



**Lugwe v Kwale County Assembly Service Board (Cause 100 of 2019)
[2022] KEELRC 12966 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12966 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 100 OF 2019
B ONGAYA, J
OCTOBER 28, 2022**

BETWEEN

WILLIAM MJAPE LUGWE CLAIMANT

AND

KWALE COUNTY ASSEMBLY SERVICE BOARD RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 18.12.2019 through Otieno Asewe & Company Advocates. The claimant's case is that he was unfairly terminated from employment by the respondent on 16.07.2019. he claims against the respondent for:
 - a. A month's salary in lieu of the termination notice Kshs.164, 310.00.
 - b. Balance of ½ salary for 3 months Kshs.82, 155 x 3 = Kshs. 246,465.00.
 - c. Subsistence allowance 24th -30th March 2019 Kshs. 14,000.00 x 5 days = Kshs. 70,000.00.
 - d. Compensation for unfair termination Kshs.164, 310.00 x 12months = Kshs.1, 971, 720.00.
 - e. Total claim Kshs. 2, 382, 495.00.
 - f. General damages for discrimination and violation of constitutional rights.
 - g. Respondent to settle claimant's mortgage.
 - h. Respondent to be compelled to sign the discharge form from the love fund.
2. The claimant alleged that the dismissal was unlawful and unfair because it was contrary to sections 35, 41, 43, 45, and 49 of the *Employment Act*, 2007 and, unconstitutional. The claimant prayed for judgment against the respondent for:
 - a. Payment of Kshs. 2, 82, 495.00.



- b. Reinstatement.
 - c. Respondent to settle claimant's mortgage.
 - d. Respondent to be compelled to sign the discharge form from the lapfund.
 - e. General damages for discrimination and violation of constitutional rights.
 - f. Costs of the claim and interest thereon at Court rates.
 - g. A declaration that the termination of the claimant's employment was unfair, unjust, and wrongful.
 - h. Any other relief that the Honourable Court may deem just and fit to grant.
3. The respondent filed the response to the memorandum of claim on 10.02.2020 through Munyao, Muthama, & Kashindi Advocates. The respondent denied the claimant's case and claims and prayed that the suit be dismissed with costs.
 4. The claimant testified to support his case and the respondent's witness(RW) was the Fatuma H. Mwalupa, the respondent's Secretary. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.
 5. To answer the 1st issue for determination, the Court returns that by pleadings and evidence there is no dispute that the parties were in a contract of service. The respondent employed the claimant as the Accounts Assistant III in the Finance Department of the Respondent. The claimant applied internally and on 01.01.2015 the respondent appointed him to the position of Internal Auditor and he served as the Head of Internal Audit Function for the respondent. The claimant's last monthly salary was Kshs. 164, 310,00.
 6. To answer the 2nd issue for determination, the Court returns that by pleading and by evidence, the claimant's contract of service was terminated by the letter dated 23.05.2019. The letter stated that the claimant had been accorded a fair hearing by the Staff Advisory Committee with respect to the allegations levelled against the claimant in the previous correspondence and the Committee had recommended that the claimant be dismissed from the respondent's service. The letter also stated that Management Committee had upheld the findings and recommendations of the Staff Advisory Committee. Further, the respondent Board had considered the disciplinary proceedings and noted that the Staff Advisory Committee conducted a fair hearing and gave the claimant a fair opportunity to be heard and present evidence in defence. The respondent had therefore decided to terminate the claimant's employment effective 22.05.2019. He was given 14 days to appeal against the findings of the Staff Advisory Committee.
 7. The 3rd issue for determination is whether the termination of the contract of service was unfair. The disciplinary procedure was initiated by the letter on gross misconduct and interdiction dated 09.04.2019 addressed to the claimant and signed by RW, the respondent's Secretary. The letter stated that the it had been reported that the claimant's general conduct and work performance as Internal Auditor had been found wanting on account of the following reported acts of gross misconduct:
 - a. Absconding of duty.
 - b. Insubordination and threats to the office of the Chairman to the Board.
 - c. Insubordination to the office of clerk.
 - d. Negligence of duty.



- e. Unauthorised use or disclosure of confidential information.
 - f. Using abusive language and insulting language or behaving in a manner likely to cause a breach of peace.
8. The letter stated that further particulars of the acts of gross misconduct would be availed later. The letter invited the claimant to show cause why disciplinary action would not be taken against him as it was contemplated to dismiss him from the service. He was required to reply in 30-days. He was equally interdicted from office on half salary, full house allowance and entitlement to medical cover. He was precluded from the respondent's premises.
 9. The respondent replied by his letter dated 12.04.2019 received by the respondent on 15.04.2019. The letter was titled "apology" and he wrote that he was sorry and thereby apologised to the matters raised as per the letter of gross misconduct and interdiction dated 09.04.2019. He further wrote, "There is no arguing that the matters are regrettable, and I want to make sure you know I recognize that and feel horrible about it." He further stated, "I pray for forgiveness from the Board and to everyone that I ill-treated. It is my humble request the Board considers withdrawal of the interdiction and that it serves a warning for myself and others who will engage themselves in unethical conducts." He requested the Board to deploy him to any lowly office it considered fit. He suggested that the Board establishes an office on monitoring and evaluation separate from Audit and Finance Departments to help the County Assembly perform its oversight function over the executive better and as the respondent considered fit.
 10. By letter dated 07.05.2019 the Staff Advisory Committee's Secretary forwarded to the claimant a charge sheet requiring the claimant to submit response before 2.00pm on 13.05.2019, the time scheduled for the Committee's sitting. The claimant was invited to be present and to give oral submissions. The charges were five under each of the alleged acts of gross misconduct in the letter of interdiction of 09.04.2019. The charges and the particulars were as follows:
 1. Charge 1: as Head of Audit Department, he absconded duty without informing the clerk of his whereabouts and evidence was said to be attached.
 2. Charge 2: the claimant had send threatening messages to the Speaker via his phone as per attached snap shot messages.
 3. Charge 3: the claimant had been insubordination of the office of the Clerk by writing and signing letters to the County Engineer which was not forwarded by the clerk and delivered the same without knowledge of the Clerk. The misconduct was revealed when the Engineer took the letter to the attention of the Clerk complaining that the letter did not have her signature and forwarding remarks. Also per attached evidence he had send demeaning emails to the acting Clerk.
 4. Charge 4: the claimant had neglected duty by no forwarding his Audit weekly and quarterly reports to the Clerk except when the Board asked him to do so.
 5. Charge 5: the claimant had used abusive and insulting language by sending the Speaker and the acting Clerk messages in a manner to cause a breach of peace to the offices they held.
 11. The meeting of the Staff Advisory Committee held on 09.05.2019 extended the interdiction period by 15 days and for the claimant to be informed as conveyed to the claimant by the letter dated 10.05.2019.
 12. The Staff Advisory Committee met on 14.05.2019 and the claimant was present. He admitted committing some of the alleged charges and also gave explanations. The Court has considered the



responses and the testimony by RW, the Claimant and the other exhibited documents and the analysis is as follows:

- a. The claimant told the Committee he had not signed the check-in register and used the biometric system for check in because he had to audit the same records. In his testimony he stated the ICT officer had failed to take his finger prints and so he could not use the biometric system. As for the registers he had not signed because as Internal Auditor, he had been deployed in a block where the register for check-in had not been provided. RW testified that she had warned the claimant about the absence without permission. That evidence by RW is verified by the email at page R30 dated 27.06.2018 reminding the claimant he had not been reporting at work as required and that any absenteeism or sick off had to be approved. The email lamented that the office did not know his whereabouts. He was asked to report at the office without fail. On the same 27.06.2018 the claimant replied to RW thus, "I understand the issue at hand but I won't be involved in updating the books of accounts. Let them finish the work. I'll assist where necessary." The Court finds that the claimant gave contradictory account on why he failed to sign the check-in register or use the biometric check-in system. The emails confirm his absence without permission. The charge of gross misconduct of absence from work without permission is found to have been established by the respondent to have existed as at termination per section 43 of the *Employment Act*, 2007.
 - b. He admitted to charge 2 and informed the Committee that he was very bitter that the Chairman was not picking his call and he was in dire need of money that time. The Court finds that misconduct was thereby established.
 - c. He admitted charge 3 and stated he was remorseful and had committed it because the acting Clerk had failed to pick his call at a time he needed money to assist his aunt who was critically ill at hospital. The Court finds the gross misconduct existed as at termination.
 - d. On charge 4 he stated he was not comfortable forwarding audit reports to the acting Clerk because he wanted to forward them to the Board directly. The Court has considered the appointment letter dated 05.01.2015 and clause 2 on position states, Internal Auditor reporting to the Clerk. The Court finds that the claimant contractually reported to the Clerk and not the Board. He was misconceived not to provide the weekly and other audit reports to the Clerk. The Court finds that gross misconduct was valid as at the time of the termination.
 - e. The minutes show the claimant admitted charge 5 during the Committee hearing and he was abusive because the Chairman and the clerk had not been picking his calls. That ground of gross misconduct is found to have been valid as at termination.
13. The Committee recommended stern action against the claimant as all the charges had been established.
 14. The Court finds that the reasons for termination have been established by the respondent to have existed and were valid as at termination and per section 43 of the Act. The Court further finds that the reasons were fair per section 45 of the Act because they related to the claimant's conduct, capacity, and compatibility and, were based on breach of the respondent's operational systems. The Court has examined the email correspondence exhibited for the respondent and which show that the claimant was a difficult employee who rudely did not want to follow instructions given by his immediate supervisor, the Clerk. As submitted for the respondent, the termination was not unfair.
 15. The Court has considered the claimant's testimony that the Staff Advisory Committee ought not to have considered his case and that the Finance Head and Procurement Head who attended were the complainants. However, the Court finds the purported grievance as mere after thought. First,



in the reply to the letter of gross misconduct and interdiction, the claimant had written his apology on 12.04.2019 judging himself culpable, declaring his actions and conduct horrible, and proposing imposition of a demotion. By that letter of apology, the Court finds that the claimant admitted culpability and even without any further process before the Staff Advisory Committee, he was bound accordingly. Second, on 27.05.2019, the claimant wrote his formal appeal. He did not raise any question about the propriety of the Committee's composition or procedures. Instead he stated that the Board accepts his apologies. The Court finds that the rational inference about the purported appeal is that the claimant admitted culpability but requested that his apology be accepted. The respondent cannot be faulted when in declining the appeal and upholding the termination wrote the letter of 16.07.2019 stating in part, "We further noted that the letter you wrote as a formal appeal was only a prayer for the Board's to accept your apologies and not an appeal on the charges levelled and confirmed against you." The Court finds that it cannot be found that in the circumstances, the respondent adopted an unfair procedure. The evidence is that the procedure adopted was fair as envisaged in section 45 of the Act and was substantially consistent with the safeguards of a notice and a hearing as envisaged in section 41 of the Act.

16. While making that finding, the Court has considered the claimant's case that he was dismissed when he wrote to the Engineer to access certain information to aid his audit duty. However, as already found, the claimant reported to the Clerk as the immediate contractual supervisor. As submitted for the claimant, Regulation 161(3) of the Public Finance Management (National Government) Regulations, 2015 provides, "(3) The internal auditor shall have unrestricted, direct and prompt access to all records, official or personnel holding any contractual status and to all the premises and properties of the entity." The claimant's case is not that the Clerk had failed to assist him to access the information held by the Engineer. The issue in dispute and being offensive to the respondent appears to be that in furtherance of insubordination of his supervisor, the claimant wrote to the Engineer in a manner calculated to undermining the Clerk – namely not disclosing or consulting or involving the Clerk as the supervisor. Further, the Court finds that as submitted for the respondent, the cited regulations did not apply and the applicable Regulation 155 of the Public Finance Management (County Governments) Regulations, 2015 required the claimant to act within the reporting structure thus, "155(1). The Head of Internal Audit unit in a county government entity shall enjoy operational independence through the reporting structure by reporting administratively to the Accounting Officer and functionally to the Audit Committee." Thus, the Court finds that the administrative reporting structure applied. By his own evidence, he authored the letter through the Clerk but the Clerk actually never forwarded it. Instead he deliberately delivered the letter to the County Engineer without the Clerk forwarding it. The Engineer then forwarded the letter to the Clerk by email and pointing out that it lacked the Clerk's forwarding remarks. The Court returns that per the submissions made for the respondent, the claimant's action undermined the regulatory administrative reporting structure which had been incorporated in the contract of service which stated that the claimant reported to the Clerk. The Court further finds that despite that letter to the Engineer in issue, the claimant has been found to have admitted culpability and he wrote apology with respect to the allegations that were levelled against him.
17. The Court returns that the termination was not unfair in procedure and substance. The submissions made for the respondent are upheld in that regard. Consequently, the Court finds that the prayers for notice pay and compensation for unfair termination plus the prayer for reinstatement will all collapse as unjustified.
18. The 4th issue for determination is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:



- a. As submitted for the respondent the claimant did not plead particulars of the alleged discrimination. There was no evidence to establish discrimination or violation or threatened violation of other rights and freedoms. The prayer for general damages for discrimination and violation of constitutional rights will fail as unjustified.
- b. The claimant has prayed that the respondent is ordered to pay his mortgage facility. As submitted for the respondent, the claimant offered no evidence or contractual basis to justify the prayer. It will fail.
- c. The claimant prayed that the respondent be compelled to sign the discharge form from the lapfund. The claimant's case is that he was a contributor to the fund but the respondent had failed to enable him access the fund. His case was that the respondent had failed to sign a discharge form to facilitate the release of the funds. RW testified that the claimant had not returned the property belonging to the respondent and had not cleared and, the claimant had not applied. The Court finds that the respondent should facilitate the claimant to access the lapfund per applicable procedures.
- d. The Court considers that the termination having been not unfair and the claimant not having worked during the interdiction period, the claimant would not be entitled to half salaries withheld during the interdiction period. Thus the Court upholds and follows the holding in *Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR*, thus, "The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."
- e. The Court finds that the claimant has provided no evidence on the contractual or policy basis for the claim of Kshs. 70, 000.00 being alleged subsistence allowance for 24th – 30th March 2019. The claimant has not offered pleadings and evidence of the basis for the payment. The prayer will fail.
- f. The court has considered the margins of success and all circumstances of the case and returns that each party will bear own costs of the suit.

19. In conclusion the suit is hereby determined and judgment entered with orders:

1. The respondent to facilitate the claimant to access the lapfund per applicable procedures including signing the relevant forms.



2. Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS
FRIDAY 28TH OCTOBER, 2022.**

BYRAM ONGAYA

JUDGE

