



**Odindo v Kenya Airports Authority (Employment and Labour Relations Cause 130 of 2018) [2022] KEELRC 13461 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13461 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 130 OF 2018**

**L NDOLO, J**

**DECEMBER 8, 2022**

**BETWEEN**

**BENARD AKUNGU ODINDO ..... CLAIMANT**

**AND**

**KENYA AIRPORTS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant's claim brought by a memorandum of claim dated January 25, 2018 and filed in court on February 7, 2018 is for wrongful dismissal. The respondent filed a reply on April 18, 2018.
2. At the trial, the claimant testified on his own behalf and the respondent called its manager-administration and staff welfare, Muchiri Elias Githinji. At the time of writing this judgment, only the respondent had filed final submissions.

**The claimant's case**

3. The claimant states that he was employed by the respondent on January 17, 2007, as a security warden trainee. After successful training, he was deployed at Jomo Kenyatta International Airport, effective May 2, 2007.
4. On January 19, 2009, the claimant was promoted to the position of security warden grade S4. On August 10, 2012, he was transferred to Eldoret International Airport and on June 26, 2014, he transferred back to Jomo Kenyatta International Airport.
5. On December 27, 2016, the claimant was deployed at the G60 screening point at Jomo Kenyatta International Airport. He worked alongside his colleague, George Maasai.



6. At around 0900 hours a cleaner employed by Limah Cleaning Services East Africa Limited by the name Alice went to clean the claimant's workstation. The claimant states that after finishing her cleaning duties, Alice left and came back escorted by the police. Alice accused the claimant and George Maasai of harassing her.
7. The claimant was taken to the Jomo Kenyatta International Airport Police Station, where he recorded a statement. He was later charged at the JKIA Chief Magistrate's Court with the offence of attempted rape contrary to section 4 of the *Sexual Offences Act*, with the alternative count of committing an indecent act with an adult contrary to section 11(6) of the *Sexual Offences Act*.
8. The claimant's colleague, George Maasai was charged with the offence of conspiracy to commit a felony contrary to section 393 of the *Penal Code*.
9. Upon being released on bond, the claimant resumed duty on December 30, 2016. On the same day, he received a show cause and suspension letter by which he was suspended from duty effective December 30, 2016 until determination of the criminal case. The claimant was also required to show cause why disciplinary action should not be taken against him.
10. The claimant responded to the show cause letter on January 4, 2017, denying the allegations levelled against him. He further stated that the outcome of the criminal case would have a direct bearing on any disciplinary action that the respondent might take against him.
11. On January 6, 2017, the claimant wrote another letter to the respondent, asking that his suspension be lifted on the ground that the suspension had no basis and was unreasonable. The claimant did not receive any response to his request.
12. On May 8, 2017, the claimant received a letter inviting him to a disciplinary hearing on May 12, 2017. The claimant attended the disciplinary hearing but requested the disciplinary committee to consider suspending the disciplinary proceedings on account of the pending criminal case. The disciplinary committee did not accede to the claimant's request and the disciplinary hearing proceeded.
13. While denying the accusations levelled against him, the claimant requested the disciplinary committee to run the CCTV footage to establish the truth regarding the alleged offences, a request that was declined.
14. On June 6, 2017, the claimant was issued with a letter of summary dismissal. The claimant points out that the letter referred to a disciplinary meeting held on May 8, 2017, which he was not aware of since he only attended a disciplinary hearing on May 12, 2017.
15. The claimant appealed against the dismissal by his letter dated June 22, 2017 and on July 5, 2017, his advocates wrote to the respondent asking that the claimant be reinstated pending the outcome of the criminal case.
16. By letter dated July 18, 2017, the claimant was invited to an appeal hearing scheduled for July 25, 2017.
17. On September 29, 2017, the claimant was acquitted of the criminal charges under section 215 of the *Criminal Procedure Code*. Upon his acquittal, he wrote to the respondent on October 2, 2017, requesting for reinstatement. The respondent wrote to the claimant on October 9, 2017, informing him that his dismissal had been upheld on appeal.
18. The claimant renewed his request for reinstatement by his letter of October 19, 2017 and by a return letter dated November 30, 2017, the respondent affirmed its decision to dismiss the claimant.



19. The claimant terms his dismissal as unlawful and unfair. He accuses the respondent of discriminating against him by refusing to reinstate him while reinstating George Maasai, who was his co-accused in the criminal case.
20. The claimant avers that his dismissal was in breach of section N 8(5) of the respondent's human resource manual and the collective bargaining agreement signed by the respondent in the year 2015.
21. The claimant now asks for reinstatement without loss of benefits, or in the alternative:
  - a. 3 months' salary in lieu of notice. Kshs 269,586.00
  - b. 12 months' salary in compensation. 1,078,344.00
  - c. Unpaid public holidays for 10 years. 329,494.00
  - d. Punitive exemplary and aggravated damages. 2,516,136.00
  - e. Salary up to retirement age. 30,193,632.00
  - f. Unpaid leave days for 10 years. 629,034.00
  - g. Prorata leave for the year 2017. 30,558.08
  - h. General damages. 3,000,000.00
  - i. Certificate of service

#### **The respondent's case**

22. In its reply dated April 16, 2018 and filed in court on April 18, 2018, the respondent admits having employed the claimant as stated in the memorandum of claim.
23. The respondent further concedes having issued the claimant with a show cause letter on December 30, 2016, on account of allegations of misconduct.
24. The respondent maintains that due process was followed in handling the claimant's case, noting that the claimant was granted an opportunity to defend himself.
25. The respondent asserts that it arrived at the decision to dismiss the claimant on grounds of gross misconduct after conducting a proper and full hearing in accordance with the respondent's code of regulations and the law. The respondent avers that the claimant's appeal was heard and determined on merit and following strict guidelines governing disciplinary proceedings on appeal.
26. The respondent's case is that the claimant's dismissal was lawful and fair.

#### **Findings and determination**

27. There are two (2) issues for determination in this case:
  - a. Whether the claimant's dismissal was lawful and fair;
  - b. Whether the claimant is entitled to the remedies sought.

#### **The dismissal**

28. The claimant was dismissed by letter dated June 6, 2017 stating as follows:

' Dear Andrew,



Summary dismissal

Reference is made to our show cause letter dated December 30, 2016, your response letter dated January 4, 2017 and subsequent disciplinary committee meeting held on May 8, 2017.

We regret to advise you that you have been summarily dismissed from the service of the authority with effect from June 7, 2017 on account of gross misconduct.

Following this, you will be entitled to the following:

1. Allowance earned up to and including June 7, 2017.
2. Leave days earned but not utilized up to June 7, 2017.
3. Pension as provided in the trust deed.
4. Any other dues, if any.

The above 1 & 2 will be paid to you upon filling and returning the attached clearance form.

In the meantime, you will be required to handover staff identification card, security pass and staff uniforms as part of clearance process.

Yours sincerely,

(Signed)

Jonny Andersen

**Managing director/CEO'**

29. This letter does not disclose the reason for the claimant's dismissal. There is however evidence on record that the claimant was dismissed on allegations of attempted rape and committing an indecent act.
30. On his part, the claimant denied these allegations, and pointed to the fact that he had been acquitted by the criminal court, as an absolution. This court is aware of the settled jurisprudence to the effect that acquittal in criminal proceedings does not act as an automatic bar to disciplinary proceedings on the same set of facts.
31. In its decision in [\*David O Owino v Kenya Institute of Special Education \[2013\] eKLR\*](#) this court stated the following:  

' In the case of Kibe v Attorney General (Civil Appeal No 164 of 2000) the Court of Appeal held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.'
32. My brother Rika J affirmed this position in [\*James Mugeria Igati v Public Service Commission of Kenya \[2014\] eKLR\*](#) by establishing a clear demarcation between a disciplinary process, which is a private process between an employer and an employee and a criminal trial, which is a public process carried out by the state.



33. The learned judge stated that:

'The two processes are independent of each other; the standards of proof are different; and an acquittal or conviction at the public process does not bind the employer in conduct of the disciplinary process. There is no provision in the old or the new *Employment Act*, which makes it necessary for employers to follow police investigations, or findings, or indeed criminal court decisions, in resolving employment disputes based on cross-cutting facts.'

34. With the foregoing in mind, I must add that an employer who decides to take disciplinary action against an employee must demonstrate that there was indeed a valid reason for taking such action. This is the essence of section 43 of the *Employment Act* and a valid reason for termination of employment is established at the shop floor in accordance with the dictates of section 41 of the Act.

35. The allegations made against the claimant were grave but the procedure adopted by the respondent towards proving them was casual. Significantly, the claimant was not allowed an opportunity to face his accuser at the disciplinary hearing. Instead, the disciplinary committee heard each party separately, in a shuttle diplomacy style. Additionally, there was no evidence adduced to corroborate the word of the claimant's accuser.

36. On the whole, the allegations leading to the claimant's dismissal were not proved and there was therefore no valid reason for the dismissal. The dismissal was thus substantively and procedurally unfair.

### **Remedies**

37. The claimant seeks reinstatement. However, due to the lapse in time post dismissal, I find and hold that reinstatement would not be an appropriate remedy.

38. Consequently, I award the claimant eight (8) months' salary in compensation. In arriving at this award I have taken into account the claimant's length of service but also his adverse employment record. I have further considered the respondent's unlawful conduct in the disciplinary process.

39. Additionally, I award the claimant one (1) month's salary in lieu of notice

40. The claims for public holidays, leave pay and damages were not proved and are disallowed.

41. The court found no basis for the claim for salary up to retirement age which also fails and is disallowed.

42. In the end, I enter judgment in favour of the claimant as follows:

a. 8 months' salary in compensation. Kshs 718,896

b. 1 month's salary in lieu of notice, 89,862

**Total. 808,758**

43. This sum will attract interest at court rates from the date of judgment until payment in full.

44. The claimant is also entitled to a certificate of service plus costs of the case.

45. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER 2022**

**LINNET NDOLO**

**JUDGE**



Appearance:

Mr. Bizimana with Mr. Were for the Claimant

Mr. Maithya for the Respondent

