on the progress as am yet to receive content to update.”
90. These email exchanges show that by 19<sup>th</sup> July, 2017, neither the Web design or the content changes nor the paypal was in place.
91. The respondent appear to have reached the end of the tether and had no other option but to take a drastic step.
92. The claimant had admitted on cross-examination that there were issues of lateness in the uploading of content in the website and with reference to the payment portal, he had requested for 3 months from March 2017 to complete coding at the end of July 2017. He was also explicit that by 19<sup>th</sup> July, 2017, he had not implemented the changes envisioned for which he was responsible.
93. From the evidence on records, it is unclear why the claimant was not meeting deadlines set by his supervisor or himself. At no moment was he explicit on the major or minor challenges he was facing and the assistance or facilitation he required and updates were only supplied on request.
94. In the courts view, the totality of the evidence on record is that the respondent had on a balance of probability established that the claimant neglected his duties and/or omitted to perform duties assigned to him by his supervisor and the contract of employment.
95. Section 44 (4) (c) of the *Employment Act* provides that;
- “ . . . an employee wilfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.”
96. It is the finding of the court that the respondent had a valid and fair reason to terminate the claimant’s employment.



## Procedure

97. Section 41 of the [Employment Act](#) prescribes the mandatory process to be complied for a termination of employment or dismissal to pass muster as was held in [Pius Machafu Isindu V Lavington Security Guards Ltd](#) (supra). In Postal Corporation of [Kenya V Andrew K. Tanui](#) (2019) eKLR the Court of Appeal summarized the provisions of section 41 of the [Employment Act](#) as follows;

“Four elements must thus be discernible for the procedure to pass muster:-

- i. an explanation of the grounds of termination in a language understood by the employee.
- ii. the reasons for which the employer is considering termination.
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made.
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

98. The court is guided by these sentiments.

99. While the claimant submits that he was neither given a notice to show cause nor an opportunity to be heard, the respondent states that the claimant was invited for a disciplinary hearing on 20<sup>th</sup> July, 2017. That he was invited to the meeting via a phone call but no notice to show cause was issued and was not informed of the right to be accompanied by a fellow employee or appeal, did not make written representations and no minutes were recorded.

100. Although RW1 testified that the claimant was reminded of the claims he was facing, it is unclear whether it was by word of mouth or some document was handed over.

101. Instructively, the respondent did not comply with paragraph 23 (c) (iv) of its Human Resource Policy, October 2016 contrary to the testimony of RW1. Although paragraph 23 (c) provides that issues of alleged misconduct could be dealt with at the final stage of the procedure and without prior warnings having been given, paragraph 23 (c) (iv) relates to cases where a final warning has not achieved a satisfactory response or further misconduct is committed during the currency of the final warning.

102. The Respondent had not issued any warning to the Claimant. More significantly, however, neither the respondent’s memorandum of defense, or the witness statement nor the letter of termination dated 20<sup>th</sup> July, 2017 characterise the claimant’s conduct as gross misconduct.

103. The precepts of hearing dictate that employee must be made aware of the detailed allegations or accusations he/she is facing and must be given an opportunity to rebut them by word of mouth or in writing.

104. The Respondent furnished no evidence of the list of the allegations made against the Claimant nor provide minutes of the meeting held on 20<sup>th</sup> July, 2017 to demonstrate that the specific allegations made against the claimant were read out to him in a language he understood.

105. No one informed him that termination of his employment was being considered.

106. It is patently clear that the claimant was not accorded time and facilitation to prepare his defense or effectively respond to the allegations.



107. What questions were asked and what were the claimant's responses? One of the crucial items missing in the jigsaw puzzle are the minutes of the meeting.
108. For the above stated reasons, the court is satisfied that the respondent has on a balance of probabilities failed to demonstrate that termination of the Claimant's employment was in accordance with fair procedure as dictated by the provisions of the *Employment Act*.
109. Accordingly, it is the finding of the court that the claimant's termination from employment was unfair for want of procedural propriety.

### **Reliefs**

- a. Having found that termination of the claimant's employment contract was unfair, a declaration to that effect is hereby issued.
- b. 12 months salary compensation Kshs.840,000/=.
110. Based on the foregoing finding, the Claimant is entitled to the discretionary relief provided by Section 49(1) (c) of the *Employment Act*, 2007.
111. As ordained by Section 49 (4) of the Act, the court has in determining the quantum of compensation considered the following factors.
  - i. The Claimant was an employee of the respondent for a duration of about 8 months and 18 days, a fairly short duration.
  - ii. The performance appraisal on record assessed the claimant between satisfactory and outstanding.
  - iii. The claimant had no previous record of misconduct or neglect of duty.
  - iv. The claimant did not appeal the decision to terminate his employment which is clear stipulated in paragraph 23 (c) (v) of the Respondent's Human Resource Policy, October 2016.
  - v. The respondent had a valid and fair reason to terminate the claimant's employment for neglect of duty.
112. In the circumstances, the court is satisfied that the equivalent of two (2) months salary is fair.
  - c. General damages for unfair termination.
113. The Claimant led no evidence to substantiate or prove this prayer. It is disallowed.
114. In conclusion, judgement is entered for the claimant against the respondent as follows;
  - a. Equivalent of two (2) month's salary Kshs.140,000/=.
  - b. Costs of this suit.
  - c. Interest at court rates from date of Judgement till payment in full.
115. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JULY 2022**

**DR. JACOB GAKERI**



**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

