



**Onyango v Lake Basin Development Authority (Cause 146 of 2016)  
[2022] KEELRC 12883 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12883 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 146 OF 2016  
S RADIDO, J  
OCTOBER 12, 2022**

**BETWEEN**

**DAVID JOSEPH ONYANGO ..... CLAIMANT**

**AND**

**LAKE BASIN DEVELOPMENT AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. This cause was heard on May 9, 2022 and May 31, 2022.
2. David Joseph Onyango Ariwi (the claimant) and a legal officer with Lake Basin Development Authority (the respondent) testified.
3. The parties' submissions were not on record within the agreed timelines.
4. The court has given due consideration to the pleadings and evidence and will adopt the issues as examined hereunder.

**Unfair Termination Of Employment**

**Procedural fairness**

5. On or around January 20, 2014, the respondent's managing director issued show-cause letters to the trustees of the Lake Basin Development Authority Provident Fund, including the claimant (the respondent was the founder of the fund).
6. The letter referred to an audit which had found anomalies in the operations of the fund and requested the claimant (who was one of the trustees) to respond to allegations outlined in the show cause within 48 hours.



7. The show cause advised the claimant that upon his response, the human resource advisory committee would handle the issue. The claimant responded on January 22, 2014 and, on January 23, 2014, attended a meeting in the office of the chairman of the respondent to discuss the audit report.
8. On February 12, 2014, members of the fund met and resolved that the trustees be removed, and fresh elections be held.
9. Consequently, the respondent wrote to the claimant on February 20, 2014, informing him of removal as a trustee based on the members' resolution. The letter instructed the claimant to prepare a comprehensive handover report.
10. The claimant and other trustees prepared a handover report dated February 26, 2014, and on the same day, he was suspended from work, pending further investigations.
11. On October 21, 2014, the respondent notified the claimant of his dismissal.
12. The claimant challenged the procedural fairness of his dismissal on the grounds that he was not given a show cause letter, he was not given a copy of the report of the investigation, he was not allowed an opportunity to be heard by the disciplinary committee and that his appeal against dismissal was not considered.
13. The respondent had in place a human resource policies and procedures manual. Clause 16.4.5.3 of the manual prescribes a step-by-step process before a dismissal could be effected.
14. These include appearances before the human resource advisory committee, membership of the committee and the right to call witnesses.
15. The clause also envisages the committee making recommendations to the managing director, who forwards the same to the board of directors for a final decision.
16. Despite the claimant admitting that he appeared before the committee, the respondent did not place before the court any evidence that the committee sat (in for of minutes or notes) after the suspension of the claimant on February 26, 2014. There was equally no evidence that the committee recommended to the managing director that the claimant be dismissed.
17. The respondent also did not provide any evidence that the recommendation to dismiss the claimant (if any) was approved by the board as demanded by the manual.
18. The claimant appealed against his dismissal as provided under the manual. There was nothing put before the court to show that the respondent's board processed the appeal.
19. The court has no hesitation in concluding that the respondent did not comply with its own disciplinary protocols, thus rendering the claimant's dismissal procedurally unfair.

### **Substantive fairness**

20. In terms of sections, 43 and 45 of the *Employment Act*, 2007, an employer should have valid and fair reasons to dismiss an employee.
21. Validity of reasons should have a firm underpinning in law or contract.
22. The claimant contended that his dismissal was not for valid reasons because the allegations leading to the dismissal did not arise during employment but during his duties as a trustee of the Lake Basin Development Authority Provident Fund Scheme, a different entity from the respondent.



23. It is not in dispute that the allegations leading to the claimant's dismissal arose outside the scope of an employer/employee relationship. However, the allegations directly impacted the claimant's relationship with other employees of the respondent who were members of the fund.
24. The allegations were alleging dishonesty in the operations of the fund. The respondent's employees comprised the primary members of the fund. The respondent was the sponsor of the fund.
25. Although the parties did not draw the attention of the court to any domestic case law, jurisprudence from other jurisdictions contemplate the dismissal of an employee for misconduct outside the workplace ( see Tibbett & Britten (SA) (Pty) Ltd v Marks & others (2005) 26 ILJ 940 (LC), National Union of Mineworkers & others v East Rand Gold & Uranium Co Ltd (1986) 7 ILJ 739 (LC), O'Keefe v William Muir Pty Ltd t/a Troy Williams the Good Guys (2011) FWA 5311).
26. In the court's view, there was a clear nexus in the claimant's roles as a trustee of the fund, and an employee of the respondent. The claimant was elected to represent the employees in the fund. The respondent's reputation as the sponsor of the fund was at risk because of the irregularities established by the audit.
27. The claimant admitted in response to the show cause that there had been irregularities in the operations of the fund, and the court finds that the respondent had valid and fair reasons to take disciplinary action.
28. The respondent did not get the procedure right. It had valid and fair reasons to dismiss the claimant.
29. The court, therefore, declines to award compensation or salary *in lieu* of notice.

### **Breach Of Contract**

#### **Salaries for November/December 2013**

30. The claimant prayed for Kshs 116,360/- stated to be salaries for November and December 2013.
31. Despite raising the question of these salaries in the witness statement, which was adopted as part of the evidence, the respondent's witness did not controvert the oral evidence by the production of any attendance or pay records or any sufficient explanation why the salaries were not paid (the claimant had in a letter dated 9 December 2013 indicated that the respondent had confiscated the attendance register).
32. The court will allow the head of the claim.

#### **8 Months allowance**

33. Clause 16.4.5.1 of the human resource manual provided that an employee on suspension would not be entitled to a salary. The employee was, however, eligible for allowances.
34. The claimant sought Kshs 188,000/- on account of the allowances for the 8 months he was on suspension.
35. The respondent produced a copy of a pay change advice to show that the claimant was paid his entitlements during the suspension period.



### **Medical cover**

36. The claimant also relied on the aforesaid clause to claim Kshs 830,000/- as medical cover for 2014. The respondent placed before the court records showing the claimant was paid Kshs 4,000/- as medical allowance for March 2014 and that thereafter, employees were placed on medical insurance cover.
37. Nothing turns on this head of the claim.

### **Pro rata leave**

38. On account of pro rata leave for 2013, the claimant pleaded Kshs 48,483/30. The respondent, however, contended that the claimant was not entitled to the accrued leave because the same had become forfeited when he did not apply for the leave.
39. The claimant was on suspension for 8 months starting February 26, 2014, and it would not have made logical sense to expect him to apply or forfeit the leave before the end of the leave year.
40. The leave would have only become forfeited by the end of 2014.
41. The court will allow this head of the claim.

### **Long service award**

42. The claimant made a pitch for Kshs 50,000/- as a long service award. He had served for about 26 years.
43. The human resource policies and procedures manual provided for a long service award after 10 years' service but was silent on when the award would be paid (either yearly or upon retirement).
44. The claimant did not lay an evidential foundation to show that the respondent had a practice or custom of paying the long service award to employees who had been dismissed.
45. With the lack of clarity, the court declines to allow this relief.

### **Contributions to provident fund**

46. The claimant sought the equivalent of 20% of the basic salary stated to have been the employer's contributions towards the provident fund during the suspension period.
47. The records filed in court by the respondent indicated that the provident fund benefits paid to the claimant included 50% of the employer's contribution.
48. The fund, a legal entity capable of being sued, was not made part of the proceedings. The court declines to allow this head of the claim.

### **Underpayments**

49. The claimant contended that he was underpaid by Kshs 2,744,524/-, based on the revised salary scales from July 1, 2009 to October 21, 2014.
50. To support the head of the claim, the claimant relied on and produced a copy of a circular from the office of the prime minister referenced the re-alignment of the salary structure for civil servants effective from July 1, 2012.
51. Civil servants, the court takes judicial notice, were public officers employed by the public service commission of Kenya and deployed to serve ministries.



52. The claimant did not show that the public service commission employed him or that the circular applied in the case of employees of the respondent.
53. The records placed before the court show that the respondent had its salary structures, and relief is declined.

#### **Underpayment of commuter allowance**

54. The claimant based this head of the claim on a press statement notifying the public of payment of commuter allowance arrears for civil servants.
55. The claimant did not prove that he was a civil servant or that the press release applied in his case. Evidence before the court was that the claimant was getting Kshs 2,500/- monthly as a commuter allowance.

#### **Access to records**

56. The claimant asked the court to order the respondent to furnish him with copies of the audit report and minutes of the human resource advisory committee, which recommended the dismissal.
57. The claimant separated from the respondent over 6 years ago. Access to the required records would be of no legal utility.

#### **Certificate of service**

58. A certificate of service is a statutory entitlement, and the respondent should issue one to the claimant within 30 days.

#### **Conclusion and orders**

59. From the foregoing, the court finds and declares that the dismissal of the claimant though procedurally unfair, was for valid and fair reasons.
60. The court, however, declines to grant compensation or salary *in lieu* of notice.
61. The court finds the respondent in breach of contract and awards the claimant:
  - i. November/December 2013 wages
  - ii. *Pro rata* leave
62. The respondent to compute and pay the awards within 45 days, failure to which the same to attract interest at court rates from the date of judgment.
63. The respondent to issue a certificate of service within 30 days.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 12<sup>TH</sup> DAY OF OCTOBER 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

#### **Appearances**

For Claimant Ouma Njoga & Co. Advocates

For Respondent Ogejo, Omboto & Kijala Co Advocates



Court Assistant Chrispo Aura

