



**Kaimenyi v Nemchem International Kenya Limited (Cause
E016 of 2024) [2024] KEELRC 1957 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1957 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E016 OF 2024**

**M MBARÚ, J
JULY 25, 2024**

BETWEEN

NAFTALI KAIMENYI CLAIMANT

AND

NEMCHEM INTERNATIONAL KENYA LIMITED RESPONDENT

JUDGMENT

1. The respondent employed the claimant on 13 January 2023 as a sales account manager. His workstation was the Mombasa branch earning Ksh.100, 000 per month.
2. On 19 September 2023 the respondent issued the claimant notice terminating his employment with a 7 days' notice contrary to his letter of employment which required one month's notice. There was no payment of terminal dues. The claimant has been unable to secure new employment as the respondent refused to give him a Certificate of Service.
3. The claim is that termination of employment was without hearing and reasons. Terminal dues were not paid and the claimant is seeking the following;
 - a. Ksh.750,000 on account of underpayment for five months of Ksh.150,000;
 - b. Ksh.3,000,000 12 months compensation;
 - c. Ksh.250,000 notice pay;
 - d. Damages for violation of constitutional rights;
 - e. Damages for breach of privacy and reputational damage.
 - f. Costs.

4. The claimant testified in support of his case that on 13 January 2023, he was employed by the respondent as the Key Sales Accounts Manager, in Mombasa. His salary was agreed at Ksh. 80,000 per month for the first 3 months of probation and later adjusted to Ksh.250, 000 per month upon successful completion since he was earning Ksh.150, 000 in his previous job. He was also to earn a commission of 15% on chemicals and equipment sold and 8% on consumables.
5. The claimant testified that he met the general manager and sales manager in Africa and agreed to adjust his salary to Ksh.100, 000 per month. The other terms of employment were to remain the same.
6. The claimant was told to relocate to Mombasa and would be called to the office to sign the appointment letter once the adjustments were done. He reported as directed with effect from 1st February 2023. He looked for an office and found one in Nyali area and he signed the lease agreement and the county license.
7. The claimant asked for the due letter of appointment. After three months, there was no confirmation of employment or extension of probation. When he asked, the respondent said that his salary would be adjusted.
8. On 11 August 2023, the claimant was issued with a warning letter. In the same month, the claimant had a traffic accident while driving from Malindi. On 19 September 2023 he was issued with notice terminating employment without prior notice, hearing and payment of terminal dues.
9. The claimant testified that part of his employment required him to sign key performance indicators (KPI) but he never got the letter confirming his employment or change of terms and conditions. He was to earn a bonus and commissions based on his sales. He did not achieve the targets but was about to when he was issued with notice terminating employment. The notice indicated that he had failed to meet the KPI set in his contract which was not true. On 11 August 2023 he had been issued with a warning letter on the basis that he had not met the KPIs.
10. In response, the respondent admitted that the claimant was employed on 13 January 2023 at a gross salary of Ksh.80, 000 per month as a Key sales accountant, the Mombasa branch. He was issued with a letter of appointment. The terms and conditions of employment were that he was to generate sales of Ksh.1, 000,000 (one million) on a monthly basis for the Mombasa branch and Ksh.4, 000,000 for the whole month on at the coastal region. In addition to the gross salary, the claimant was entitled to sales commission as follows;
Chemical 15%,
Consumable 8%;
Equipment's 15%;
11. Pest control 12% of the gross profit of the contract is the gross profit is below 30% on top of the 8% of the gross profit of the above 30% the claimant is entitled to get an additional 8% of the difference.
12. The employment contract allowed the respondent to terminate employment upon notice or payment in lieu thereof.
13. The response is also that the claimant working habits were subpar and he committed several acts of gross misconduct. These acts included being absent from work and absenting himself from duty for 4 days and being unreachable, being intoxicated during work hours or being drunk while performing his official duties to the extent of causing an accident involving company vehicle, improperly performing his duties falling below target amounts and failing in his duty to set up the Mombasa office. The claimant committed an offence against the property of his employer as he misappropriated funds given

- to him for the purchase of office equipment, failing to purchase office desks despite having been issued the funds to do so. There were communication difficulties occasioned by multiple instances where he was unreachable on the phone, with particular reference to one incident where the claimant was unreachable for 5 days. There were several complaints made through the office line indicating that the claimant was by the roadside in Mombasa with the company vehicle heavily intoxicated and unable to drive. He failed to open the Mombasa office as required and preserve it properly so as to reflect the image of the respondent. The claimant delayed cheque collection and deposit of the same promptly. Being indolent, slothful and lacked reactivity where he received damaged sales items and failed to relay the information to the main office in Nairobi about the damaged goods.
14. In a letter dated 11 August 2023, the respondent notified the claimant that his employment would be terminated. There was a 7-day notice and the claim for notice pay is not justified. There was no request for issuance of a letter of recommendation. The respondent does not owe the claimant any terminal dues.
 15. The respondent offered the claimant many chances to remedy his conduct to no avail precipitating the respondent to call a disciplinary hearing. Further to the oral hearing, the claimant made a written response to the allegations made against him and upon considering these submissions, there was a conclusion that dismissal was justified for poor performance. The respondent followed the due process under the law and there were justified reasons leading to the termination of employment. The claims made are not justified and should be dismissed with costs.
 16. In evidence, the respondent called Kelvin Sepete the country general manager who testified that the claimant was employed as key sales account manager through letter of appointment dated 13 January 2023. The letter had terms that probation would be for 90 days, 3 months and termination of employment would be upon notice or payment in lieu thereof. The parties also agreed on KPIs requiring the claimant to generate a minimum of Ksh.1,000,000 in sales and targeting Ksh.4,000,000 each month once the team was sent up for the coastal region. As the manager, the claimant would be in charge of setting up the Mombasa office which he failed to address.
 17. Sepete testified that the parties agreed that the due salary was Ksh.80, 000 per month for the probation period subject to statutory deductions. The claimant failed to meet the KPI as agreed and underperformed and also committed gross misconduct by being absent from work, being intoxicated and the respondent received complaints that he had been found drunk by the roadside due to intoxication while driving the company vehicle. The claimant hence committed offence against the property of the respondent and also misappropriated funds meant to purchase office equipment's. He admitted to these matters through his letter dated 11 August 2023. The respondent also found the claimant had failed to communicate about his whereabouts and could not be reached leading to delays poor performance of duty. The claimant was issued with a warning letter on his conduct, he failed to meet his KPIs and due to his drunkenness, he was involved in an accident and could not control the vehicle he was driving.
 18. Despite the claimant being offered several opportunities to be heard, he continued to be of gross misconduct. The respondent hence committed acts of gross misconduct and was allowed to address but failed to do so leading to termination of employment.
 19. Sepete testified that the claim that there was a salary of Ksh.250, 000 per month is not correct and this was never agreed upon. From the letter of appointment, there was an agreement to pay Ksh.80, 000 per month and this increased to Ksh.100, 000 plus the commissions due. He failed to meet his sales targets and hence did not earn any commissions. The probation period was extended. There was a disciplinary

hearing before termination of employment through the phone and no record was taken. The claimant had committed various acts of gross misconduct and termination of employment was justified.

At the end of employment, both parties filed written submissions.

Determination

20. Termination of employment is regulated in law. Section 41 of the [Employment Act](#) requires the employer to issue the employee with notice to allow the employee a fair chance to respond and further, invite the employee to attend at the shop floor with another employee of his choice and to make his representations. These motions of the law are mandatory. Without securing these rights for the employee, the resulting termination of the employment is unlawful. At the end of employment, the employer is required to give valid, fair genuine reasons leading to termination of employment failure to which, such notice results in unfair termination of employment.
21. These motions are aptly captured by the Court of Appeal in the case of [Oyombe v Eco Bank Limited \(Civil Appeal 185 of 2017\)](#) [2022] KECA that before termination of employment, the employer must adhere to four elements;
- ... four elements must thus be satisfied for the summary dismissal procedure to be said to be fair, being: -
- a) An explanation of the grounds of termination in a language understood by the employee;
 - b) The reason for which the employer is considering termination;
 - c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
 - d) Hearing and considering any representation made by the employee and the representative chosen by the employee.
22. In the case of [Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd](#) [2013] eKLR the court gave emphasis to these provisions that;
- The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
- Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, in writing or through a representative or shop floor union representative if possible.
- Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before deciding to dismiss or give other sanction.
23. In this case, the respondent issued the claimant with a warning dated 11 august 2023 relating his work performance. The respondent noted that the claimant had not met his KPI and was of poor work performance.
24. The warning was for a month to allow the claimant to improve his work performance and to achieve his sales targets.

25. The respondent also filed disciplinary minutes for a disciplinary hearing conducted on 11 August 2023. The witness called, Sepete testified that the disciplinary hearing was on the phone.
26. At the disciplinary hearing on 11 August 2023 when the warning notice was also issued, present were the claimant and Denise Tegisi held at Nemchem International (K) Limited's Offices on 11.08.2023 at 2PM.
27. Sepete testified that the disciplinary hearing was on the phone. There is no prior notice to this disciplinary hearing and the claimant was not allowed a chance to call his employee of choice at the hearing as required under Section 41(2) of the *Employment Act*;
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
28. Even in a serious case of gross misconduct where the claimant was found absent from work, where he was found drunk while at work and was found to have put into waste the employer's property, the mandatory provisions of Section 41 of the *Employment Act* must be adhered to. In the absence of such compliance, the respondent as the employer committed unfair termination of employment.
- Notice pay and compensation are due.
29. The claimant had a probationary contract ending after 90 days from 13 January 2023 which then lapsed on 12 April 2023. There is no letter confirming employment after this probation period. During the probation period, the claimant was paid Ksh.80,000 per month and the respondent filed the last payment statement indicating that the claimant was earning a basic salary of Ksh.100,000. This is the due amount lastly earned by the claimant according to Section 10(5) of the *Employment Act*. The claim for Ksh.250, 000 is premised on a promise that was not actualized through a written contract or achievement of the KPIs agreed upon.
- The due notice pay is Ksh.100, 000.
30. On compensation due, to the findings that there was unlawful and unfair termination of employment, the court is also required to consider the motions of Section 45(5) (b) and (e) of the *Employment Act*. The conduct of the employee in the course of his employment should be taken into account;
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
- (a) ...
- (b) the conduct and capability of the employee up to the date of termination;
- (e) the existence of any previous warning letters issued to the employee.
31. In the case of *Gerald M. Ochieng v Copyright Board of Kenya & another* [2016] eKLR and *Grace Atieno Onyango v St. Hannah's Preparatory School Limited* [2015] eKLR the court held that the previous record of the employee should be taken into account when assessing compensation.
32. In this case, the claimant admitted that in August 2023 he had a self-involving accident. This accident was linked to his being intoxicated. The respondent filed a police abstract record where the claimant

was involved in KCD 863V the property of the respondent. The evidence that this accident occurred while the claimant was intoxicated was not challenged in any material way.

33. The provisions of Section 45(5) addressed, the claimant contributed to reasons leading to termination of employment. The due process addressed above and redressed, to award compensation would be to reward gross misconduct. Zero (0) award is hereby found justified. See *Lilian W. Mbogo-Omollo v Cabinet Secretary Ministry of Public Service & Gender & another [2020] eKLR - Petition 86 of 2020.*
34. On the claim for underpayment of Ksh.750, 000 is not due as there is no written contract enhancing the salary and benefits. The last salary paid was ksh.100, 000.
41. On the claim for damages and violation of constitutional rights, the findings that there was no due process and termination of employment was unlawful and unfair, such arose within the employment relationship and hence addressed. Such matter is addressed above and notice pay and compensation assessed.
42. The claimant has also urged the court to award damages for the lack of issuance of a letter of recommendation. That he is not able to secure new employment for lack of this letter.
43. Section 51 of the *Employment Act*, the employer is not bound to issue a letter of recommendation but a Certificate of Service. The former is optional and the latter mandatory.
44. On costs, the claim successfully save for the noted matters outlined above, each party to bears its costs.
45. Accordingly, judgment is hereby entered for the Claimant against the Respondent in the following terms;
46.
 - a. Notice pay Ksh.100,000;
47.
 - b. Each party to pay its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25 DAY OF JULY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine.

..... **and**