



REPUBLIC OF KENYA



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Akumu & another v Independent Electoral & Boundaries Commission [IEBC] (Cause 1709 of 2016) [2022] KEELRC 13309 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13309 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1709 OF 2016
J RIKA, J
NOVEMBER 30, 2022

BETWEEN

LYDIA ONDISO AKUMU 1ST CLAIMANT

TONY OPICHO WANYAMA 2ND CLAIMANT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
[IEBC] RESPONDENT

JUDGMENT

1. The Claimants filed separate Statements of Claim, on 25th August 2016.
2. The Claims were consolidated in an order issued on 15th July 2020.
3. It was directed that Cause No. 1709 of 2016 would be the lead file.
4. The 2nd Claimant Tony Opicho, availed himself first, and was heard on 4th March 2021. The 1st Claimant Lydia Ondiso, was heard on 5th November 2021 when the Claimants closed their consolidated Claim.
5. The Respondent's Human Resource Manager, Peter Miring'u, gave evidence on 10th February 2022, when the hearing closed.
6. The Claim was last mentioned in Court on 27th July 2022, when Parties confirmed filing and service of their Submissions, and were informed by the Court that Judgment would be delivered on notice.

1st Claimant's case.

7. The 1st Claimant pleads and testified that she was employed by the Respondent Commission in July 2012. She was employed as a Warehouse Assistant.



8. She was suspended on 2nd November 2015 for alleged misconduct. The specific allegation was that she, alongside 2 other Employees of the Respondent, received kickbacks totalling Kshs. 700,000, from one of the Respondents Travel Agents, M/S Silverbird Travel Plus.
9. She appeared before the Respondent's Disciplinary Committee, which she states, was faulty, because the Committee she appeared before, was a Standing Disciplinary Committee, which dealt with Officers at Management level. She ought to have appeared before a Disciplinary Committee set up by the Respondent's CEO, under the approved Human Resource and Administration Manual.
10. She complains that the Standing Disciplinary Committee relied on hearsay; failed to consider her evidence; there was no documentary evidence of any kickback; her accusers did not present themselves at the hearing; she was not availed the full investigation report; and, the Committee did not consider her disciplinary record over the 4 years served.
11. Her last monthly salary was Kshs. 91,910.
12. Her contract was terminated on 10th March 2016 for gross misconduct.
13. She appealed against the decision to dismiss her, through a letter dated 15th April 2015. She has never received a response from the Respondent, which is against the HR Manual section 10.2.4.
14. Termination was unfair and unlawful. She had 45 days of pending annual leave, by the time she was dismissed. Her character was injured, as she was reported in the newspapers to be a very corrupt officer. She was, following this reputational damage, unable to secure alternative job in a reputable organization.
15. She prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair.
 - b. Full salary from 2nd November 2015 to February 2016 at Kshs. 367,640.
 - c. 1-month salary in lieu of notice at Kshs. 91,910.
 - d. 12 months' salary in compensation for unfair termination at Kshs. 1,102,920.
 - e. 45 days of annual leave.
 - f. Damages for unfair termination.
 - g. Letter of Service.
 - h. Costs and Interest.
16. She restated these pleadings in her evidence before the Court. She adopted her Witness Statement. She met Respondent's CEO on 16th October 2015. The meeting was about procurement. She did not at any time, discuss ticketing, or confess to the CEO that she had received a kickback. She restated that she was not fairly heard, before the right Disciplinary Committee. She felt intimidated to face the Management Disciplinary Committee. She appealed. The Appeal ought to have been concluded within 90 days, in accordance with the HR Manual. She only received communication rejecting the Appeal, 6 months after she filed it, and when she initiated the Claim in Court. There were 3 Employees who were alleged to have received kickbacks- the Claimants and Joseph Ayata. Ayata was exonerated, while the Claimants were found culpable.
17. Cross-examined, the 1st Claimant confirmed that she was a Warehouse Assistant. She was involved in procurement. Respondent's annexure 1 is a memo on procurement of air tickets. There was a



meeting on the issue, held on 16th October 2015. The 1st Claimant did not agree with the contents of the memo. There was no need for her to write a protest letter on the contents of the memo. Clause 6 of her contract allowed the Respondent to terminate the contract on reasonable suspicion of misconduct. Rules and Regulations of the Respondent applied to the 1st Claimant. The letter of suspension dated 2nd November 2015 states that the 1st Claimant admitted receiving kickback. The meeting was impromptu. She did not expect an impromptu meeting to be preceded by a memo. She states in her Witness Statement that she was surprised that Ayata was not dismissed. She did not imply that all 3 implicated officers should have been dismissed. She expected all of them to be reinstated. The letter to show cause, did not involve Ayata. She was prejudiced by being taken before the Standing Disciplinary Committee, which hears Directors. She was intimidated. She was not precluded from answering any question. She did not confess to anything. Termination was with immediate effect. She would not be entitled to notice. She had not cleared with the Respondent. Payment of terminal dues depended on her clearance.

18. Redirected, she told the Court that her accusers were the Respondent's CEO and Silverbird. The 3 implicated Employees should have been accorded similar treatment. She was not told why Ayata was not dismissed. The memo referred to impromptu meeting. She was not convicted of a criminal offence.

2nd Claimant's case.

19. The 2nd Claimant was employed by the Respondent in the year 2012 as a Stores Clerk. He was suspended alongside the 1st Claimant, on 2nd November 2015. He was like the 1st Claimant and their colleague Joseph Ayata, alleged to have received a total sum of Kshs. 700,000 from the Travel Agent. The 2nd Claimant was taken through the same disciplinary motions as the 1st Claimant. His contract was terminated on 10th March 2016 on account of gross misconduct.
20. He adopts similar complaints as made by the 1st Claimant at paragraph 10 of this Judgment, and makes similar prayers as made by the 1st Claimant. The only adjustments he makes, are based on his monthly salary of Kshs. 77,260; he pleads accrued annual leave of 30 days; and pleads annual increment of 10% of his monthly salary for the years 2013, 2014 and 2015. In total, the 2nd Claimant prays for a sum of Kshs. 1,416,253, costs and interests.
21. He adopted his Witness Statement in his evidence. He restated his employment history, the terms of his service, and the allegations made against him, which led to the disciplinary process and ultimate dismissal. There was no confession from the 1st Claimant, that she received a bribe from the 2nd Claimant, which had been received from the Travel Agent. Confession if any, should have been recorded. He appealed against the dismissal decision. He did not receive an answer, within the prescribed 90 days. If the allegations on kickbacks were true, the Claimants' colleague, Joseph Ayata, would have been dismissed.
22. Cross-examined, the 2nd Claimant described himself as a hustler. He was given the opportunity to defend himself, but felt intimidated by being heard before the higher Disciplinary Committee. He was advised on his right to be accompanied by a representative of his choice. He did not exercise this right. Salary increment was automatic. The 2nd Claimant was not given increment. He did not admit that he received a kickback from the Travel Agent Silverbird, which he distributed to the 1st Claimant and Ayata. Salary increment under the HR Policy, was subject to satisfactory performance. His response to the accusations against him could not have been different, had he appeared before any other Disciplinary Committee. He did not face his accusers. The Manual says appeal is to heard within 90 days.



23. Redirected, the 2nd Claimant told the Court that there was a reason why the Manual created 2 different Disciplinary Committees. He was not informed why he was taken before the Commission Disciplinary Committee. Salary increment is mandatory, under the letter of appointment. He was not required to put out a request for increment to the CEO. The 2nd Claimant was not invited for the final dues. He was not availed his Certificate of Service.

Response.

24. The Respondent filed Statements of Response to both Claims, on 15th September 2016. It is conceded that the Claimants were employed by the Respondent in the positions and on dates pleaded in the consolidated Claim.
25. The Respondent's Procurement Manager, Milcah Chebosis delegated to Procurement Assistant, Edward Keem to upgrade air tickets for the Respondent's Chairman and Commissioner, who were traveling abroad on official duty. Keem reported that all Travel Agents had declined to upgrade on the basis of local purchase orders. All were said to have asked for cash payments, save for one Silverbird Travel Agent.
26. Silverbird declined to give a quotation, saying it would only do so, upon authorization by the Procurement Manager. Chebosis, the Procurement Manager called Silverbird, who insisted that the Procurement Manager was Lydia Ondiso, the 1st Claimant therein, and that only she could authorize the upgrade. Silverbird alleged also, that Chebosis had been transferred.
27. Chebosis called the 1st Claimant, enquiring why she impersonated him. In her response, the 1st Claimant said that Ayata, who was the Respondent's Manager in charge of Commission Services, had called her, to get the quotation from Silverbird. She stated further that Ayata had informed Silverbird that she was the Procurement Manager. In a meeting held on 15th October 2015, the 1st Claimant confessed that she received money from the 2nd Claimant while the Procurement Manager was on annual leave. The money was from inflated air tickets, and was shared by the Claimants and Ayata.
28. The real Procurement Manager escalated this report of corruption to the Chief Finance Officer. Another meeting was called involving the Procurement Manager, Chief Finance Manager and the 1st Claimant. The 1st Claimant again confessed receipt of the kickbacks.
29. A meeting was convened involving the CEO, where the Claimants owned up to receiving kickbacks, in the presence of Respondent's Deputy Secretary, Procurement Manager, Chief Finance Officer, and Procurement Clerk. They conceded that they solicited, received and shared Kshs. 700,000 from Silverbird. Confession was documented by witnesses who attended the meeting. Ayata was not present, but upon return, he denied receiving a kickback.
30. The Claimants and Ayata were all suspended, while Silverbird was blacklisted. The Officers were issued letters to show cause. They responded denying corruption. They were taken before the Commission's Disciplinary Committee. They were heard. Evidence from Senior Officers who heard the confessions, was taken into account. The Committee recommended termination of the Claimants' contracts. The Claimant's respective contracts were terminated on 10th March 2016. They were advised to appeal within 90 days. They did so, and the Respondent held a special plenary on 8th August 2016. There was no new evidence and termination was upheld. They were informed about the decision.
31. The Claimants were treated fairly. 10% salary increment was subject to performance appraisal. It was not automatic. They do not merit notice pay, having exited on gross misconduct. They have not shown that they were owed annual leave days.



32. The Respondent's Human Resource Officer, Peter Mulele adopted the Pleadings filed by the Respondent, and his Witness Statement, in his evidence, as summarized above. He adopted Documents filed by the Respondent in both files, as Respondent's evidence.
33. On cross-examination, he told the Court that the Claimants were paid their terminal dues, save for what should be paid after clearance. He was not there when the Claimants were summoned by CEO Ezra Chiloba. He relied on documentation in his evidence. He did not have a written confession from the Claimants. He did not have evidence of bribery in the sum of Kshs. 700,000 alleged to have been paid by Silverbird. There is a Management Disciplinary Committee and a Commission Disciplinary Committee. Both are Standing Committees. It is not defined which Employee appears before which Committee. One can appear before either Committee. Clause 10.2.1 establishes Management and Commission Disciplinary Committees. The Claimants were heard by the Commission Disciplinary Committee. There could be a reason for the distinction. It is a matter of interpretation. The accusers did not attend the hearing. The Appeals filed by the Claimants were concluded past the 90 days given in the Manual. Joseph Ayata was exonerated. Mulele did not know why. The 2nd Claimant was entitled to annual salary increment of 10%. Mulele did not know if this was effected. Increment was subject to performance. There was no evidence that the Claimant took annual leave. Leave records were in the custody of the Respondent. The days would be computed after the Claimants cleared.
34. Redirected, Mulele told the Court that salary increment, was subject to appraisal. There was no demand for increment of salary at 10%. Leave days are not particularized, and only 15 days could be carried forward. HR Manual does not specify where an Employee should appear for disciplinary hearing.
35. The issues are whether the Claimants' contracts were terminated fairly under Sections 41, 43 and 45 of the Employment Act, 2007; and whether they merit the remedies sought.

The Court Finds: -

36. There is no dispute on the employment history of the Claimants, their terms and conditions of service, and that their contracts were terminated by the Respondent, in similar circumstances.
37. Procedure. The Claimants were suspected of receiving Kshs. 700,000 from Travel Agent Silverbird Limited, in kickbacks, which they shared between themselves and their colleague, Ayata.
38. They were called to a meeting in the CEOs office on 16th October 2015. The meeting was attended by among others, the CEO Ezra Chiloba.
39. There are no minutes recording the meeting. The Respondent explained that the meeting was impromptu, as stated in the CEOs letter, dated 2nd November 2015, addressed to the Claimants.
40. It is at this meeting that the Claimants are said to have confessed having received kickbacks from Silverbird.
41. They were suspended through the letter from the CEO, dated 2nd November 2015.
42. They were asked show cause why they should not be summarily dismissed, within 7 days.
43. They both wrote back to the CEO on 9th November 2015, denying the allegation, and underscoring their clean records, and their wish to continue serving the Respondent Commission.
44. The Respondent was not satisfied with their explanations. They were invited to appear before the Commission Disciplinary Committee on 22nd February 2016 for hearing.



45. They concede that they were heard, but heard before the wrong Disciplinary Committee.
46. The Respondent's Human Resources and Administration Policies and Procedures Manual, creates 2 Standing Disciplinary Committees, under clause 10.2.1.
47. There is a Disciplinary Committee at the Commission level, as set up and agreed by the Commission; and, a Disciplinary Committee at the Management level, set up by the CEO in consultation with the Directors of Human Resources, and Legal and Public Affairs.
48. The Claimants were heard before the former, and complain that this procedure was flawed, because they ought to have been heard by the Management Disciplinary Committee, and felt intimidated by the Commission Disciplinary Committee.
49. The Manual is not clear on which Employee should appear before which of the 2 Disciplinary Committees. What a Disciplinary Committee at Commission level is, and how it differs from a Disciplinary Committee at Management level, is not made clear in the Manual.
50. The Court does not see, who a Disciplinary Committee at Commission level is intended to serve, because accusation of gross misconduct relating to Respondent's Commissioners, is dealt with by a Tribunal, appointed by the President under Article 251 of the *Constitution*. The Disciplinary Committee at Commission level cannot be intended for the Commissioners.
51. In his Internal Memo of 20th November 2015, to the Directorate of Human Resources, the CEO advised that the Claimants should be heard before the Commission Disciplinary Committee because they were at Management level. It is explained that Staff below Management level are subjected to Management Disciplinary Committee.
52. The CEO cites the Respondent's Human Resources Manual, but the Court has not seen anything in the said Manual, directing what category of Staff, should be heard before which Committee. The advice of the CEO to the Human Resource Office, is not anchored on any clause in the Manual. One would think that a Disciplinary Committee at Management level, deals with Managers, while there would be a Non-Management Staff Disciplinary Committee, dealing with Non-Management Staff, rather than a higher Commission Disciplinary Committee, with unclear jurisdiction.
53. The Manual appears confusing, even to the Respondent's own CEO.
54. But in advising that the Claimants are heard before the Commission Disciplinary Committee, the CEO stated that there was nothing wrong in such a forum, as long as the principles of natural justice were observed.
55. The actual hearing discloses no violation of the principles of natural justice. Hearing was in accordance with Section 41 and 45 of the *Employment Act*. The Court does not find any significant flaw in procedure. The Disciplinary Committee heard the Claimants and reached a verdict on their culpability.
56. They were advised on their right of appeal under clause 10.2.4. They complain that they did not get a decision on appeal, within 90 days. The clause states that the Appeal may be lodged within 90 days, but does not place a cap, on the number of days within which a decision is to be made.
57. The Court is satisfied that fair procedure was observed.
58. Validity of Reason or Reasons. The Claimants were dismissed ostensibly on account of gross misconduct. It was said that they received kickbacks from Travel Agent Silverbird, a service provider



- retained by the Respondent. They were alleged to have received Kshs. 700,000 from the Agent. The loot was shared by the Claimants and their accomplice, Joseph Ayata.
59. The Claimants are alleged to have confessed the offence at the impromptu meeting convened by the CEO, on 16th October 2015. The Respondent argues that there were Senior Officers who heard the confessions.
 60. The Claimants denied that they made any confessions in their response to the letters of suspension, and continued to deny making such confessions, when they presented their Claims before the Court.
 61. It was incumbent upon the Respondent, in the face of these denials, to establish the existence of such confessions, or in the absence of confessions, establish that kickbacks were received by the Claimants from Silverbird.
 62. There was no evidence given by the CEO Ezra Chiloba, or any other Senior Officer, who attended the meeting of 16th October 2015, who heard the Claimants make confessions. There is no written confession, or confession in any other recorded form, placed before this Court. There is no evidence from Silverbird. There is no evidence from Ayata, who the Respondent pleads, was the Officer who called the 1st Claimant to get a quotation from Silverbird, and who was alleged to have informed Silverbird, that the 1st Claimant was the Procurement Manager. Ayata was the heart of the alleged corruption, but was spared disciplinary action, and was not called as a Witness to shed light on the kickbacks.
 63. Peter Mulele, the Witness for the Respondent told the Court that he did not have evidence of any confessions made by the Claimants; he did not have evidence of payment of kickbacks; and did not have evidence of any nature from Silverbird.
 64. It boggles the mind why an Independent Commission, would fail to escalate a serious economic crime, to relevant investigative and prosecutorial agencies.
 65. The Respondent did not show valid reason or reasons, to justify termination, under Section 43 and 45 of the *Employment Act*. To this extent, termination was unfair.
 66. The Court would also agree that the Claimants suffered reputational damage by the publication of reports in the press media, under the banner “Chiloba sacks 3 IEBC Managers.” The report states that the CEO suspended the Claimants, in a new corruption purge, months after the infamous ‘chickengate’ scandal that tarnished the Agency’s name. The Claimants were specifically named in the report. It was further reported that the Claimants were suspended for pocketing Kshs. 1.5 million from an air ticketing firm, and that the CEO was doing everything to ensure the Secretariat was clean.
 67. The Report definitely would affect the reputation and employability of the Claimants. The Respondent did not establish that the allegations were true, and did not escalate the matter to investigative and prosecutorial agencies. The Claimants merit damages against the Respondent.

Remedies

68. Damages for reputational damage / loss of employability is granted at Kshs. 200,000 each.
69. The 2nd Claimant prays for 10% annual salary increment, for the years 2013, 2014 and 2015 at Kshs. 25,573. Clause 7 of his contract provides for an annual salary increment of 10% per annum. Clause 20 states that the Commission Rules and Regulations as amended from time to time, applies to the Claimant’s contract. The Human Resource Manual therefore formed part of the Claimant’s terms and conditions of service. At clause 4.8.3, salary increment of 10% annually, was subject to satisfactory



- performance. The Claimant did not place any evidence before the Court to show that he was appraised, and was found to have satisfactory performance, to qualify for annual salary increment. The increment was not automatic, and the prayer is unsustainable.
70. The Claimants were suspended on 2nd February 2016, and dismissed on 10th March 2016. They seek payment of their salaries for the period under suspension.
 71. They were still Employees of the Respondent for the period under suspension. The Court has not found any justification for the decision to terminate their contracts, and consequently, there is no justification for forfeiture of their salaries, for a period when their contracts of employment were still alive. The prayer for salaries due from 2nd November 2015 to 10th March 2016, is allowed.
 72. They are granted salaries of 1-month each, in lieu of termination notices.
 73. Termination as concluded above, was fair on procedure, but substantively flawed. The 1st Claimant worked for 3 years, and 3 months. The 2nd Claimant worked for 3 years and 1 month. They were on permanent and pensionable terms. They did not disclose at what age they left employment, but the Human Resource Manual, clause 10.4.6, entitled them to work until they were retired at the age of 60 years. It was not shown by the Respondent, that they contributed to the circumstances leading to termination. It is not clear what the 1st Claimant did for living at the time of giving evidence, but the 2nd Claimant described himself as a ‘hustler.’ The Oxford Dictionary describes a ‘hustler’ to be a person adept at aggressive selling or illicit dealing, or a prostitute. It is not clear what exactly the 2nd Claimant meant by describing himself as a ‘hustler,’ but the Court would think he meant he was involved in the informal sector, and has not secured alternative employment after termination, and the injurious publicity that obtained to that termination. The Respondent did not disclose any adverse performance or disciplinary issues against the Claimants, prior to the accusation on solicitation and receipt of kickbacks.
 74. The Court would allow the prayer for compensation for unfair termination at equivalent of 4 ½ months’ salary each.
 75. The 1st Claimant prays for annual leave of 45 days, while the 2nd Claimant seeks annual leave of 30 days. Section 74 [1] [f] of the *Employment Act*, requires an Employer to keep a written record of an Employee’s annual leave entitlement, days taken and days due, as specified in Section 28. Section 28 states that an Employee is entitled to not less than 21 days of paid leave, after every 12 months of consecutive service. Annual leave in both provisions is described as an entitlement accruing to an Employee. There is no provision of forfeiture of what the law describes to be an entitlement. Neither Section 28, nor Section 74[1] [f] of the *Employment Act*, suggests that annual leave can be forfeited, or that only 15 days, regardless of how many days have accumulated, can be carried forward, as the Respondent’s Human Resources Policy stipulates. Annual leave is either utilized, or converted into cash payment made in favour of the Employee. It is the Employer’s responsibility to regulate hours of work as well as annual leave at the workplace, and Employers ought therefore, to ensure annual leave is utilized or paid for in cash when it is due, instead of coming up with forfeiture policies, which are nothing short of illegalities and unfair labour practices. A benefit which has accrued to an Employee, is never clawed back.
 76. The Court is persuaded that the Claimants merit their pending annual leave days, pleaded at 45 and 30 days respectively.
 77. The Respondent shall release to the Claimants their respective Certificates of Service.
 78. Costs to the Claimants.



79. Interest allowed at court rates from the date of Judgment till payment is made in full.

In Sum, It Is Ordered: -

- a. It is declared that termination was unfair.
- b. The Respondent shall pay to-
 1. Lydia Ondiso
 - I. Salary for the period of suspension [4 months] at Kshs. 367,640.
 - II. 1-month salary in lieu of notice at Kshs. 91,910.
 - III. Equivalent of 4 ½ months' salary in compensation for unfair termination, at Kshs. 413,595.
 - IV. 45 days of annual leave at Kshs. 137,865.
 - V. Reputational/ loss of employability damages at Kshs. 200,000.
Total...Kshs. 1,211,010.
 2. Tony Opicho.
 - I. Salary for the period of suspension [4 months] at Kshs. 309,040.
 - II. 1-month salary in lieu of notice at Kshs. 77,260.
 - III. Equivalent of 4 ½ months' salary in compensation for unfair termination at Kshs. 347,670.
 - IV. 30 days of annual leave at Kshs. 77,260.
 - V. Reputational/loss of employability damages at Kshs. 200,000.
Total...Kshs. 1,011,230.
- c. Certificates of Service to issue.
- d. Costs to the Claimants.
- e. Interest allowed at court rates, from the date of Judgment, till payment in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 30TH DAY OF NOVEMBER 2022.

**JAMES RIKA
JUDGE**

