



**Ekale v Norwegian Refugee Council (NRC) (Cause 2 of 2021)
[2022] KEELRC 13441 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13441 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE 2 OF 2021
NJ ABUODHA, J
DECEMBER 7, 2022**

BETWEEN

SAMUEL EKAI EKALE CLAIMANT

AND

NORWEGIAN REFUGEE COUNCIL (NRC) RESPONDENT

JUDGMENT

1. This claim was instituted by the claimant vide a statement of claim filed in court on September 19, 2021 against the respondent alleging illegal, arbitrary and unlawful termination. As a result, the claimant sought for the following reliefs;
 - a. A declaration that the termination of the services of the claimant is arbitrary, illegal and unlawful and that the claimant is entitled to general and exemplary damages for defamation of character to be assessed by court
 - b. Payment of salary arrears, benefits and pension contribution totalling to Kshs 1,253,807.10
 - c. Costs and interest from the date of payment was last due(sic) till payment in full
 - d. Any other relief the court shall deem fit to grant
2. In that statement of claim, the claimant avers that he was employed by the respondent as a security and safety officer in July 2013 on an annual basis subject to renewal and that the same was renewed and extended up to December 31, 2021 but that he was terminated from employment on the basis of malicious falsehoods vide a termination letter dated June 14, 2021.
3. The claimant avers that the respondent made an adverse finding against him without conducting a proper hearing or inquiry.



4. The respondent opposed the claim vide a response filed in court on November 12, 2021. It is the respondent's position that the allegations made against the claimant were supported with evidence and that he participated in the hearing.

Claimant's Evidence

5. The claimant tendered his testimony on May 23, 2022. He adopted his witness statement recorded on September 3, 2021 as his Evidence in chief and relied on his documents filed in court in support of his claim.
6. According to the claimant, he was terminated on allegation of incitement and a disciplinary hearing was held where the complainant was the chair of the said disciplinary panel.
7. He further averred that the manager, who was the complainant made a report at the police station and accused the claimant of threatening him and that he was called by the OCS whereby he exonerated himself and that no charges were preferred against him.
8. He stated that he was terminated before the expiry of his contract.
9. On cross examination, the claimant stated that he was terminated on the allegations that he was absent from a mandatory training, he threatened the area manager, he deleted security staff from the whatsapp group and that he mobilised the community to demonstrate against the respondent.
10. He however maintained that he was exempted from attending the said mandatory training and denied ever threatening the area manager. The claimant also stated that the deletion of the security staff from whataspp group was accidental.
11. On re-examination, CW1 maintained that the disciplinary procedure was not properly conducted.

Respondent's Case

12. The respondent called one Neil Charles Turner, its Country Director who testified as RW1 on July 27, 2022 in furtherance of its case.
13. RW1 adopted his witness statement recorded on November 11, 2021 as his evidence in chief.
14. He stated that he was in-charge of overseeing all disciplinary cases and that ordinarily, the disciplinary hearing is conducted by the area manager who in this case was Mr Bundu, the complainant in the allegations levelled against the claimant but had to be involved the case.
15. He contended that the claimant never objected to the conducting of the hearing chaired by RW1.
16. RW1 reiterated that the claimant was terminated because he failed to attend a mandatory training, threatened the area manager, deleted the security staff from WhatsApp group and incitement of the local community against the respondent.
17. It was averred by RW1 that trainings are mandatory for all staff members unless one is expressly exempted from attending a training.
18. RW1 maintained that the claimant did not give a convincing explanation on the other allegations and as such, he was found to be guilty of gross misconduct.
19. At the close of the respondent's case, the court directed the parties to file written submissions. The respondent filed its submissions on September 27, 2022 whereas the claimant filed his on September 29, 2022.



20. I have considered the said submissions.

Determination

21. Upon looking carefully at the pleadings on record, the evidence adduced before this court in this matter and the submissions of the parties filed in court, I find that the issues that fall for my determination are;

- i. Whether the termination of the claimant from employment was unlawful and unprocedural
- ii. What reliefs should then issue

22. In matters termination of employments, it is now trite that the court should consider and determine that the reasons given by the employer for termination were valid and also, that there was procedural fairness.

23. Section 45 of the *Employment Act* provides in part as follows;

"(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove: -

- (a) That the reason for the termination is valid;
- (b) That the reason for the termination is a fair reason: Related to the employees conduct, capacity or compatibility; or Based on the operational requirements of the employer; and That the employment was terminated in accordance with fair procedure."

24. Section 47(5) of the *Employment Act* is to the effect that;

"For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

25. In the current case, the respondent has averred that the claimant was terminated from employment on allegation that he had threatened the area manager, he had failed to attend a mandatory training, he removed some security staff from the WhatsApp group and that he incited the local community to demonstrate against the respondent.

26. In his evidence, the claimant admitted removing the security staff from the WhatsApp group but stated that the deletion was accidental. The claimant however denied inciting the local community and threatening the area manager. On training, the claimant stated that he was exempted from the same and that it was meant for new staff. The claimant further stated that he had other official duties to attend to during the period the training was taking place.

27. From the above analysis, should we then say that the allegations against the claimant were valid reasons for termination? I think so.

28. For instance, the claimant did not tender any evidence to show that he was exempted from training as alleged and of the official duty he was attending to during the training. Training is an useful tool for management in bringing staff up to speed with challenges and new developments in workplace and how to respond to them. Hence it is important for an employee to undergo training. The court observes that it would be odd for the claimant to be involved in official duties during the period the training was taking place yet the respondent does not know and opts to take disciplinary action against



the claimant. Further as observed, although the claimant alleged he was exempted from the training, he never produced any evidence of exemption.

29. It then follows that the reasons advanced for the claimant's termination were valid in view of section 43 of the *Employment Act* which provides *inter alia*,

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

30. I therefore find that the respondent has discharged the burden of proving that the claimant was dismissed for a valid and fair reason.

31. As regard the procedure followed, section 41 of the *Employment Act* provides;

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

32. Although the claimant in his testimony conceded that a disciplinary hearing was conducted, he faulted the process arguing that the said area manager who was the complainant on the allegations made against the claimant, was among the panellists in the disciplinary committee. The claimant has thus submitted that the said hearing was not fair and not in accordance with the rules of natural justice.

33. The respondent on its part maintained that the disciplinary hearing committee was well constituted and that the claimant did not raise any issue on the way the hearing was conducted. The respondent's witness in his evidence stated that the claimant was invited to the disciplinary hearing with a representative of his choice which he waived and admitted that it would be unnecessary.

34. The court from the foregoing is satisfied that due process was followed before the termination of the claimant's service. The court observes that the disciplinary process need not be carried out with the precision of a rocket scientist. Provided basic principles of a fair hearing have been observed, the court would be reluctant to fault a disciplinary hearing process on minor procedural lapses which do not significantly affect the outcome of the process.

35. In conclusion the court finds the claim without merit and dismisses the same with costs.

36. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 7TH DAY OF DECEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

