



**Ngala v Pidilite East Africa Limited (Cause E126 of 2023)
[2024] KEELRC 1200 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1200 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E126 OF 2023**

**M MBARÚ, J
MAY 9, 2024**

BETWEEN

JONES NGALA CLAIMANT

AND

PIDILITE EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as a business development executive – retail from 17 February 2022 under a one-year term contract at a gross salary of Ksh.100, 000 per month. At the end of the term contract, the claimant continued to work for the respondent under a month-to-month employment contract.
2. On 8 March 2023, the respondent wrote an email to the claimant citing poor performance. The claimant was shocked by this assessment because his overall sales performance was good despite the respondent admitting that there were factors beyond his control coupled with stockouts on key products. Despite these concerns, there was no performance improvement plan to address any alleged poor performance.
3. On 7 July 2023, while the claimant was attending the monthly sales meeting at the head office in Nairobi, the respondent called him to a meeting with the head of sales and line manager and notified him that his employment had been terminated with immediate effect due to poor performance. The claimant disputed such a matter but the head of sales told him to resign and hand over the company vehicle immediately or else risk having a bad reference which would harm his chances for future employment.
4. The claimant refused to resign. The respondent was frustrated with his employment and refused to give him fuel allocation for July 2023. On 25 July 2023, the respondent summarily dismissed the claimant. The respondent alleged that he was of poor performance. This was malicious and unfair for lack of



justification. The claimant's performance at the time was recorded as good. There was no improvement plan issued to allow the claimant to address this. No hearing was conducted to hear the claimant on his representations.

5. The claim is also that while the claimant was employed by the respondent, in October 2022 the respondent granted him a car loan of Ksh.760,000 which he used to purchase motor vehicle registration number KCW 466B. The vehicle was registered in the name of the respondent pending recovery of the loan facility.
6. At the time employment was terminated, the claimant was repaying his loan facility through a checkoff of Ksh.22, 337.74 per month plus a monthly interest of 0.2% on the outstanding amount. Immediately after his employment was terminated, the respondent opted to recall the car claiming that it belonged to the company, and also demanded Ksh.580, 781 on account of depreciation costs of the car at Ksh.396 per month from 1st August 2023.
7. The claim is that as much as the car is registered under the respondent, the recall is unjustified. Instead, the respondent should claim the outstanding amount of the car loan. On the loan;
The principal sum paid for 9 months is Ksh.219, 215;
Interest on loan paid for 9 months Ksh.10, 109.24;
Car insurance Ksh.39, 000;
Car transfer fee Ksh.3, 000;
Tyre replacement is Ksh.30, 000;
Car service Ksh.36, 000;
Wheel alignment Ksh.13, 600;
Total Ksh.350, 924.24
8. Due to the wrongful summary dismissal, the claimant is unable to repay the loan facility on the car. He is seeking to be allowed to make repayments on terms secured while in employment. In the alternative, the claimant is seeking to offset the car loan facility from his terminal dues.
The claimant is seeking the following dues;
 - a. One month's notice pay Ksh.100,000;
 - b. Salary for July 2023 Ksh.100,000;
 - c. 12 months compensation for unfair termination of his employment Ksh.1,200,000;
 - d. July 2023 fuel allowance Ksh.26,000;
 - e. 24 leave days Ksh.107,692;
 - f. To be allowed to repay the car loan on terms secured while in employment or the same be offset from terminal dues;
 - g. Certificate of service;
 - h. Costs.
9. The claimant testified to support his case that as a sales executive, his performance remained good until the respondent terminated his employment on account of alleged poor performance. He had no prior notice, hearing, or any performance improvement plan to assist him improve on the alleged poor



performance. At the time of summary dismissal, the claimant had a car loan which he seeks to repay the balance to retain instead of the respondent recalling and seeking to recover costs.

Response and Counterclaim

10. In response, the respondent admitted the claimant was employed for the period of the fixed-term contract which took effect on 7th March 2022 and expired on 28th February 2023. The respondent avers that the Claimant's overall performance in key areas such as his overall sales target, retail channel activation, product placement/product activations, demand generation, report, and documentation was of dismal performance, a fact which was brought to his attention on several occasions with caution to him to improve, which he did not lead to his termination of employment on account of poor performance. the Claimant was given several chances to improve his performance which he did not.
11. The fuel allocation was only paid for business development activities which did not take place in July 2023 and as such the Claimant is not entitled to the same.
12. The Claimant was summarily dismissed on account of poor performance. The Claimant was informed of his poor performance in most of the monthly review meetings and at the time of his termination and given a chance to defend himself. Termination of employment was not unprocedural, and unlawful as alleged. The claims made should be dismissed.
13. The claimant had a car loan but denied charging the Claimant an interest on the outstanding amount at the rate of 0.2%. The respondent recalled for the return of the vehicle following the Claimant's refusal to pay the instalments as agreed and as such the Respondent is entitled to a return of the motor vehicle. The interest is in the payment of the balance of the loan amount advanced to the Claimant for the purchase of the car in the sum of Kshs. 580,781/=. the loan repayment amount so far paid in the sum of Kshs. 219,215/=. 21. the Claimant is bound to settle the loan issued to him by the Respondent regardless of their employment relationship.

Counterclaim

14. In counterclaim, Respondent avers that it employed the Claimant as a senior development executive on a fixed term contract which took effect on 7th March 2022 and expired on 28th February 2023. In October 2022, in a bid to make the work of the Claimant easier, it advanced to the Claimant a car loan for the sum of Kshs. 760,000/=. It also paid for the car insurance on behalf of the Claimant for the year 2022 in the sum of Kshs. 6,697/= and Kshs. 33,299/= making the total amount payable Kshs. 799,697/=. The terms of the loan were that the Claimant was to repay the loan in 36 monthly instalments of Kshs. 21,297.14 which installments were later reviewed to Kshs.22,337/= per month. The Claimant only paid the installments up to July 2023 when he stopped making the payments as agreed. The Claimant had only paid the sum of Kshs. 219,215/= leaving a balance of Kshs. 580,781/= which the Respondent now claims. Despite numerous reminders and notices to pay, the Claimant has refused, ignored, and or neglected to make good the balance of the loan in the sum of Kshs. 580,781/=
15. In evidence, the respondent called Aderson Kiprono the finance executive officer who testified that the claimant was an employee on a term contract until October 2023 when his employment was terminated due to poor performance. He failed to achieve the targets set which gradually deteriorated leading to summary dismissal.
16. Mr. Kiprono testified that at the time of summary dismissal, the claimant had a car loan facility which he failed to repay and this entitles the respondent to recall the vehicle and to be paid for the use until return. The claimant refused to pay the agreed monthly instalments and there is an outstanding balance of Ksh.580, 781 which is counterclaimed.



17. At the end of the hearing, both parties filed detailed written submissions which are put into account.

Determination.

18. Employment between the parties is agreed as having ended on 25 July 2023 through summary dismissal on account of poor performance. At the time, the claimant was earning Ksh.100, 000 per month.
19. The claimant also admitted that he had a car loan facility and was under an agreement that he should repay through monthly instalments of Ksh.22,337 per month until payment in full.
20. Through the ruling delivered on 25 January 2024, the court directed the respondent to allow the claimant to retain the motor vehicle and the claimant to repay all the outstanding unpaid instalments and to continue making repayments at the agreed rate of Ksh.22, 337 per month.
21. During the hearing, both parties confirmed that the claimant was up to date with the repayments of the car loan facility. He is in good standing as directed by the court.
22. The case of poor performance is one matter addressed under Section 41 of the *Employment Act*, 2007 (the Act) as comprising a ground upon which an employer can terminate employment. However, before the employer can apply the grounds of poor performance as the reason for termination of employment, great introspection is required. Section 41(1) of the *Act* requires that;
- (1) 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.
23. Through case law, the court has developed the guiding principles upon which the employer can apply in assessing an employee as being of poor performance. In the case of *George Okoth Okello v Africa Blooms Limited & another* [2022] eKLR the court held that for poor performance to qualify as a ground for terminating the services of the employee, it must be demonstrated that there are measures put in place to measure performance by the employer which measures were used to determine the performance of the employee thereof.
24. This position is affirmed by the Court of Appeal in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR that;
- " Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof ...to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance."
25. Earlier in *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR the court held that where an employer alleges that there is poor performance, it will not suffice to just say that one has been terminated for poor performance. The measures taken and leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse. In the case of *Eddah Anyango Akumu v AAR Insurance Kenya Limited* [2018] eKLR, the court emphasized the fact that the employee must be allowed to improve. Such opportunity can only be measured over time. A plan must then be put in place to assist the employee to improve. The employer must invest time and resources to assist the poor-performing employee before applying such a matter as a disciplinary issue leading to summary dismissal.



26. In this case, even though the respondent sent several emails to the claimant on his work targets, there are no efforts to assist him to improve, or any measures put in place to identify why he was found to be of poor performance. The claimant raised the issue that there were stokeouts. This issue was not addressed by the respondent at all. Where there were stokeouts, what did the respondent do? Without the respondent putting in place mechanisms to assist the claimant as the employee, to use the reason for poor performance is unlawful and unfair, contrary to Section 41(1) and 45 of the *Act*. The reason for termination of employment cannot be attributable to the employee where the employer failed to apply internal measures to assist him in improving if at all found to be performing poorly.
27. On the finding there was unfair termination of employment, the claimant is entitled to notice pay and compensation.
28. The claimant was last earning Ksh.100, 000 per month which is due in notice pay.
29. The claimant worked for the respondent from February 2022 to July 2023. A period of under two years. He was not taken through the due process and the reason applied to summary dismissal was unlawful and unfair. Compensation is hereby allocated at four (4) months gross salary all at Ksh.400, 000.
30. In the counterclaim, this is addressed at length in the ruling of 25 January 2024. The claimant does not deny that he owes the respondent for a car loan facility. Since the court ruling, he has repaid all the due instalments and is in good standing.
31. Following the unfair termination of employment, the claimant was denied a fair chance to earn a living and be able to repay the car loan facility advanced. Had he been taken through the due process, he would have used his monthly earnings to offset the loan facility through monthly instalments. The claimant shall therefore continue to repay his loan facility at the staff preferential rates until payment in full unless he is desirous of offsetting the same immediately for the ownership to revert to him.
32. On the claim for salary for July 2023, the claimant worked for 25 days. For work done, despite the pending loan facility being due, the claimant cannot be denied pay for his labour as required under Section 18(4) and (5) of the *Act*. The reason leading to summary dismissal notwithstanding, for days worked, his salary is due all at Ksh.84, 000.
33. For the July 2023 fuel allowance, this benefit is due for the 25 days of employment. The respondent cannot justify the denial of the benefits accruing with employment. The claim for Ksh.26, 000 fuel allowance prorated for 25 days is Ksh.22, 000.
34. Taking annual leave is a right under Section 28 of the Act. The employer as the custodian of work records must submit evidence that the employee has enjoyed such benefit. Without any record to confirm the days of annual leave taken, the claim by the claimant that he had accrued 16 leave days in the year 2022 and 12 days in the year 2023 stands correct.
35. Untaken leave days are tabulated based on the basic pay which is Ksh.70, 000. For 24 days, the claimant is entitled to Ksh.56, 000.
36. A certificate of service is due at the end of employment. The best practice is for the employee to clear with the employer and to ensure all properties of the employer including loans advanced or the motor vehicle are accounted for in full. The claimant shall clear his car loan balance and be issued a Logbook and Certificate of Service by Section 51 of the Act.



37. On costs, the claimant enjoys a loan facility from the employer. He will continue to enjoy a staff repayment rate. The respondent will secure the claimant's rights until he settles the due car loan facility. Therefore, each party is to bear its costs.
38. In this regard, the counterclaim is allowed to the extent that the claimant shall repay the car loan facilitated as agreed and repay all due and unpaid amounts through monthly instalments of Ksh.22, 337 per month until payment in full. In the event of default in repayments, the respondent shall be at liberty to recall the loan facility balance at commercial rates.
39. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. A declaration that employment was terminated unfairly;
 - b. Compensation awarded at Ksh.400,000;
 - c. Notice pay Ksh.100,000;
 - d. Pay for July 2023 Ksh.84,000;
 - e. Leave pay for 24 days Ksh.56,000;
 - f. Fuel allowance Ksh.22,000;Counterclaim;
 - g. The counterclaim is allowed to the extent that the claimant shall continue to repay the loan facility on monthly instalments of Ksh.22, 337 until paid in full, with the option to pay up the total amount at once.
 - h. In default of making the instalments due, the respondent shall be at liberty to recall the balance of the car loan facility at commercial rates;
 - i. For the suit, each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 9TH DAY OF MAY 2024.

M. MBARŪ

JUDGE

