



**Okumu v Prime Power Batteries E.A. Limited (Cause E176 of 2021)
[2024] KEELRC 1229 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1229 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E176 OF 2021
NZIOKI WA MAKAU, J
MAY 9, 2024**

BETWEEN

NICHOLAS ODHIAMBO OKUMU CLAIMANT

AND

PRIME POWER BATTERIES E.A. LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent Company through a Statement of Claim dated February 22, 2021. He averred that the Respondent offered him employment as Sales and Marketing Manager, Western Region with effect from 1st January 2019 and he was thereafter promoted to Senior Sales and Marketing Manager in a Contract dated 8th August 2020. He asserted that he discharged his duties as set out in his Employment Contract until the Respondent summarily dismissed him from employment through a Summary Notice dated 9th November 2020, on account of poor performance in sales and collection of accounts receivables. That notably, the Respondent neither engaged him about his performance nor gave him any opportunity for hearing prior to the summary dismissal. The Claimant's averment was that being greatly aggrieved by the Respondent's decision to terminate his employment with no valid reason, he appealed against the dismissal through a letter dated November 12, 2020 but the Respondent did not respond to the Appeal.
2. The Claimant's case was that he had been achieving his target sales in the Respondent company until October 2020 when the Company verbally and in writing stopped the sales for all sales persons. He averred that the Respondent had directed that collection of overdues replace the sales and that whoever achieved the overdue collection be counted as having achieved the sales collection. That subsequently, he collected the overdues as required without fail and consequently achieved his target. He further averred that the reason for the termination of his employment is not valid and was only a conjured-up scapegoat to cover up the actual reason. That termination on the grounds of poor performance came as a surprise given that Respondent had recognised him as the best sales person in the Company.



The Claimant noted that after the termination, the Respondent swiftly replaced him with another staff member despite its claims that the Claimant's position had become redundant. That in a meeting between the Respondent's Managing Director and himself on 24th November 2020, the Respondent informed him that the actual reason for his termination was that it was undertaking a restructuring that had rendered the Claimant's employment position redundant. He asserted that he was not given an opportunity to show cause why he should not be terminated and averred that the Respondent simply wanted to get rid of him hence the dithering between terminating his services because of poor performance and alleged redundancy. As regards the alleged redundancy, the Claimant averred that the Respondent failed to issue the required notices in following the due process provided for in section 40 of the Employment Act prior to the termination.

3. In addition, the Claimant averred that the Respondent had been mocking him about his Adventist religious persuasion in the course of his employment, which he felt was one of the reasons it terminated his employment. That the Respondent also withheld his salary at his detriment and without any substantiated grounds. The Claimant submitted that the foregoing together with the summary and abrupt termination of his employment in the midst of a global health pandemic amounted to unlawful termination that caused him great economic loss, damage and prejudice. He therefore prays for the following reliefs against the Respondent:

- a. A declaration that the dismissal was unlawful, unprocedural and unfair in the circumstance the claimant is entitled to compensation;
- b. Admission of liability for discriminatory conduct against the Claimant;
- c. Payment of the following;
 - i. Accrued leave of 40 working days – Kshs. 133,133/-
 - ii. One-month salary in lieu of notice – Kshs. 1,650/-
 - iii. Severance Pay – Kshs. 93,333/-
 - iv. Compensatory damages for wrongful termination at 12 months' salary – Kshs. 1,216,665/-
 - v. Underpayment of salary by Kshs. 1,650/- per month for three months
 - vi. Underpayment in August 2020 salary – Kshs. 11,650/-Total Kshs. 1,461,581/-
- d. Interest on (c) above;
- e. Costs of the suit and interests at court rates from time of filing the suit until payment in full;
- f. Any other further and better relief the Honourable Court may deem just and fit to grant.

4. Respondent's Case

The Respondent averred in its Statement of Defence dated 6th April 2021 that it never signed two contracts with the Claimant as alleged and asserted that the Claimant falsified the Contract dated 1st January 2019. It further averred that contrary to the Claimant's averments, he was not diligent in the discharge of his duties, he routinely and chronically absented himself from work without permission and was given a verbal warning for his behaviour. The Respondent's case is that the termination of the Claimant's employment was lawful, procedural and within the law and it is thus not entitled to pay him any terminal dues. That it terminated the Claimant's employment because he wilfully neglected to



perform his duties causing the Company to suffer losses. That moreover, it does not owe the Claimant any money since it paid him all his dues and that the Claim is unfounded, baseless frivolous, a clear abuse of the court process and should be dismissed with costs.

5. The Respondent also filed a Witness Statement made on December 14, 2021 by Mr. Joseph Anthony Doyle, who asserted that the Claimant's services were terminated on 9th November 2020 due to his continued poor sales performance and negligence while assessing clients. He explained that the Claimant's sales performance had continually been poor for a period of over four months despite his request and receipt of salary increases. That the Claimant's negligence while assessing clients led to a significant theft of batteries in March 2020 for a value of more than Kshs. 350,000/- together with bad debts of Kshs. 300,000/-. Mr. Doyle concluded that the Claimant was thus not diligent in discharging his duties, was a liability to the Company and his actions exposed the Respondent to losses.

6. The Claimant's rejoinder in his reply to defence dated April 30, 2021 was that he did not falsify his Contract dated January 1, 2019. He averred that the Employment Contract dated August 8, 2020 that promoted him to Sales and Marketing Senior Employer, made reference to his earlier Contract under the Terms of Employment and provided verbatim that, "the terms of this agreement continues from the existing employment contract in place since January 2019". He further averred that the orders or overdue collection and email of the workdays could prove his presence at work and that the Respondent had not proved how and when he absented himself from work. That the Respondent had also not demonstrated how it followed due process in terminating his employment. The Claimant denied that he was served with a warning letter as alleged and stated that the Respondent contradicts itself by claiming that it is not entitled to pay any dues to him while at the same time claiming to have paid him all his dues. He argued that the issuance of bounced cheques does not amount to any payments.

7. Evidence

The Claimant testified that the Respondent praised him during the employment period due to his hard work and awarded him bonuses for being the best in Sales. He stated that the Respondent sent his termination letter to a junior staff who handed over the same to him and after raising issue on the said service, the Respondent wrote him an email attaching the letter. That despite the Respondent having communicated that he would hear him on the appeal, he was only told to collect the overdue payment and further told that the reason for the termination was restructuring of the Company and poor performance. The Claimant notified the Court that he collected three (3) overdue payments, that the Respondent gave him a post-dated cheque for Kshs. 70,000/- that bounced and that he was not paid the rest. He noted that there was no action on the alleged poor performance and that he did not take all the leave days due

8. The Respondent's case was then closed as they were absent despite service.

9. Claimant's Submissions

The Claimant submitted that the following issues are for determination before this Honourable Court:

- a. Whether the Claimant was an employee of the Respondent;
- b. Whether the Respondent had a valid reason for terminating the Claimant's employment;
- c. Whether the Claimant is entitled to the terminal benefits sought in the Statement of Claim; and
- d. Who should bear the cost of the suit and interests.



10. It was the Claimant's submission that the Respondent did not produce any witness to dispute the authenticity and validity of the Contract dated 1st January 2019, which was further confirmed with his promotion vide the Contract dated 8th August 2020. That having established that he was an employee of the Respondent, he is therefore entitled to the terminal benefits sought and the compensation claimed. He cited the case of *Menginya Salim Murgani v Kenya Revenue Authority* [2008] eKLR wherein the Court pertinently addressed this issue as follows:-

“...In so far as the employee spends the bulk of his or her time in the service of the employer, little other livelihood, in most cases, is earned by the employee outside the framework of the employment relationship. Of this fact, this Court takes judicial notice; and it must then be considered that the status quo of the employment relationship, inherently vests in the employee both normal rights, and legitimate expectations...”

11. The Claimant submitted that the standard set out in section 43 of the *Employment Act*, 2007 is in mandatory terms that the employer shall 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. Secondly, the reasons for termination of a contract are the matters the employer genuinely believed to exist at the time of termination of the contract, and which caused the employer to terminate the services of the employee. He fronted that the Respondent did not attach proof to substantiate its claim that the reason for terminating the Claimant's employment was poor performance, which thus remains an assertion. He relied on the legal principle codified in section 107 of the *Evidence Act* that he who alleges must prove, and also affirmed by Majanja J. in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. The Claimant argued that the Respondent having engaged him as an employee, it should have properly informed him of the clear reasons for the termination. He further submitted that however since the Respondent did not prove poor performance on his part, the inference of the same as a reason for terminating his employment was a mere afterthought calculated to render him jobless without legal consequences.

12. As regards his entitlement to the terminal benefits sought, the Claimant submitted that he had shown that the Respondent failed to comply with the procedure for fair termination as per section 41 of the *Employment Act* of 2007. That he neither received notice prior to termination of his employment nor was paid full compensation in lieu of the same and that this Court should award his claim for Kshs. 11,650/- being the balance of the amount owed to him as salary in lieu of notice. On the claim for unpaid leave, the Claimant submitted that the Respondent had not proved that he went for his leave and/or was paid for the same, which thus entitles him to compensation for unpaid leave days as was stated in the case of *Charity Wambui Nyambura v Mayfair Holdings Limited* [2022] eKLR. Regarding the claim for service gratuity, he submitted that section 35(5) of the *Employment Act* is clear that where an employee has not been terminated *vide* a notice or upon payment in lieu of notice, they shall be entitled to service pay of 15 days for each completed year worked. He therefore prays for service gratuity for the full year of service that he rendered to the Respondent as sought in his Claim. It was the Claimant's submission that he has adduced evidence before the Court supporting his case that his salary was paid less Kshs. 11,650/- in August 2020, which underpayment should thus be compensated to him. He maintained that having demonstrated on a balance of probability that he was both unfairly and unprocedurally terminated from his employment, he should be granted 12 months' salary as compensation for the unfair loss of employment, in full compliance with the provisions of section 49(1)(c) of the *Employment Act* of 2007. Lastly, that he is entitled to the costs of the suit and interests because the Respondent failed, refused or neglected to make good his claim leading to



institution of the present suit, for which he has incurred costs, time and resources prosecuting. He thus prays that the Court orders the Respondent to bear the costs of the suit and interest at court rates.

13. The Respondent did not file any submissions in the matter.
14. The Claimant is alleged to have been dismissed for poor performance. He on the other hand is alleged to have been declared redundant. It has to be either of the two not both. An employee cannot be said to be a poor performer hence the position he holds declared redundant. The process under each of the two has different parameters. The employee who is a poor performer is entitled to be put under performance improvement program and where the performance does not change, the employee can be terminated for poor performance in terms of section 41 of the Employment Act. If the position held is to be declared redundant, the procedure is laid out in section 40 of the Employment Act. A careful reading of the two sections of the Act demonstrates that one cannot be terminated for both poor performance and redundancy. The Respondent did not demonstrate the poor performance alleged against the Claimant. Indeed, the Respondent's witness had asserted the Claimant was rewarded with pay rises despite his poor performance. It is ridiculous for an employer to reward an employee with increments in salary when the employee is a poor performer. The fact of the increments puts paid the Respondent's assertion that the Claimant was a poor performer. The Respondent therefore seems to have had no reason to terminate the services of its employee. The provisions of section 43 of the Employment Act dictate that there must be a demonstration of the reason for termination. Failure to demonstrate reason implicates the decision to terminate to be unfair and unlawful within the meaning of section 45 of the Act. As such, having failed to demonstrate a reason for termination, the Respondent is found liable for the dismissal.
15. The Claimant sought as part of his claim service pay. He relied on section 35 of the Employment Act. Section 35(6)(d) of the Employment Act makes provision as follows:-
 - (6) This section shall not apply where an employee is a member of –
 - (d) the National Social Security Fund.
16. The provisions of section 35 are clear. It is only where an employee is not a member of NSSF that the trigger for payment of service pay can arise. The Claimant has not demonstrated that he was not a member and contributor to the NSSF thereby denying his claim to service pay. The Claim in that regard must fail and the Court disallows the claim for service pay. In relation to termination, where the employer terminates employment without payment of notice or failing to give adequate notice, the employer is liable to pay such notice. In this case, no notice was given – whether for the intended and alleged redundancy nor was any given at the time of the alleged termination for poor performance. The instances where summary dismissal is possible are set out under section 44 of the Employment Act. Performance is not one of them. As such, the Claimant would be entitled to notice pay in addition to the compensation of 6 months for the egregious termination. The period is capped at 6 months given the relatively short period he served as employee and the distressing manner of termination of service. The Claimant was underpaid in August 2020 and as such is entitled to the sum that was not paid being Kshs. 11,650/-. On this sum interest will run at court rates from the date of filing suit till payment in full. All the other sums except costs will have interest at court rates running from the date of judgment till payment in full. In the final analysis, I enter judgment for the Claimant against the Respondent for:
 - a. Underpayment in August 2020 – Kshs. 11,650/-
 - b. One month's salary in lieu of notice – Kshs. 101,388.75
 - c. 6 months salary as compensation – Kshs. 608,332.50



- d. Costs of the suit.
- e. Interest at court rates on the sum in (a) above from the date of filing suit till payment in full.
- f. Interest at court rates on the sums in (b) and (c) above from the date of judgment till payment in full.
- g. Certificate of service in terms of section 51 of the *Employment Act*.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024

NZIOKI WA MAKAU

JUDGE

