



**Osoro v SOS Children Villages Kenya (Cause 1612 of 2016)  
[2022] KEELRC 3840 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3840 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1612 OF 2016  
SC RUTTO, J  
AUGUST 5, 2022**

**BETWEEN**

**SAMUEL MOGAKA OSORO ..... CLAIMANT**

**AND**

**SOS CHILDREN VILLAGES KENYA ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted the instant suit *vide* a memorandum of claim dated August 11, 2016. He avers that he was employed on February 21, 2006. That he started off as a project accountant and rose steadily to the position of finance manager. The claimant terms his performance at work as excellent in that, the respondent did not have any complaints in that regard.
2. The employment relationship started to go south when the claimant was issued with a show cause letter on May 25, 2016. This would mark the beginning of the end, as the ensuing process led to his termination from employment on July 19, 2016. It is that termination that has triggered the instant suit. The reliefs sought in the claim total the sum of Kshs 14,502,031.60 and constitute compensatory damages, general damages and unpaid house allowance from May, 2009 to July, 2016.
3. The respondent in opposing the claim, avers that the claimant's dismissal was genuine, warranted and justified. That the claimant was terminated on grounds of gross misconduct and was given an opportunity to be heard before the decision to summarily dismiss him was made. The respondent has asked the court to dismiss the claim with costs.

**Claimant's Case**

4. The claimant tendered oral evidence on March 16, 2022. He adopted his witness statement and documents as part of his evidence in chief.



5. In his testimony before court, the claimant stated that sometimes in August, 2015, he received instructions from the respondent's national director (director), to effect salary review of certain cadre of staff. That he realized that the instructions had compliance issues hence he wrote to the director highlighting the errors. That for instance, some of the staff who were still on probation had been factored in the review while others were wrongly graded.
6. That the director responded informing him that the document had to be implemented as it was. That since the director was the approving authority, he implemented the changes, hence the employees' salaries were increased. That the letters communicating the review were done by the human resource manager in the month of October, 2015.
7. It was the claimant's testimony that at the end of October, 2015, the auditors picked the issue of the salary review and the respondent's management was requested to address the same. That since the letters had already been dispatched and fearing litigation, recoveries could not be made from the salaries of the concerned employees. That it was therefore agreed that the human resource manager would take responsibility for professional negligence. That as such, the payments which had been made to the staff was to be recovered from the salary of the human resource manager.
8. That further, on March 11, 2016, the human resource manager placed an advertisement in regards to a non-existent position of programme coordinator, Meru. That the advertisement had consequences as it involved misuse of money and was also misleading to the members of the public. That he discussed the issue with the director who agreed with him that the money spent in placing the advertisement would be recovered from the human resource manager.
9. The claimant further testified that the director approved and signed off the payroll byproduct on April 28, 2016. That on the same evening, he received an email from the director requiring him to reimburse the salary deduction to the human resource manager. That he emailed back stating that for any reimbursement to be effected, he required a board resolution given that by then, the money was already in the respondent's bank account.
10. It was his testimony that he was not given a proposal on how to account for the money as per the audit query. That subsequently, he received an email on May 23, 2016 from the director asking him to figure out how to recover the money.
11. That thereafter, he received a show cause letter accusing him of irregularities in that he had effected deductions from the salary of the human resource manager. That he was also accused of not following the instructions of the director. That he responded to the show cause letter and thereafter appeared for a disciplinary hearing which was being chaired by the director. That he presented his case at the disciplinary hearing and thereafter, he was terminated on grounds of misconduct and insubordination. That he appealed his termination but the same was rejected with the communication of the appeal outcome emanating from the director.
12. The claimant maintained that what he did was within his job description, which was to safeguard the funds of the respondent organisation. Before closing his testimony in chief, he went on to cite a similar incident in which the director had travelled to Ethiopia and exceeded his expenditure limit hence he had to recover the money from him. The claimant in concluding his testimony, termed his termination as unfair.

### **Respondent's Case**

13. On its part, the respondent elected not to call oral evidence hence its case is as per the memorandum of defence in which it avers that on April 28, 2016, attention was brought to its board that the claimant



had unilaterally effected deductions from the salary of the human resource manager, despite earlier advice not to do so. That the claimant had disregarded the directive of the director hence he recovered the sums of Kshs 15,000/= from the salary of the human resource manager.

14. That the claimant was further advised to reimburse the amounts as his actions were unauthorized and did not follow due process.
15. That the claimant's actions of bypassing the board of trustees and commencing recoveries without prior approval were in violation of the law and his contract of employment.
16. That subsequently, he was issued with a show cause letter, which he responded to. That on June 15, 2016, a disciplinary hearing was held and the claimant was given an opportunity to explain his misconduct. That after considering his response, the respondent was of the view that he had failed to explain his misconduct hence he was summarily dismissed from employment. That the claim is therefore without basis in fact and/or in law.

### **Submissions**

17. It was submitted on behalf of the claimant that with or without consent of the director, it was his duty to recover the money due to the audit question that had been raised and as an accountability issue to the donors. He placed reliance on the case of *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwoma* CA Appeal No 3 of 2014. That further, by the respondent not calling witnesses at the hearing, it had failed to demonstrate that the reasons for the claimant's termination were fair. It was further submitted on behalf of the claimant that the panel constituted to hear his case was not neutral hence the rules of natural justice were not observed. The case of *Ridge v Baldwin* (1963) 2 All ER was cited in support of this position.
18. The respondent submitted that the claimant was afforded procedural fairness as contemplated under the provisions of section 41 of the *Employment Act*. That further, the respondent had a valid and fair reason to initiate a disciplinary process against the claimant. The respondent invited the court to consider the determination in *Abidan Kipkerich Kimerick v Cooperative Bank of Kenya* Kisumu ELRC No 202 of 2018.

### **Analysis And Determination**

19. From the pleadings filed by both parties, the evidentiary material placed before me and the submissions on record, the court singles out the following issues for determination: -
  - a) Whether the respondent had a justifiable reason to terminate the claimant's employment?
  - b) Whether the claimant was accorded procedural fairness prior to termination?
  - c) Is the claimant entitled to the reliefs sought?

### **Justifiable Reason?**

20. Section 43(1) of the *Employment Act* (Act), requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further, section 45 (2) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on its operational requirements.



21. This legal position was reaffirmed in the determination of the Court of Appeal in *Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Mesback M Saboke & 2 others*, Nairobi Civil Appeal No 241 of 2015, where it was held as follows: -

“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the *Employment Act* deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”

22. The reasons for which the claimant was dismissed from employment can be discerned from his letter of summary dismissal which is couched in part: -

“...The management and board having offered you the opportunity to respond to and discuss all the actioned restated below and the concerns herein find you guilty and in violation of the organizational policies on account of the following: -

1. Executing deductions from the salary of an employee of the organisation for an amount overpaid to kindergarten teachers without instructions authorizing such deductions.
2. Executing a deduction from the salary of an employee with respect to a job advertisement without instruction authoring such a deduction.
3. Failing to follow lawful and proper instructions from your supervisor, the national director, even after giving you guidance and direction on the above issues.
4. Acting on a matter before the board of trustees for deliberation, thereby usurping the authority and mandate of the board to give direction on the matter.

The above violations amount to gross insubordination and misconduct and punishable by termination of the contract as per the SOS CB Kenya HR Policy and section 44(4) (e) of the *Employment Act*. Your actions have aggravated the working relationship within the senior management team, a relationship the respective managers and the board of trustees have spent the past six months trying to build and strengthen....”

23. What manifests from the claimant’s letter of termination is that he was accused of insubordination, executing deductions from the salary of the respondent’s employee without instructions and acting on a matter that was before the respondent’s board of trustees for deliberation hence usurping their mandate.
24. In revisiting the provisions of sections 43(1) and 45(2) (a) and (b) of the Act, the respondent was required to prove the fairness and validity of the reasons advanced.
25. While the claimant averred that it was within his duty to effect the deductions, the respondent maintained that the same was undertaken without proper instructions.
26. It is therefore not in dispute that the claimant effected the deductions from the salary of the respondent’s human resource manager. What is in dispute is whether the claimant had authority to do



- so. The claimant testified that he had discussed the issue with the director who subsequently gave him the approval to effect the deductions from the salary of the human resource manager. The claimant further testified that the director had approved the payroll byproduct which contained the deductions. To this end, he exhibited a payroll summary in respect of April, 2016, which indicates that the same was approved on April 28, 2016. The claimant in his testimony stated that the signature belonged to the director and that he was well aware of the deductions when he signed off the payroll. That as such, he had the go ahead to effect the deductions from the salary of the human resource manager.
27. It was also the claimant's case that he effected the deductions in line with the relevant policies of the respondent.
  28. In view of the apparent contest, the respondent had to prove that there was no authority or approval by the director and that the policy in place, did not authorize the claimant to effect the deductions in the manner he did. The burden of proof which is on a standard of probability, rested on its shoulders.
  29. On this note, it is instructive that the respondent did not lead any evidence to counter the assertions by the claimant particularly as regards the issue of the authority he was acting upon when effecting the deductions and the prevailing policy provision in that regard.
  30. As the respondent elected not to tender oral evidence, its case as presented through the memorandum of defence was not be tested in cross examination hence was of little evidential value. Such was the holding by the Court of Appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR where it was held that a document "marked for identification", is of very little, if any, evidential value until it is formally produced.
  31. In this case, the email communication from the director to the claimant on this issue was neither marked for identification nor formally produced as an exhibit before court. As such, it was of no evidential value to the respondent as compared to the claimant's testimony and evidence. In this regard, the said email communication did not aid the respondent in proving that the claimant lacked prior approval and authority of the director in effecting the deductions and that he acted outside the relevant policy.
  32. Coupled with the foregoing, it is notable that the claimant in his response to the show cause letter had given his defence to the allegations in a detailed manner citing policy issues and provisions. This line of defence by the claimant was not challenged by the respondent either through documentary or oral evidence.
  33. As regards the issue of insubordination which was failure to follow lawful and proper instructions of the national director, the claimant testified that by the time he was being asked to reimburse the funds to the human resource manager, the deductions had already been effected. It is also notable that in his email of May 23, 2016, the claimant stated that he would refund the money. Thus: -

"Dear Tom,

With your below communication, I will proceed and refund.

Please note that my actions were guided by the policies of the organisation.

Finally advise on whose account to book the money since I'm not able to account for the funds in the accounting system.

Regards"



34. Following this email communication above, the respondent did not produce evidence to prove that the claimant failed to effect the reimbursement as indicated. Similarly, there was no evidence that the matter was pending before the respondent's board of trustees for deliberation.
35. Over and above, it is noteworthy that some of the claimant's relevant duties as per the job description exhibited herein entailed: -
- a) Leading and coordinating the effective management of finance and general administration functions of finance department;
  - b) Managing the financial activities of the national office;
  - c) Reviewing all monthly income and expenditure statements and informing the national director of any irregularities;
  - d) Ensuring all financial procedures are implemented and adhered to and financial statements are correctly prepared on a timely basis;
  - e) Ensuring all donations, fees and other incomes are adequately accounted for, banked to the appropriate account; and
  - f) Ensuring the organisation meets all its financial commitments to the donors and is the contact person in all finance related matters.
36. With respect to the claimants' duties and responsibilities highlighted above, it is noteworthy that the respondent failed to adduce evidence to prove that he acted outside his mandate of ensuring that the respondent's funds are accounted for and that all the financial procedures are implemented and adhered to.
37. In light of the foregoing, I am not persuaded that the respondent discharged its evidential burden by proving that the reasons for the claimant's dismissal were fair and valid. The resultant termination of the claimant was therefore not fair.

### **Procedural Fairness?**

38. Under section 45 (2) (c) of the Act, an employer is required to comply with the provisions of fair process and prove that it accorded an employee a fair hearing. The specific requirements of a fair process are provided for under section 41 of the Act. In this regard, an employer is required to notify an employee of the intended termination, the reasons thereof in a language he or she understands, in the presence of another employee or a shop floor union representative.
39. From the record, there is an indication that the respondent complied with the requirements of fair hearing, as the claimant was informed of the allegations against him through the show cause letter which he responded to. He was later appeared for a disciplinary hearing where he stated that he presented his case.
40. What appears to be in contest is the neutrality and impartiality of the respondent's panel and in particular, the director.
41. It is evident from the show cause letter that the claimant was accused of not following the instructions of the national director. Essentially, this accusation turned the director to a complainant against the claimant.
42. The foregoing notwithstanding, it is the same director who issued the show cause letter to the claimant. The claimant further stated that the director chaired the disciplinary panel that heard and determined



- his case. This assertion was not disputed and could not be ascertained as the minutes of the disciplinary hearing were not produced in evidence.
43. Further, it bears from the record that it is the director who communicated the outcome of the appeal to the claimant. Yet again, there was no evidence that the director was not part of the team that sat to consider his appeal. Simply put, there was no evidence from the respondent's end, to discount the claimant's assertions that the director was part of the entire process put in motion by the respondent, to consider his disciplinary case. From a perusal of the record, the director was an integral part of the process right from the start to the end.
44. As it is, he was the complainant, the prosecutor, a potential key witness and the decision maker. Needless to say, his participation albeit in an official capacity, portrayed a sense of bias and a conflict of interest. Being one of the complainants against the claimant, it was only fair and just that he keeps off the proceedings relating to the claimant's disciplinary case.
45. This scenario brings to mind the determination in the oft cited case of *Ridge v Baldwin* 1964 AC 40 in which Lord Hudson identified the principles of natural justice as: -
- i. The right to be heard by an un-biased tribunal;
  - ii. The right to have notice of the charge of misconduct; and
  - iii. The right to be heard in answer to these charges.
46. The principle in regards to bias prohibits a person from deciding any case in which he or she may be, or may fairly be suspected to be, biased. What presents in this case is that there was a likelihood of bias in view the role and the level of participation by the director.
47. Subsequently, in as much as the respondent appeared to have complied with the requirements of section 41 of the Act, the level of participation by its director who was a complainant against the claimant, marred the entire disciplinary process and presented a likelihood of bias. To this end, and when viewed in a holistic manner, the process did not seem fair against the claimant.
48. In the end, and taking all factors into consideration, I cannot help but find that the claimant's dismissal was unfair and unlawful.
49. What reliefs then avail the claimant?

### **Appropriate Reliefs**

50. As I have found that the claimant's termination was unfair and unlawful, I award him compensatory damages equivalent to eight (8) months of his gross salary. This award takes into account the length of the employment relationship and the fact that the respondent has not laid basis for the claimant's termination.
51. The claimant has prayed for payment of house allowance in the sum of Kshs 5,087,295.60 with the start date being May, 2009 until July, 2016. The claimant states that the contract of employment which took effect on May 1, 2009 only provided for basic salary. That in the said agreement, house allowance was not provided for and neither was it provided for in his pay slips.
52. The respondent contends that the claimant's contract of employment February 1, 2006 was specific that his salary was consolidated. That the contract of April 6, 2009 was explicit that it was continuous hence the salary captured was consolidated.



53. From the record, the claimant was issued with two contracts of employment. The first was issued when he initially joined the respondent organisation. The said contract provided that his salary would be consolidated. This is not in contention.
54. The second contract is the one whose terms are in dispute. It provides for the component of basic salary and does not include the word “gross” or “consolidated”. It is on this basis that the claimant is seeking payment of house allowance pursuant to the provisions of section 31 of the [Employment Act](#).
55. While the respondent contends that the terms of the initial contract apply to the second one, this does not seem to be the case. Why do I say so? The contract provides expressly that it “supersedes any other agreements made with the organisation”
56. It is also notable that the provision in regards to continuity is under the title “Nature and duration of employment”. My construction of this expression is that the continuity was only limited to the duration of the employment, as it provides that; “For all intents and purposes employment shall be deemed to have been continuous with SOS Children’s village Kenya with effect from March 7, 2006.”
57. Accordingly, the continuity did not have any bearing on the other terms and conditions of the employment contract, which in any event, have been extensively covered.
58. Further, had the respondent intended the salary to be deemed as consolidated, nothing would have been as easy as providing as much, thus leaving no room for ambiguity.
59. My finding is fortified by the determination of the Court of Appeal in [Grain Pro Kenya Inc Ltd v Andrew Waitthaka Kiragu](#)[2019] eKLR where it was held that:-

“(13) Looking at the letter of appointment which is subject contract against the above provision of the law and while conscious that it is not within the scope of courts to re-write a contract but merely to interpret, we find the contract of employment did not indicate whether the sum of USD 600 included house allowance and specifically provided that the respondent was to be paid “other benefits as required by law .....We cannot fault the Judge for that interpretation because house allowance is a benefit that is required under the [Employment Act](#) and the contract did not provide that house allowance was consolidated in the basic wage.... For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause “other benefits as required by law” in the contract to award house allowance. We would have applied section 31 (2) (a) of the [Employment Act](#) to exclude it... To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent.”

60. The upshot of the foregoing is that the claimant is entitled to house allowance at the rate of 15% of his basic salary.
61. The claim for general damages is denied as the claimant has not laid down the basis for its award. Besides, the award of compensatory damages is sufficient to make good the claimant’s loss.

### Orders

62. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded: -
  - a. Compensatory damages equivalent to eight (8) months’ gross salary being Kshs 1,882,650.00 (Kshs 265,650\*8 months).



- b. House allowance in the sum of Kshs 1,285,885.05 calculated as follows: (Kshs 42,439\*15%\*13 months + Kshs 70,789\*15%\*12 months+ Kshs 82,064\*15%\*12 months+ Kshs 84,526\*15%\*24 months+ Kshs 231,000\*15%\* 18 months)
- c. The total award is Kshs 3,168,535.05.
- d. Interest on the amount in (c) at court rates from the date of judgment until payment in full.
- e. The respondent shall also bear the costs of this claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF AUGUST, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Muhanda

For the Respondent Mr. Ouma

Court Assistant Abdimalik Hussein

**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 had 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.

**STELLA RUTTO**

**JUDGE**

