



**Kandiyal v Canaan Factories Company Limited (Cause 6530 of 2020)  
[2024] KEELRC 1819 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1819 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 6530 OF 2020**

**SC RUTTO, J  
JULY 12, 2024**

**BETWEEN**

**SUNIL KANDIYAL ..... CLAIMANT**

**AND**

**CANAAN FACTORIES COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The instant suit was commenced by the Claimant through a Memorandum of Claim filed on 8<sup>th</sup> December 2020, in which he avers that he was employed by the Respondent as a Sales and Marketing Distribution Manager. According to the Claimant, he worked faithfully, diligently and with utmost dedication for the betterment of the Respondent.
2. The Claimant further avers that despite him continuously serving the Respondent faithfully and diligently, the Respondent through its top management, engaged in unfair labour practices to his detriment. He further states that to his utter shock, the Respondent went ahead and verbally terminated his services on 30<sup>th</sup> January 2020 for what was termed as “failing to perform” contrary to the Employment Act and the contract of employment without letting him utilize his leave days. It is against this background that the Claimant claims the following reliefs against the Respondent:
  - a. A declaration that the Respondent's conduct in handling the Claimant's employment period amounted to unfair, unlawful and summary dismissal and in breach of the Employment Act and principles of the employment law.
  - b. Damages for unfair and constructive dismissal from employment equivalent to twelve (12) months gross salary totaling to Kshs. 1,104,000/- with interest thereon at Court rates from the date of Award until payment thereof in full.
  - c. Three month's salary in lieu of notice of Kshs. 900,000/-



- d. Leave allowance of Kshs. 300,000/-
  - e. Unpaid salaries and pending payments Kshs. 707,692.00/-
  - f. Certificate of service.
  - g. Costs of the suit plus interest thereon from the date of Award.
  - h. Any other relief that this Honourable Court may deem fit to and just to grant in the circumstances.
3. The Claim did not go unopposed. Through its Statement of Response dated 23<sup>rd</sup> March 2021, the Respondent has averred that the Claimant's contract was for a period of two years with an initial probationary period of 12 months. According to the Respondent, the Claimant's performance after completion of the probationary period was below the expected Key Performance Indicators (KPIs) for an employee operating as its Sales, Marketing and Distribution Manager.
  4. The Respondent further denied the Claimant's assertions to the effect that it engaged in unfair labour practices. It is the Respondent's contention that it is a law-abiding employer with high regard to the Employment and labour law standards. The Respondent further avers that it exercised its contractual and statutory obligations in terminating the Claimant's contract in strict adherence to the contract and the employment law.
  5. Reiterating that the Claimant was not unfairly dismissed, the Respondent states that on completion of the 12-month probationary period, it conducted an evaluation and the Claimant failed to measure up, prompting it to exercise its right to terminate his employment. Consequently, the Respondent has asked the Court to dismiss the Claimant's suit with costs.
  6. The matter proceeded for hearing on 14<sup>th</sup> March 2024, during which the Claimant testified in support of his case. On the other hand, the Respondent elected not to call oral evidence.

#### **Claimant's Case**

7. At the outset, the Claimant sought to rely on his Memorandum of Claim and witness statement to constitute his evidence in chief. He further produced the documents filed alongside the Memorandum of Claim as exhibits before Court.
8. The Claimant told the Court that he did not complete his contract which was to run from 2019 to 2021. He further stated that the contract was not terminated due to nonperformance and that he was not subjected to any performance evaluation. That further, he did not have any KPIs.
9. According to him, there was a miscommunication between him and the Respondent's Chief Executive Officer (CEO) hence he was asked to leave the company.
10. He further stated that he was not given any written document following his termination.

#### **Respondent's Case**

11. As stated herein, the Respondent elected not to call oral evidence hence its case was as per its Statement of Response.

#### **Submissions**

12. The Claimant submitted that the Respondent acted in ways that violated the salient features of the *Employment Act*. Citing the case of *Cooperative Bank Limited vs Yator (Civil Appeal 87 of 2018)* [2021]



- KECA 95 (KLR), the Claimant urged the Court to find that the Respondent unfairly dismissed him without according him a fair hearing which action amounted to a contravention of the law.
13. The Claimant further submitted that the procedure leading to his termination was overly flawed and that he was ambushed with allegations that he was never given a chance to be heard.
  14. Placing reliance on the case of *Barasa Paul Isaac vs Xfor Security Solutions (Ke) Ltd (2015) eKLR*, the Claimant further submitted that he was dismissed for unfounded reasons and without being accorded any hearing.
  15. On the Respondent's part, it was submitted that the Claimant failed to undergo performance appraisal despite being aware of its necessity. Still on this issue, the Respondent posited that its attempts to terminate the Claimant's contract were enhanced due to his sudden abscondment of duty.
  16. It was the Respondent's further submission that the Claimant's desertion from duty automatically terminated the probation contract and the entire employment contract ceased to exist.
  17. Referencing the case of *Margaret A. Ochieng v National Water Conservation & Pipeline Corporation (2014) eKLR*, the Respondent further submitted that its intention was to purely engage the Claimant on a fixed-term contract and his desertion did not warrant an improvement of terms from probation to confirmation.

### **Analysis and Determination**

18. From the pleadings on record as well as the evidentiary material placed before the Court and the rival submissions, the following issues stand out for determination:-
  - a. Whether the Claimant's termination from employment was fair and lawful;
  - b. Is the Claimant entitled to the reliefs sought?

### **Unfair and unlawful termination?**

19. It is the Claimant's case that his termination from employment was unfair and unlawful. Under the *Employment Act*, an employer is required to prove that an employee's termination was not only fair substantively but also procedurally. Fundamentally, this is the standard for determining whether an employee's termination was fair or not. In this regard, Sections 43, 45 and 41 of the *Employment Act* (Act), are key.
20. In terms of Section 43(1) of the Act, an employer is required to prove the reason or reasons for the termination of an employee's contract of employment, and where it fails to do so, such termination is deemed to have been unfair within the meaning of Section 45. This is also referred to as substantive justification.
21. In addition to the foregoing, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
22. In the instant case, the record bears that the Claimant was not issued with a letter of termination. As such, the reason leading to the Claimant's termination from employment cannot be discerned therefrom. According to him, his termination was verbal. This being the case and bearing in mind the statutory provisions aforementioned, the burden was on the Respondent to prove the reasons for which the Claimant was terminated from employment and that the same were fair, valid and related to his conduct, capacity or compatibility; or based on its operational requirements.



23. In its Response to the Claim, the Respondent pleaded that the Claimant's performance was below the expected KPIs. The Respondent further stated that it conducted an evaluation and the Claimant failed to measure up prompting his termination from employment.
24. In essence, the Respondent has averred that the termination of the employment contract was related to his performance.
25. Despite the Respondent's assertions, there is no evidence on record to prove that he was issued with KPIs. Further to that, there is no evidence to demonstrate that the Claimant's performance was evaluated and if so, against what targets.
26. Indeed, the Respondent did not adduce evidence to demonstrate that the Claimant had been issued with specific measurable targets that he was required to meet within specified timelines or during his probationary period as the Respondent alleges.
27. Most of all, there was no evidence from the Respondent's end that it had put in place measures to evaluate the Claimant's performance against set targets.
28. In light of the foregoing observations, I cannot help but question how the Respondent was in a position to determine that the Claimant's performance was below the expected KPIs yet there were no KPIs to start with, no measures to assess his performance and no evidence of an evaluation of his overall performance against such targets.
29. In the case of *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR, the Court rendered itself as follows in respect of termination of an employee's contract of employment on account of poor performance:

“The reason advanced by the Bank for terminating the respondent's employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK)* (September, 2013) the court observed as follows;

- “a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act, 2007*. The employer must show that in arriving at the 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.
- b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”



... We find no basis for faulting the Judge’s finding that an appraisal ought to have been conducted on the respondent’s work performance in 2014 to confirm whether the respondent had improved on his 2013 performance rating before termination of his employment and that in the absence of such proof, termination of the respondent’s employment with the Bank was unfair.”

30. Applying the above precedent to the case herein, it becomes apparent that the Claimant’s termination from employment was not substantively justified seeing that the Respondent has failed to prove that it had KPIs in the first place as well as measures to enable it assess the Claimant’s performance. Over and above, there is no evidence that it undertook an evaluation of the Claimant’s performance.
31. Submitting on the issue, the Respondent has stated that the Claimant deserted duty having been informed of his below par performance and the looming performance appraisal.
32. Be that as it may, the Respondent did not indicate, let alone suggest that upon noting that the Claimant had deserted duty, it attempted to establish his whereabouts. In an employment context, it is expected that where an employee deserts duty, an employer would take reasonable steps to ascertain his or her whereabouts. (see the case of *Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme* [2015] eKLR)
33. In light of the foregoing, the Court arrives at the inescapable conclusion that the Respondent has failed to discharge its evidential burden by proving that it had a justified reason to terminate the Claimant’s employment based on his performance. To this end, his termination was not substantively justified.
34. With respect to procedural fairness, Section 45(2) (c) of the Act, provides that for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the Act sets out the specific requirements of a fair hearing. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.
35. In the instant case, there is no evidence or the slightest indication that the Claimant was subjected to the process contemplated under Section 41, prior to the termination of his employment contract. This being the case, I can only conclude that no such process was undertaken.
36. In the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR, the Court of Appeal highlighted the minimum requirements with respect to procedural fairness as follows:

“ Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”



37. Applying the above decision to the instant case and in the absence of relevant evidence from the Respondent's end, I cannot help but find that the Respondent has not proved that it acted in compliance with the spirit of Section 41 of the Act as read alongside Section 45(2) (c).
38. In the circumstances, it is this Court's finding that the Respondent is at fault for want of procedure.
39. The upshot of the foregoing is that the Claimant's termination from employment was both unfair and unlawful in terms of Sections 41, 43 and 45 of the Act.

### **Reliefs?**

40. As the Court has found that the Respondent has not proved that it had a justifiable reason to terminate the Claimant's employment, he is awarded compensatory damages equivalent to two (2) months of his gross salary. This award has considered the length of the employment relationship which I note was considerably short, as well as the circumstances attendant to the Claimant's termination from employment.
41. The Claimant is further awarded three (3) months' salary in lieu of notice.
42. According to the Respondent, the Claimant was on probation for one (1) year from 21<sup>st</sup> January 2019 up to 30<sup>th</sup> January 2020. Despite the Respondent's assertions, this provision is not evident from the contract of employment as it only provides that the Claimant's performance was to be evaluated on completion of one (1) year. Indeed, there is no mention that the Claimant's probation was for one (1) year. In any event, such a provision would be contrary to the law.
43. I say so in light of the provisions of Section 42 (2) of the Act which is couched as follows:  
A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.
44. As can be discerned from Section 42(2) above, the minimum probationary period an employee can serve is six (6) months subject to an extension of a similar period with the concurrence of the employee. Therefore, the Respondent's assertion that the Claimant was serving on a one (1) year probationary contract does not hold and if anything, is contrary to the law.
45. Further, as provided under Section 42(2) aforementioned, an extension of the probationary period must be mutually agreed upon by both the employer and the employee. In this case, there is no evidence that there was mutuality to extend the Claimant's probationary period. In any event, I have found that the contract of employment was silent on the Claimant's probationary period.
46. It is therefore this Court's finding that as of 30<sup>th</sup> January 2020, the Claimant was not under any probation hence was entitled to a notice period of three (3) months prior to termination or payment in lieu thereof.
47. The Claimant has further prayed for the sum of Kshs 707,692.00 being salaries and pending payments. Notably, the Claimant has not specified the period and the specific payments for which he is seeking compensation from the Respondent. Being a specific claim, it behoved the Claimant to craft it in a precise manner. Having failed to do so, the claim to this extent collapses.
48. The claim for leave allowance also fails as the Claimant has not made any justification for the same.
49. As the employment relationship has been admitted, the Claimant is entitled to a Certificate of Service in line with Section 51(1) of the Act.



## Orders

50. To this end, Judgment is entered in favour of the Claimant against the Respondent and he is awarded: -
- a. Three (3) month's salary in lieu of notice being Kshs 900,000.00
  - b. Compensatory damages in the sum of Kshs 600,000.00 which sum is equivalent to two (2) months of his gross salary.
  - c. The total award is Kshs 1,500, 00.00.
  - d. Interest on the amount in (c) at court rates from the date of Judgment until payment in full.
51. The Respondent shall issue the Claimant with a Certificate of Service within 30 days from the date of this Judgment.
52. The Claimant shall also have the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 12<sup>th</sup> day of July 2024.

.....  
**STELLA RUTTO**

**JUDGE**

### Appearance:

For the Claimant Mr. Odongo instructed by Mr. Ochieng

For the Respondent Mr. Kisigwa

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

