



Onyango v Judicial Service Commission & another (Cause E52 of 2021) [2022] KEELRC 1248 (KLR) (12 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1248 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E52 OF 2021
HS WASILWA, J
JULY 12, 2022**

BETWEEN

AGGREY OURE ONYANGO CLAIMANT

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for unfair termination and sought to be reinstated back to employment and in the alternative be compensated for the unfair termination.
2. The facts of this case is that the Claimant was employed by the 1st Respondent on the 26th February, 2001 as a process server II and deployed to Migori Law Courts.
3. The Claimant worked for the Respondent faithfully and on the 28th February, 2013, he was promoted to be Court Bailiff under Job Group PLS 9.
4. On the 24th October, 2019 the Claimant was served with a show cause letter and directed to give an explanation of how Kshs 1,550,000 was paid to him from the deposits Bank Account of Molo Law Courts on diverse dates on 26th June, 2018, 17th August, 2018 and 26th October, 2018 and to explain the circumstance under which he received such money from Molo law Courts. In response, the Claimant vide the letter dated 25th November, 2019 stated that the said money was send to his account by a colleague called Richard Tamar of PJ. Number 36108, on the pretext that he had a loan in his personal account and could not receive any money on the said account and he needed the said for his personal use. The Claimant maintained that he was not aware that the said money were send from Molo Deposit Account and only allowed the said money to be deposited in his account thinking that he was helping his friend.



5. The Claimant was suspended on the 7th January, 2020 for gross misconduct. The Claimant responded to the suspension letter vide his letters of 20th January, 2020 and a further explanation vide the letter of 7th August, 2020.
6. By the letter of 2nd November, 2020, the Claimant was summoned for a disciplinary hearing scheduled for 17th November, 2020 which proceeded as scheduled. He avers that he requested for proceedings and the decision of the Disciplinary committee to no avail and only learnt that he was dismissed through Judiciary Newsletter, which dismissal was in the letter of dismissal dated 4th January, 2021. He avers that the failure by the Respondent to supply him with the decision of the disciplinary committee and proceedings thereof is contrary to the provisions of Articles 47, 48 and 50 of *the Constitution*.
7. The Claimant also avers that the Respondent did not provide him with the documents and evidence that the disciplinary committee was relying on, in contravention of Section 25(4) of the Third Schedule of the Judicial Service Commission Act.
8. The Claimant maintain that he was unfairly terminated from service, when he gave an explanation of the said funds and explained that Mr. Richard Tamar had send the subsequent money to his account without his consent and also that he was not informed of the source of the said funds.
9. He therefore prays for the Following reliefs; -
 - a. A declaration that the Claimant was unfairly dismissed from employment by the Respondents.
 - b. A declaration that the disciplinary proceedings conducted by the Respondents as against the Claimant on the 17th November, 2020 and the eventful dismissal of the Claimant from service were disproportionate, unfair, lacked valid reason and therefore null and void.
 - c. An order to quash the Respondents decision against the Claimant communicated through the letter dated 4th January, 2021 dismissing the Claimant from employment.
 - d. An Order of reinstatement to the position that the Claimant held before dismissal of a Court bailiff in the judiciary without loss of benefits and salary.
 - e. An order directing the Respondents to pay the Claimants salary and allowances thereto accruing from the date of dismissal being 4th January, 2021 to the date of reinstatement.
 - f. An order for damages for unfair dismissal up to the age of retirement.
 - g. Terminal allowances and/or retirement benefits.
 - h. Costs and interest of this suit.
10. The firm of Muma Kanjama filed their Notice of Appointment of advocate on the 21st November, 2021 appearing for both Respondents and filed Response to Claim on the 23rd December, 2021 averring that the Respondents issued the Claimant with a letter of 24th October, 2019 requiring answers to an Audit query that was facing it and the same was not a show cause letter.
11. The Respondent confirmed the procedure followed before the disciplinary hearing as pleaded by the Claimant and in addition stated that Claimant admitted receiving the Kshs.1,550,000/= in his National Bank Account number xxxx. After interrogating the facts and the evidence, the Human Resource Management Advisory committee that carried out disciplinary hearing found the Claimant culpable as it was satisfied that the Claimant had consented to the said monies being send to his account and made its recommendation to the Directorate of Human Resource management (DHRM) and



after further interrogation of facts and evidence the DHRM resolved to dismiss the Claimant from service.

12. The letter of termination was then served upon the Claimant on the 4th January, 2021 through the Claimant's last place of work and the Claimant was entitled to Appeal within 6 weeks which he did on the 5th January, 2021 however the appeal was rejected for failing to advance sufficient grounds.
13. The Respondent's avers that as per the evidence and the facts leading to the termination, the Respondent was satisfied that the Claimant had committed an act of gross misconduct and subjected him to disciplinary process however the Claimant failed to exonerate himself leading to the dismissal therefore that the termination was justified in the circumstances and the Claim herein ought to be dismissed with costs.
14. The Claimant filed a response to defence on the 25th January, 2022 reiterating the contents of his claim and in addition stated that the investigation report revealed that only 1,200,000 passed through the Claimant's account and not Kshs.1,550,000 and having been done by a person known to the Respondent, the Human Resource Management Advisory committee made recommendation for the Suspension to be lifted with effect from 7th January, 2020 and the Claimant to be reinstated back to employment while the said Richard Tamar be ordered to pay the said money.
15. He avers that the move by Directorate of Human Resource management (DHRM) to find his answer unsatisfactory when they did not participate in the hearing was unfair and contrary to the provisions of Article 50 (1)(f) of *the Constitution*.
16. He also stated that he appealed against the decision of the Respondent however the appeal has never been heard to date or the decision if any communicated to him.

Claimant's case.

17. During hearing the Claimant testified as CW-1 and stated that he is currently jobless and adopted his witness statement dated 21.9. 2021. In addition, he testified that he only agreed on one occasion to have Richard Tamar send money to his account because the said Tamar had informed him that his account had a standing Order and the entire sum of money will be utilized leaving him with nothing to sustain himself. He avers that he never inquired the source of the money neither did he ever know it was from the Deposit Account of Molo law Courts. On the monies received, the Claimant testified that he never benefitted from any of the monies as he received the same and immediately forwarded to Richard Tamar and the withdrawn cash was handed over to Tamar. The 270,000 given to Mr. Richard Tamar was done in presence of Billy Opiyo, his brother.
18. He testified that he was subjected to disciplinary hearing, however that he was not served with the documents the disciplinary committee was relying on and upon termination he requested for a copy of the decision of the committee and the proceedings to enable him Appeal however none was served on him. He stated further that, he later learnt that the recommendation of the disciplinary committee was for his reinstatement but the Directorate terminated his services regardless of the recommendation of the Disciplinary committee. He finally produced the documents as filed as his exhibits.
19. Upon cross examination by Owaro Advocate, the Claimant testified that he responded to the letter of 24.10.2019 vide his letter of 25.11.2019. He testified that he agreed to have received the said money from his friend Tamar because he was convinced that his account had a standing Order only to realize the money was from Molo law Court later when he was served with the query letter. He confirmed that he received a show cause letter which clearly stated the charges against him and affirmed that he was subjected to disciplinary hearing. He stated that he never mentioned that he needed any documents



during the hearing. Also that he learnt of his dismissal through the judiciary newsletter which had a column that showed persons that had been dismissed in the judiciary and those who had died.

20. The Claimant called Billy Opiyo as his CW-2. He adopted his statement dated 22.2.2021 and upon being cross examined the witness testified that the Claimant is his brother and after withdrawing cash from the bank he handed over to Richard Tamar while they were standing outside National Bank of Kenya.

Respondent's case

21. The Respondent called the 1st Respondent's Assistant, director Human Resource manager, Peter Bunde, as its RW-1 who adopted his witness statement dated 21.12.2021. He avers that the Claimant was discovered following an audit carried out at Molo Law Courts which showed that some money had been misappropriated and some of the money was traced to the Claimant's accounts. As a result, he was subjected to disciplinary hearing after responding to the show cause letter and was eventually terminated. The Appeal was received by the Respondent however it was dismissed for lack of sufficient grounds.
22. Upon cross examination by Mwenga Advocate, the witness testified that the Claimant was working at Nakuru Law Court during the Audit. In the disciplinary hearing the Claimant was accompanied by Brigit Konga a fellow employee at Nakuru Law Courts. He avers that the auditor that discovered the misappropriation of funds was not present in the disciplinary hearing or the Appeal.
23. Upon further cross examination, RW-1 testified that the termination letter was sent to the Claimant's known postal address. He admitted that the recommendation by the disciplinary committee was for reinstatement however the Respondents overturned the recommendation of the Disciplinary hearing in their meeting of 7th December, 2020 and resolved to dismiss the Claimant.

Claimant's Submissions.

24. The Claimant submitted on two issues; whether the termination of the Claimant was unfair and whether the Claimant is entitled to the reliefs sought.
25. On the first issue, the Claimant relied on the case of [*Anthony Njenga Kuria v Bata Shoe Company \(K\) Limited*](#) [2017] eKLR where the Court held that;

“The primary statutory framework governing disputes relating to termination of employment is found in sections 35, 40, 41, 43, 45 and 47 of the [*Employment Act*](#), 2007. The point to start the discourse is section 47(5) of the [*Employment Act*](#), 2007 which provide that; For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. The above statutory provision lays a very low threshold of proof on an employee, but in any case a threshold which an employee must meet in the first instance when complaining of unfair termination or wrongful dismissal before an employer is called upon to discharge the onerous burden placed on the employer by sections 40, 41, 43 and 45 of the [*Employment Act*](#), 2007.”

26. Accordingly, it was submitted that the reason for termination as espoused by the Respondent was on allegation of engaging in gross misconduct of receiving Kshs.1,550,000 from Molo law Courts when all evidence points out to an act by the Claimant assisting his friend who had alleged that he had a standing



- Orders. Also that the fact that the Claimant never benefitted from the money is a clear indication that he was not working in cahoots with the perpetrator as such the reason for termination is not justified.
27. The Claimant testified that the beneficiary of the said monies was never called to testify in the disciplinary hearing when the said person is an employee of the Respondents who was well known by the Respondent and adversely mentioned in the Audit report. No explanation was given for failing to call the said Richard Tamar. In this the Claimant relied on the case of *Abmed Abdullabi Mohammed & Another v Mohammed Abdi Mohammed & 2 others* [2018] eKLR.
 28. Similarly, that the Court ought to draw an adverse inference against the Respondent for failing to call the main witness being Richard Tamar to testify in the disciplinary process.
 29. It was submitted further that the Disciplinary committee made finding to the effect that the Claimant had not colluded with the Claimant and the recommendation was for him to be reinstated however the Directorate dismissed him without cause when the committee that heard him recommended otherwise.
 30. With regard to procedural fairness, it was submitted that the same was adhered to up to the completion of disciplinary process and the recommendation of the Disciplinary committee exonerated him. The Directorate under the Respondent on the other hand went against the recommendations of the disciplinary committee without giving reasons for the said departure. Further that the said decision was never communicated to him. He learnt of the termination through the Judiciary newsletter. Upon appealing, he was never invited for hearing and only learnt that the appeal was not considered through the Respondent's pleadings.
 31. On the reliefs sought, the Claimant submitted that it has proved his case for unfair termination and urged this Court, taking into consideration the factors laid down under section 49(4) of the *Employment Act* to reinstate him. He argued that the Claimant has been in Respondent's employment for 21 years, desire to continue working for the Respondent and the fact that the Respondent is an arm of Government with various Court all over Kenya makes this case a suitable one to Orders reinstatement.

Respondent's Submissions.

32. The Respondent submitted that for termination of an employee to be justified, the employer must demonstrate that it had a valid reason for the termination and subjected the employee to due procedure as anchored under Section 41, 43, 45, and 47 of the *Employment Act* and relied on the case of *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR.
33. The Respondent submitted that the reason for terminating the services of the Claimant is captured in the letter of termination dated 4th January, 2021 for gross misconduct which an employer is justified under section 44(4) of the *Employment Act* if they summarily dismiss such an employee. It was argued that gross misconduct as provided for under section D.7.2 of the Respondent's HR Manual include corrupt practices, breach of integrity, undue influence, taking bribes, forgeries and misappropriation of funds.
34. Similarly, that the Claimant fell short of the requirements of the HR manual and consented to receiving money in his account from Molo Law Courts an act which was tantamount to gross misconduct.
35. On procedural fairness, it was submitted that the Respondent followed due procedure from issuing a notice to show cause until serving the termination letter and that the process was done in accordance with the provisions of Article 47 and 50 of *the Constitution*.



36. In conclusion the Respondent submitted that the Claimant was terminated for justified reason and following a robust disciplinary process as such is not deserving of the reliefs sought and this claim ought to be dismissed with costs.
37. I have considered the evidence and submissions of the parties herein. From the dismissal letter to the Claimant dated 4th January, 2021, the Claimant was dismissed from service on account of gross misconduct in relation to being cumulatively paid irregularly and receiving kshs.1,550,000/= from Molo Law Courts Deposits Account. The dismissal was with effect from 7th January, 2020 being the date he was suspended from duty.
38. Before this dismissal, the Claimant was served with a letter dated 24/10/2019 to explain circumstances under which he was paid 1,550,000/= into his NBK A/C No. xxxx from Molo Law Courts Deposits Bank Account.
39. This had been unearthed following an Audit Report on Revenue, Deposits, Procurement and Expenditure Management carried out on Molo Law Courts Book of accounts for the period coming 1st November, 2017 to 30th June, 2019.
40. When the Claimant was given an opportunity to explain himself, he explained that the moneys were paid into his account by a friend who is a colleague who had informed him that he had a loan on his account and if the money was paid into his account, it would be swallowed up by the loan.
41. He explained that he was a victim of an activity he didn't understand and had been used by this friend to execute an evil agenda.
42. The Claimant was thereafter invited to a disciplinary committee meeting of the Human Resource Management Advisory Committee on 30th September 2020 which he attended online.
43. From the minutes of this meeting, the claimant repeated his averments that his colleague took advantage of him and wired money in his account without his knowledge that he was executing an illegality.
44. After the committee heard him, it found that he may have been duped and found himself being part of a malpractice he never schemed.
45. The committee recommended that he be given a benefit of doubt and the suspension be lifted and he be reinstated into the service with full pay and that the staff who wired money to him be asked to repay the same 1,550,000/= within 14 days.
46. This report must have been referred to the Judicial Service Commission because vide a letter of 4/1/2021 referring to the show cause letter of 7th January 2020 and his response of 20th January 2020 and the disciplinary hearing of 17th November, 2020 the Judicial Service Commission through the Secretary wrote to him indicating that he had been found culpable of gross misconduct and had been dismissed from the service of the Judicial Service Commission.
47. The Claimant appealed this decision indicating that he had not been accorded a fair hearing and requested to have the decision reviewed and he be reinstated to work.
48. He was never served for hearing before the Judicial Service Commission as it were but the Judicial Service Commission wrote a letter indicating that the appeal had been considered and dismissed.
49. From these chronology of events, it is clear that the Claimant appeared before the Judiciary Human Resource Management Advisory Committee on 30th September 2020 for a disciplinary hearing.



50. He explained himself and the circumstances under which these moneys were deposited into his account. The Human Resource Management Advisory Committee exonerated him of blame and advised he be reinstated back to work.
51. It is evident that the Judicial Service Commission proceeded to dismiss the Claimant without according him any hearing because there is no evidence that he was heard by the Judicial Service Commission after the Human Resource Management Advisory Committee heard him and recommended a reinstatement. It is not clear whether the decision then to dismiss him was emanating from a disciplinary hearing of the Human Resource Management Advisory Committee or the Judicial Service Commission.
52. The Judicial Service Commission could not in my view decide to change the decision of the Human Resource Management Advisory Committee without according the Claimant a hearing. Section 23 (1) of the 3rd Schedule of *Judicial Service Act* states as follows in mandatory terms.

“23.Copies of proceedings

- 1 An officer in respect of whom disciplinary proceedings are to be held under this Part shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings, or to be allowed access to it”.

53. Under the provision, it is mandatory to supply a free copy of any documentary evidence relied upon by the Commission in any disciplinary processes. There is no evidence that this was done in respect of the Claimant. This is in contravention of Article 50(2)(f) of *the constitution* which states as follows;-

“(f)to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;”

54. He complained of this omission in his Appeal which was disregarded by the Commission.
55. The Claimant also complained that he was dismissed without being given a fair hearing. It is evident that the Claimant never appeared before the Judicial Service Commission.
56. He was heard by the Human Resource Management Advisory Committee but was dismissed by the Judicial Service Commission without being given a hearing.
57. This was in contravention of the Fair Administration Action Act and Section 41 of the *Employment Act* 2007 which envisages that a man should not be condemned unheard.
58. The Claimant also submitted that the Judicial Service Commission departed from the findings of the Human Resource Management Advisory Committee without providing any reason and without hearing him and this contravenes his right to a fair hearing.
59. When Claimant filed his appeal, it was also dismissed/or considered in his absence and disregarded. He was thus denied an opportunity to be heard and by extension establish the truthfulness or otherwise of the accusations against him.
60. It is therefore my finding that the disciplinary process meted against the Claimant was flawed.
61. Section 45(2) of the *Employment Act* 2007 states as follows;

“ 45.

- (1)



- (2) A termination of employment is unfair if the employer fails to prove-
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason-
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure”.

62. Having considered these averments, I make a finding that the Claimant was unfairly dismissed from service by the Respondents.

63. Given the fact that the Claimant is a young man who has served the Judiciary for 21 years without any record of misconduct and given the difficulty of finding alternative employment at his age, I find the only remedy that can compensate the Claimant is a reinstatement which I grant him with effect from the date of this Judgment with back pay with effect from the date of dismissal without any loss of salary benefits.

64. The Respondents will pay costs of this suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 12TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Moenga for the Claimant present

Obure holding brief Kanjama for the 1st & 2nd Respondent – present

Court Assistant - Fred

