



**Omondi v Danish Refugee Council (Cause E147 of 2023)
[2024] KEELRC 1166 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1166 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E147 OF 2023**

SC RUTTO, J

MAY 3, 2024

BETWEEN

PAMELAH MUSUNDI OMONDI CLAIMANT

AND

DANISH REFUGEE COUNCIL RESPONDENT

JUDGMENT

1. It is common ground that the Claimant was employed by the Respondent with effect from 1st June 2022 as the Regional Human Resources and Administration Manager. The contract of employment was for a fixed period of one year seven months hence was to end on 31st December 2023. However, this was not to be as the Claimant avers that on 19th October 2022, she was inhumanely ushered out of the Respondent's premises and at the same time, locked out of the Respondent's Information Technology (IT) system.
2. The Claimant contends that the Respondent acted illegally and unfairly in terminating her employment. As such, she has sought against the Respondent the sum of Kshs 19,701,465.94 being notice pay, salary for December 2022, accrued leave days, gratuity for the entire term, pension, salary for the full term of the contract, compensation for unfair termination and compensation for discrimination.
3. Through a Memorandum of Response dated 16th March 2023, the Respondent contends that the Claimant was not terminated and that she repudiated the contract of employment through her averments and conduct, that she was no longer the Respondent's employee. That as such, she was removed from the payroll with effect from 1st December 2022. Consequently, the Respondent has termed the Claim unwarranted and has asked that the Court to dismiss the same with costs.
4. During the trial, which took place on 28th November 2023 and 14th February 2024, both parties called oral evidence.



Claimant's Case

5. The Claimant who testified in support of her case, started by adopting her witness statement to constitute her evidence in chief. She further produced all the documents filed on her behalf as exhibits before Court.
6. It was the Claimant's evidence that the events of 19th October 2022, in which she was ushered out and/or locked out of the Respondent's premises and systems were preceded by an email dated 14th October 2022 from the Executive Director addressed to the Head of Support Services as well as the Operations Director instructing the two to invite her to a meeting of 19th October 2022.
7. The Claimant stated that it was at the meeting of 19th October 2022 which was attended by the Head of Support Services as well as the Operations Director, that she was informed that she had to immediately leave the Respondent's premises as she was no longer required at the said premises.
8. She sought to know from the other attendees of the meeting why she was being ordered to leave without any proper documentation, clearance, and/or explanation to which she was requested for her personal email address. She promptly provided her email address and an instant email was sent to her indicating that she was being sent on paid leave commencing 19th October 2022.
9. She contended that she had never applied for any leave and has to date not known why she was being subjected to the kind of treatment meted against her by the Respondent.
10. Her inhumane ejection from the Respondent's premises and being sent on unsolicited and/or unexplained paid leave was orchestrated solely to pave way for one Zimbabwean national who immediately took over her position.
11. The Claimant further avered that given the rigorous recruitment process she underwent to get into her position at the Respondent, the employment of the Zimbabwean national who immediately took over her position without going through any recruitment process as mandatorily required in the documented policies of the Respondent can only be termed as unconstitutional, discriminatory and/or malicious.
12. It was her contention that having been employed by the Respondent on a fixed-term contract ending on 31st December 2023, she had a legitimate expectation that she would serve her full term barring any shortcomings on her part.
13. The Claimant further stated that on 2nd November 2022, the Respondent issued her with a notice to show cause why disciplinary action should not be taken against her. She satisfactorily responded to the show cause through her letter of 9th November 2022 sent vide email.
14. That subsequently, through her Advocates, she did issue a demand and notice of intention to sue on 25th November 2022.

Respondent's Case

15. The Respondent called oral evidence through Ms. Alexandra Bean who testified as RW1. Ms. Bean identified herself as the Operations Manager, East Africa and Great Lakes.
16. Equally, she adopted her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits before Court.



17. It was RW1's evidence that according to the employment contract, the Claimant was required to serve a probationary period of three (3) months from the date of commencement of her employment.
18. That on 17th August 2022, the Claimant's Line Manager conducted a review of the Claimant's performance which revealed that her probationary objectives were yet to be met with satisfaction. RW1 added that her participation in matters relating to the Claimant was on account of the fact that she was a member of the Respondent's Senior Management Team.
19. It was RW1's evidence that the Claimant's probation was extended by a further three (3) months to allow her to improve. That extension of probation was only done by the Respondent in exceptional circumstances and that the Respondent opted to extend the Claimant's probation as opposed to terminating her employment.
20. The Claimant continued performing poorly which compromised the Respondent's operations through, among other things, incorrect recruitment processes, incorrect offers, poor communication on recruitment processes, and a lack of strategic engagement and guidance to the country programs.
21. A probationary review meeting was held on 19th October 2022 during which she was informed of the performance concerns.
22. When she was given an opportunity to respond, she refused the feedback entirely stating, among other things, that that was the first time she was receiving any negative feedback and then proceeded to make a number of grave and shocking threats to the Respondent, including; that she had access to the Respondent's HR information which she could use to the Respondent's detriment; that she would use the Respondent's HR information to report expatriate staff to various authorities on false allegations of discrimination; and that she would tarnish the Respondent's reputation.
23. Faced with these threats, the Respondent was constrained to take immediate temporary precautionary measures to protect its interests, pending conclusion of the probationary review by suspending the Claimant's access to the Respondent's IT system; and requiring her to leave all assets belonging to the Respondent on her desk for.
24. Since the Claimant was visibly agitated, she was informed that further communication would be issued to her on the matter.
25. After the said meeting, and at her own verbal request, the Claimant went on paid leave, and another employee was asked to step in to provide interim support in the Claimant's absence and to prevent a vacuum. The Respondent has since advertised a vacancy for the position which was published on 22nd February, 2023.
26. RW1 further stated following the performance review on 19th October 2022, the Respondent commenced disciplinary proceedings against the Claimant, and an explanatory meeting was held on 2nd November 2022 where the Claimant was informed of the reasons why the Respondent was considering not confirming her employment.
27. The Claimant was thereafter issued with a Show Cause letter dated 2nd November 2022 and accorded ample time to respond to the allegations.
28. The Claimant responded to the Show Cause letter on 9th November 2022, and, in addition to responding to the performance issues raised, she indicated that she considered herself no longer bound by her contract of employment and made demands for compensation.



29. The disciplinary process was yet to be concluded when the Claimant served the Respondent with a demand and notice of intention to sue dated 25th November 2022, to which the Respondent's advocates responded vide a letter dated 19th December 2022.
30. According to RW1, the Claimant was not terminated by the Respondent. She repudiated the contract of employment through her averments that she was no longer the Respondent's employee hence she was removed from the payroll with effect from 1st December 2022. She was issued with a Certificate of Service.
31. RW1 further stated that the Claimant made good the threats she had made at the meeting on 19th October 2022. By a letter dated 8th December 2022, the Respondent was notified by the Non-Governmental Organization Coordination Board of a 'complaint' lodged by the Claimant.
32. The said letter set out various allegations against the Respondent, disclosing confidential information pertaining to the Respondent's operations, and sensitive personal data of the Respondent's employees which she became aware of during the course of her employment.
33. In RW1's view, the Claimant's actions were in bad faith and actuated by malice.
34. The Respondent responded to the Board vide its letter dated 11th January 2023 and was subsequently verbally informed that the Board was satisfied with its response and had marked the matter as closed.

Submissions

35. The Claimant submitted that from the email of 19th October 2022, it is clear that the Respondent through Mrs. Alexandra Bean had arrived at a decision to terminate her and that is why a meeting of "Wednesday" was going to discuss her "departure from DRC". In the same vein, the Claimant submitted that in the email of 19th October 2022, Mrs. Alexandra Bean did not cite any mutual agreement for the Claimant to proceed on paid leave and that it was her (Alexandra Bean) unilateral decision.
36. According to the Claimant, there is no doubt that the Respondent terminated her employment contract from 19th October 2022 and thereafter replaced her immediately with Charity Dube.
37. The Claimant further submitted that whereas Mrs. Alexandra Bean alleged that she continued to underperform during the extended probationary period, she did not adduce any evaluation form as evidence of the same. The Claimant maintained that in the absence of an evaluation, the Respondent cannot justify termination on account of underperformance.
38. It was the Claimant's further submission that by the time the notice to show cause was being written, the Respondent had already forcefully exited her from employment, placed her on unsolicited leave, taken all her working tools, removed her from the IT system and replaced her with Charity Dube.
39. It was her contention that the notice to show cause was nothing but a ploy by the Respondent to appear to have terminated the employment contract after following the due process, albeit after the fact. The Claimant termed this a sanitization process, a sham and invalid in every respect.
40. On the Respondent's part, it was submitted that throughout these proceedings the Claimant failed to prove that there was an unfair termination and, on that basis, the entire suit fails.
41. The Respondent further submitted that the Claimant has failed to satisfy her burden of proving that there was indeed an unfair termination as required of her at Section 47 (5) of the [Employment Act](#).



42. It was the Respondent's further submission that the Claimant received her full salary for both October and November 2022. In this regard, the Respondent contended that such continued compensation contradicts any contention of termination on 19th October 2022. In the Respondent's view, it is untenable for the Claimant to assert termination when she received remuneration during the subsequent months. In support of this argument, the Respondent placed reliance on the case of James Nganga Mbugua v Kiambu Water and Sewerage Company Limited (2022) eKLR.
43. Submitting along the same lines, the Respondent stated that the Claimant has failed to provide any documentation, such as a termination letter or official correspondence, demonstrating that the Respondent severed her employment relationship. That consequently, the burden placed on her by Section 47(5) of the *Employment Act* remains undischarged.
44. Citing the case of Pius Machafu Isindu v Lavington Security Guards Limited (2017) eKLR, the Respondent further submitted that the Claimant's subsequent conduct in this matter, following the meeting of 19th October 2022, does not align with that of a Human Resource Specialist whose employment had been terminated.
45. The Respondent stated in further submission that the crux of this matter lies in the fact that the Claimant remained in employment subsequent to 19th October 2022. As such, it was the Respondent's contention that there was no termination of employment on that date or at any point thereafter.

Analysis and Determination

46. Arising from the pleadings by both parties, the evidentiary material on record, as well as the rival submissions, the following issues stand out for determination: -
 - i. Whether the Claimant was terminated from employment;
 - ii. Depending on the answer in (i) whether the termination was unfair and unlawful;
 - iii. Is the Claimant entitled to the reliefs sought?

Termination?

47. It is the Claimant's case that on 19th October 2022, she was ushered out of the Respondent's premises and locked out of the Respondent's IT system. According to the Claimant, this was subsequent to a meeting which had been convened on the same day and whose attendance included the Head of Support Services and the Operations Director (RW1).
48. Refuting this position, the Respondent has averred that the meeting of 19th October 2022 was a probationary review, having been informed by concerns regarding the Claimant's performance. The Respondent's version is that following the probationary review, it commenced disciplinary proceedings against the Claimant but before the process could be completed, she served the Respondent with a demand and notice of intention to sue. As such, it is the Respondent's contention that the Claimant was not terminated and that she is the one who repudiated the employment contract through her averments and conduct.
49. In light of the rival positions taken by the parties over the issue, the question that springs to the fore is whether the Claimant was terminated from employment by the Respondent.



50. In support of her case, the Claimant exhibited a copy of an email dated 19th October 2023 from RW1 in which she states as follows:

“Dear Pamelah

As discussed verbally, a meeting will be held next week Wednesday to discuss your departure from DRC. James or Simon will be in touch to confirm the time and location. Effective immediately you will be on leave with pay. Lastly as discussed you have been asked to return the DRC assets under your possession and this email acknowledges the return of the laptop and phone (inc. simcard). You will return the charger next week.”

51. In another email dated 25th October 2022, addressed to all staff, Simon Njagi introduced Charity Dube as the interim Regional Human Resources Manager and stated in part;

“Good morning colleagues,

Hope this email finds you well. I would like to introduce Charity Dube as the interim Regional Human Resources Manager following the departure of Pamela Omondi last week...”

52. My understanding of the emails reproduced above is that the Claimant had left the employment of the Respondent as of 19th October 2022. Indeed, the use of the term “departure” with regards to employment, connotes the end of the employment relationship. This is further taking into account that in this case, the Claimant was required to hand over the company’s assets under her custody, which I suppose were meant to facilitate her work. Therefore, it is illogical that RW1 and Simon Njagi would use the term “departure” of the Claimant from the Respondent organization and require her to hand over assets in her possession if at all she was still an employee of the Respondent.
53. Indeed, the foregoing confirms the Claimant’s version that she was informed during the meeting of 19th October 2022 that “she was no longer required at the Respondent’s premises”.
54. What’s more, despite the Respondent’s assertions that the meeting of 19th October 2022 was a probationary review to discuss the Claimant’s performance, no evidence was tendered to prove as much. As a matter of fact, it is rather odd that being a probationary review, the Claimant’s evaluation was not documented, quite unlike her probation evaluation conducted for the period ending 31st August 2022.
55. In discounting the Claimant’s assertions, the Respondent has averred that she was paid salary up to November 2022 thus confirming that she was still in its employment beyond 19th October 2022.
56. Judging by the email of 19th October 2022 from RW1, I am led to hold otherwise. My finding is informed by the fact that in the said email, RW1 informed the Claimant that a meeting was to be held on Wednesday, the following week to discuss her departure from DRC (Respondent). Therefore, I can only infer that the Claimant had already been let go from 19th October 2022 and what was pending was the formalization of her exit. Indeed, what was left was a mere formality on the manner of disengagement with the Claimant but in the real sense, the employment relationship was no longer subsisting.
57. The total sum of my consideration is that I am persuaded that the Claimant has discharged her legal burden under Section 47(5) of the *Employment Act* that she was terminated from the Respondent’s employment as of 19th October 2022.



Unfair and unlawful termination?

58. It is apparent from the record that the meeting of 19th October 2022 was the turning point in the employment relationship between the Claimant and the Respondent. The Respondent's version is that the meeting was a probationary review and had been convened to discuss the Claimant's performance. However, and as stated herein, there was no evidence that a probationary review was conducted as the Claimant's performance evaluation if any, was not documented. Therefore, it is not possible to ascertain that the real reason leading to the breakdown of the employment relationship was the Claimant's performance.
59. It is apparent that the notice to show cause issued to the Claimant cited her for poor performance. Be that as it may, there was no evidence that a performance evaluation was conducted and the Claimant was found to have fallen short of the agreed targets.
60. Section 43(1) of the *Employment Act* requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Related to this provision, is Section 45 (2) (a) and (b) which provides that a termination of employment 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-
 - i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
61. In this case, the Respondent has failed to prove the reason for the Claimant's termination from employment and more importantly, that the said reason was fair, valid and related to her conduct, capacity or compatibility. In that respect, the Claimant's termination from employment was not fair within the meaning of Sections 43 and 45(2) (a) and (b) of the *Employment Act*.
62. Beyond proving that there was a valid and fair reason for termination of an employee's employment, an employer is required to prove that such termination was in accordance with a process that is fair. That is the essence of Section 45(2) (c) as read together with Section 41 of the *Employment Act*.
63. In this case, the Claimant was issued with a notice to show cause dated 2nd November 2022. In the said notice to show cause, the Claimant was notified that she had not met expectations in the areas highlighted and she was required to give her written response within three (3) days.
64. The way I see it, the issuance of the notice to show cause was in apparent compliance with the provisions of Section 41 of the *Employment Act*. Be that as it may, the same did not serve any meaningful purpose. The horse had bolted as the decision to terminate the Claimant's employment had already been made on 19th October 2022.
65. As such, it is my considered view that the said notice to show cause was merely to satisfy the procedural requirements and was not in fulfillment of the spirit of Section 41 of the *Employment Act*.
66. In light of the foregoing, I cannot help but find that the Claimant's termination from employment was unfair in substance and procedure.

Reliefs?

67. Having found that the Claimant's termination was unfair substantively and procedurally, she is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to four (4)



months of her gross salary. This award takes into account the length of the employment relationship which I note was relatively short and the circumstances leading to the Claimant's termination from employment.

68. With regards to leave pay, the Claimant is awarded prorated leave pay of 13.02 days in line with clause 11 of the contract of employment seeing that the Respondent has failed to produce the Claimant's leave records in line with its obligations under Section 74(1) (f) of the *Employment Act*.
69. The Claimant is entitled to pension contributed during her period of employment.
70. Similarly, the Claimant is awarded gratuity in terms of clause 9(iii) of the contract of employment. This shall be prorated for the six (6) months the Claimant was in employment.
71. The salary for December 2022 is declined as the Claimant was not an employee of the Respondent at the time.
72. The claim for damages for discrimination is declined as the Claimant has not demonstrated the manner in which she was treated differently and less favourably compared to her counterparts, based on any of the grounds stipulated under Section 5(3) of the *Employment Act*.
73. The claim for salary and gratuity for the full contractual term is declined seeing that the said reliefs are anticipatory in nature. On this issue, I concur entirely with the sentiments of the Court in the case of *Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya* [2013] eKLR, thus:

“My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or ‘permanent’ contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently.” [Emphasis supplied]

Orders

74. It is against this background that I enter Judgment in favour of the Claimant against the Respondent as follows:
 - a. A declaration that the termination of the Claimant's employment was unfair.
 - b. The Claimant is awarded one (1) month's salary in lieu of notice being the sum of Kshs 498,295.00.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 1,993,180.00 being equivalent to four (4) months of her gross salary.
 - d. The Claimant is awarded the sum of Kshs 294,900 being equivalent to unutilized 13.02 leave days.
 - e. The Claimant is awarded the sum of Kshs 124,573.75 being prorated gratuity for six (6) months.
 - f. The Claimant is awarded the sum of Kshs 298,980.00 being the total pension contributions.
 - g. The total award is Kshs 3,209,928.75.



- h. Interest on the amount in (g) at court rates from the date of Judgment until payment in full.
- i. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MAY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Khaemba

For the Respondent Mr. Weru

Court Assistant Millicent Kibet

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

