



**Mbuchi v Software Group Kenya (Cause E718 of 2021)
[2024] KEELRC 1934 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1934 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E718 OF 2021
NZIOKI WA MAKAU, J
JULY 18, 2024**

BETWEEN

CHARLES MBATIA MBUCHI CLAIMANT

AND

SOFTWARE GROUP KENYA RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent through a Memorandum of Claim dated 18th August 2021 seeking for Judgment against the Respondent for:
 - i. A declaration that the Respondent violated the Claimant's rights to fair administrative action under Article 47, right to fair labour practices under Article 41, right to dignity under Article 28, right to a fair hearing under Article 50(1) as well as rights under Article 10 of *the Constitution* of Kenya, 2010.
 - ii. A declaration that the Claimant has suffered unfair wrongful termination in the first instance.
 - iii. An order for reinstatement of the Claimant to his former employment and position without any loss of benefit including allowances, seniority and continuity of service.
 - iv. In the alternative and without prejudice to prayer (c) above the payment to the Claimant actual pecuniary loss suffered since the date of termination including payment for salary/wages as would have been earned, housing allowance and together with all accruing allowances as tabulated herein below;
 - v. Notice pay for three (3) months - 337,999/- x 3 (months) = 1,013,997/-
 - vi. Maximum compensation for 12 Months for wrongful and unfair termination of employment) - 337,999/- x 12 (months) = 4,055,988/-



- vii. Compensation for breach of contract.
 - viii. House allowance for four (4) years nine (9) months (0.15x337,999/- * (57months) = 2,889,891/-).
 - ix. Payments of project based bonus and company bonus for the four (4) years nine (9) months.
 - x. General damages for violation of fundamental rights and freedoms of the Claimant.
 - xi. Any such other and further appropriate relief as the Court may deem just and fit to grant.
 - xii. Costs of this claim and interest thereon at court rates.
2. The Claimant averred that he was employed by the Respondent on 19th October 2016 as a Project Manager and had never been involved in any disciplinary hearings, warnings (verbal or written) or adverse reports regarding his performance prior to December 2020. That his performance was brought into question in or about December 2020 and without due process, he received a Warning Letter dated 21st December 2020 from the Respondent referencing incidences dating back to September 2020. That in perspective, his immediate supervisor raised concerns that his communication skills were inadequate to the set Key Performance Indicators (KIPs) for his position yet there had been no prior disciplinary meetings on his performance. He contended that he was only engaged in a consultative meeting with his supervisor and attended a scheduled performance review meeting with his supervisor and Human Resource specialist. That during the meeting, he contested the subsequent evaluation report regarding the particulars of the inconsistencies and questionable scores for his half year performance review. Further, he asserted that the said report was subjectively calculated to malign and soil his professional standing as far as his employment with the Respondent was concerned and to use it as an excuse to terminate his employment.
3. The Claimant further averred that after opposing the said evaluation report on his performance, the Respondent issued him a notification intending to put him under a Performance Improvement Plan (PIP) for six (6) weeks, with reviews after every two (2) weeks. That after the reviews, he was invited for a physical meeting at the Respondent's office upon which he was served a letter dated 18th June 2021 terminating his employment with the Respondent. He contended that the PIP process was a mere formality purely done for the benefit of demonstrating that due process was followed by the Respondent. He acknowledged having received his final statutory dues from the Respondent in accordance with the terms laid in the letter of termination. The Claimant's case was that he was neither issued with a notice to show cause nor subjected to a disciplinary hearing by the Respondent and noted that he was also never provided with housing or paid house allowance for the entire period he worked for the Respondent. He raised the issues of malice and illegality against the Respondent and asserted that there was wrongful termination and breach of contract, legitimate expectation and negligence in his case. He fronted that this Court should find that the Respondent, in terminating his employment on account of poor performance as a gross misconduct, was to comply with the provisions of the Employment Act and the normal express or implied terms of agreement for employment.

Respondent's Case

4. The Respondent filed a Reply to Memorandum of Claim dated 23rd November 2021, wherein it averred that prior to December 2020 it was brought to the attention of the HR Specialist that the Claimant had on numerous occasions failed to communicate with his supervisor on matters requiring his urgent response in his capacity as a Project Manager. It asserted that the Claimant was afforded an opportunity to be heard and his concerns were adequately addressed and denied the assertion that the aforesaid Claimant's evaluation process was not objective. It contended that the Claimant had been



informed that failure to meet or exceed the expectations set would result in further disciplinary action up to and including termination of his employment. That the Claimant was at all times informed of his responsibilities and was well aware of the KPIs he was expected to meet. It further averred that the scheduled monthly reviews show that the Claimant's performance did not improve and/or meet the Clients' and Respondent Company's expectations and that he acknowledged that the concerns he raised were addressed. That it was therefore within its rights to terminate the Claimant's contract based on his poor performance and that the termination process was procedural, fair and lawful. That it paid the Claimant all its terminal dues and issued him with a certificate of service and that he was not entitled to house allowance because the same was provided for in the gross salary as provided for in the Letter of Appointment.

5. The Respondent's case was that there was no malice and illegality on its part as alleged because it issued the Claimant with a 30 days' notice for termination of employment and paid him 30 days' salary in lieu of notice. Furthermore, the Claimant was afforded an opportunity to defend himself against the concerns raised in the warning letter and a consultative process to resolve the same ensued resulting in a performance review. That in the end, the Claimant's termination of employment was not only substantively justified and procedurally fair but also a transparent and consultative process. The Respondent submitted that it complied with section 41 of the *Employment Act* and the guiding principles for terminating an employment on account of poor performance. It further submitted that it took the issue of non-performance very seriously and that each decision made was arrived at after much consultation and deliberation. It denied each of the claims sought and prays that the Claimant's Claim be dismissed with costs to the Respondent.
6. In his response to the Respondent's Defence, the Claimant averred that the Respondent terminated his employment unlawfully and unfairly without according him a fair hearing. He denied that the Respondent conducted any investigation on his alleged poor performance and averred that the Respondent never informed him of any such investigations or issued him with an investigation report in that regard.
7. Claimant's Submissions
The Claimant submitted that the following issues are for determination before this Court:
 - i. Whether there existed any valid reasons (substantive fairness) to terminate the Claimant's employment?
 - ii. Whether the procedural requirements (procedural fairness) set out in Section 41 of the *Employment Act* were observed?
 - iii. Whether the Claimant is entitled to the prayers sought?
8. It was the Claimant's submission that termination of contract should only be where there are reasons, which reasons, the employer at the time of terminating such a contract genuinely believed to exist hence the termination. He cited the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the Court noted as follows in regard to the requirement of giving reasons for terminating employment contracts as under section 43(2) of the *Employment Act*. That further in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the Court pronounced itself that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. The Claimant argued that the test of fairness must therefore be looked at with regard to the conduct of the employee, the policy procedures given by the employer and fundamentally, the procedures adopted by the employer leading to the termination. That considering he was not issued with a show cause letter outlining the charges against him that led to his termination,



he was as such not given an opportunity to respond to the grounds of termination raised in the termination letter.

9. Further, the Claimant fronted that considering the core reason for the termination of his employment was that his work performance had not improved as required, it is settled through case laws that termination on the ground of poor performance places a high burden on the employer to prove that before arriving at the decision to terminate an employee, mechanisms were put in place to measure the performance of such an employee and where the employee was found to be performing poorly, they were placed on a PIP to monitor their performance and offer the employee a chance to improve before ultimately terminating their employment per the case of *Jane Samba Mukala v OI Tukai Lodge Limited* [2013] eKLR and the Court of Appeal's decision in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR. It was the Claimant's submission that in his case, the Respondent failed to adduce any performance appraisal to demonstrate the Claimant's poor performance and that the Warning Letter dated 21st December 2020 was issued irregularly. That therefore there was nothing against him to justify the Respondent placing him on PIP as prior to the PIP, no established tool or system instituted by the Respondent was shown to have been relied upon to measure the Claimant's alleged wanting individual performance. In this regard, the Claimant relied on the holding in the *Jane Samba Mukala* case (supra) that performance improvement must be preceded by an appraisal. He argued that in any event, the duration the PIP was conducted was for a lesser period of four weeks instead of the six weeks communicated to him, some of his duties were taken away from him and he was never appraised even after the PIP for the Respondent to consider him a poor performer. That this indicated that the Respondent was keen on terminating his employment despite there being no genuine reason for doing so and that he was subjected to an arbitrary process with an already predetermined outcome. That the reasons advanced and leading to the Claimant's termination were not valid and fair.
10. On procedural requirements, the Claimant cited the case of *Benedict Mtoto Mwabili v County Public Service Board Taita Taveta County* [2018] eKLR where the Court held that it is now a settled law under sections 10(5) and 41 of the *Employment Act*, and Article 47 of *the Constitution* of Kenya that before taking any action to the detriment of an employee, the employer must accord the employee a prior fair hearing. The Claimant submitted that while it is clear that Article 50(2) of *the Constitution* provides for a right to a fair trial to an accused person in criminal trials, it is not applicable to disciplinary proceedings which are neither criminal proceedings nor quasi-criminal proceedings. That nevertheless, he was entitled to a fair hearing as was established by the Court of Appeal in the case of *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR; that is, to be informed of the case against him/her; be given an opportunity to present her/his side of the story or challenge the case against her/him; and being accorded a hearing before any other independent and impartial body. It was the Claimant's submission that he was not issued with a show cause letter explaining to him the reasons considered for termination of his employment nor subjected to any form of disciplinary process prior to his termination from employment. He argued that even in a serious case that may require summary dismissal for grounds of misconduct or poor performance, the employee must be taken through the mandatory due process outlined under section 41 of the *Employment Act*. He relied on the case of *Kiilu v Isinya Resorts Limited (Cause E022 of 2021)* [2022] KEELRC 13240 (KLR) in which the Court held that an employee is entitled to be given adequate notice to respond to a show cause letter and adequate notice to attend a disciplinary hearing/meeting, and that an invitation letter must always inform an employee of their right under section 41 of the *Employment Act*. The Claimant maintained that considering the foregoing, he was therefore not accorded a fair hearing or any hearing at all before the termination of his employment and that it ends that the Respondent failed to comply with section 41 of the Act and Article 41 of *the Constitution*.



11. It was submitted by the Claimant that a party is entitled to damages and/or compensation upon providing and/or establishing that their termination was procedurally and substantially unfair. That this Court has the jurisdiction to make the declarations as prayed in the Claimant's Statement of Claim. He asserted that he is deserving of the maximum compensation for his loss of employment since he is a victim of a malicious, callous, arbitrary, vindictive and unfair termination which has deprived him of a source of livelihood and rendered him jobless with no prospects of getting a job. While affirming his entitlement also to general damages, the Claimant relied on the case of Grace Bosibori Nyamongo v Kenya Institute of Administration [2014] eKLR wherein the Court awarded the claimant 12 months' gross salary as compensation to cushion her for the loss of income between the time of termination of her employment and the date of reinstatement and she was awarded the sum of Kshs. 648,863 as general damages. The Claimant further relied on the case of Benson K. Nguti v Kenfreight (EA) Ltd [2014] eKLR wherein the Court, in finding that the termination of the claimant's employment was both substantially and procedurally unfair, made an award of 12 months' gross salary exclusive of the ex-gratia payment already made to the Claimant. He further noted that this decision was upheld in the Court of Appeal and Supreme Court in Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR and Kenfreight (E.A.) Limited v Benson K. Nguti [2019] eKLR respectively.
12. The Claimant abandoned the prayer for reinstatement since three (3) years have lapsed since the Respondent dismissed him from employment in terms of section 12(3)(vii) of the Employment and Labour Relations Act. He also did not submit on the prayers for notice pay and for compensation for breach of contract. Regarding his prayer for house allowance, the Claimant fronted that he was clearly not paid his house allowance as per section 31 of the Employment Act and that neither his itemised payslip nor his gross salary gave an indication that his salary was consolidated. He urged this Court to consider the reasoning of the Court in Charloy Sikuku Madiangi v Bunson Travel Service Limited [2018] eKLR that the claimant was entitled to house allowance at the rate of 15% of basic pay as the contract did not provide that the salary was consolidated. The Claimant further submitted that his prayer for payment of project-based bonus and company bonus should be allowed as prayed in terms of the Claimant's Contract of Employment under clause 4(b). It was the Claimant's position that he is entitled to costs of this suit having demonstrated that his contract of employment was unfairly and unlawfully terminated.
13. According to the Respondent, the Claimant herein is not entitled to the declarations sought in prayers (a) and (g) of the Memorandum of Claim because firstly, the claim as presented does not raise any constitutional question ripe for determination by the Court and is a contractual labour dispute disguised as a constitutional matter. That secondly, Courts have been keen to ensure that as per the doctrine of constitutional avoidance, where a dispute can be determined through another forum without necessarily raising a constitutional issue, this alternative forum ought to be pursued. That this notwithstanding, it is well established under case law that Courts should not entertain such disputes as it would amount to diminishing the safeguards created for parties with legitimate constitutional issues per Gabriel Matava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR by the Court of Appeal.
14. It was the Respondent's submission that it had valid reasons to terminate the Claimant's employment as espoused in its pleadings and evidence before this Court. Moreover, that the Claimant also admitted during cross-examination that he attended a scheduled performance review meeting with his supervisor and the HR Specialist on 28th January 2020 and the subsequent evaluation report shared with him on the same date. The Respondent argued that the Claimant's performance appraisal was therefore credible as the Claimant participated in the same as held in Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR. That it had put in place mechanisms to measure the good performance as



against poor performance for its employees and had even expressly informed the Claimant that it was considering putting him under a PIP to assist him in improving his performance. It posited that despite the Claimant being given the PIP and necessary support, it did not see the expected improvement and thus its decision to invoke the termination clause and gave him 30 days' notice.

15. Concerning the reliefs sought by the Claimant, the Respondent submitted that he is not entitled to maximum compensation because he had not shown an exceptional circumstance warranting an award for the maximum compensation available in law. That in the case of *Leonard Gethoi Kamweti v National Bank of Kenya Limited* [2020] eKLR, the Court of Appeal observed that a maximum award of 12 months' salary has to be assigned a reason for the same and carrying out any evaluation of the effect such awards have on employers and on the economy in general. Regarding the claim for house allowance, the Respondent submitted that the Claimant is not entitled to house allowance because his Employment Contract provided at clause 4(a) that he was to be paid an annual salary payable monthly in gross. The Respondent argued that it is trite that gross salary is basic salary and all allowances put together per the case of *Nisha Nileshbhai Bhavsar v Kensalt Limited* [2022] eKLR. On the prayer for payments of project based bonus and company bonus, the Respondent submitted that the said claim being special damages, ought to have been pleaded and proved before they can be awarded by the Court. Further, section 107 of the *Evidence Act* is clear that he who alleges must prove, which maxim was enunciated by Majanja J. in the case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR. That the Claimant is thus not entitled to the same as he has not quantified and specifically pleaded the sums he alleges he is entitled to as bonuses and further not provided any evidence in support of his claim for bonuses as aforesaid. In this regard, the Respondent cited the case of *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, the Court of Appeal held that where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically. Lastly, it was the Respondent's submission that the Claimant is not entitled to costs of the suit because he did not issue it with a demand letter or notice of intention to sue before proceeding to file the instant employment case. It relied on Judicial Hints on the *Civil Procedure Act*, 2nd Edition wherein Kuloba J. in discussing whether or not costs should be awarded, states that, "The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs...". The Respondent thus urged the dismissal of the Claimant's claim with costs to the Respondent.
16. The Claimant was terminated in the classic fashion of employers who have no basis for termination do. The Claimant had been an exemplary performer and had never been involved in any disciplinary hearings, had not received any verbal or written warnings nor adverse reports regarding his performance made prior to December 2020. The Respondent brought his performance into question circa December 2020. The Respondent had no basis to issue a warning letter and the one dated 21st December 2020 referencing incidences dating back to September 2020 was not only unlawful as it was fictitious in content. When one views the series of events, it is clear the Claimant's immediate supervisor raised 'concerns' that his communication skills were inadequate to the set Key Performance Indicators (KIPs) for his position yet there had been no prior disciplinary meetings on his performance. The Claimant contended that he was only engaged in a consultative meeting with his supervisor and attended a scheduled performance review meeting with his supervisor and Human Resource specialist whereat during the meeting, he contested the subsequent evaluation report regarding the particulars of the inconsistencies and questionable scores for his half year performance review. No plausible explanation was given for the warped scores. The report was manipulated to malign and soil the Claimant's professional standing as far as his employment with the Respondent was concerned and to ultimately be the crux to effecting the termination of the Claimant's employment. The Claimant was dismissed with concocted reasons and as such was unfair and unlawful in both tenure and effect. The Respondent attempted to camouflage its nefarious scheme as a normal dismissal for poor performance



and flipped through the hoops hoping it would not be discerned that the dismissal had no footing. The Claimant performed well in the KPIs and was even scored poorly on a project with detailed plan and tracking despite the Claimant bringing the matter to the supervisor – escalation as expected in the metric. On the metric where the Claimant exceeded the target he was scored at par with expectation instead of exceeded expectation since he closed the projects in 2020 H2. The stakeholders review on specific KPIs section also revealed manipulation as the Claimant's stakeholders review indicated this metric was fully achieved yet he was scored lower and the Respondent even relied on this metric to issue the false warning letter of December 2020. It is clear the manipulation of the results was geared by the Respondent to display the Claimant as poor performer in order to justify its illegal dismissal which was planned and in the offing. I find and return that the dismissal of the Claimant from employment was unfair and unlawful within the meaning of sections 43, 45 and 47 of the Employment Act. The Claimant is entitled to the following reliefs as a successful litigant noting reinstatement is not possible.

- i. A declaration do and is hereby issued that the Respondent violated the Claimant's rights to fair administrative action under Article 47, as well as the Claimant's right to fair labour practices under Article 41,
- ii. A declaration do and is hereby issued that the Respondent violated the Claimant's right to a fair hearing under Article 50(1) as well as rights under Article 10 of the Constitution of Kenya, 2010.
- iii. An award of 6 month's salary as compensation for the unlawful dismissal – Kshs. 2,027,994/-
- iv. Costs of the suit
- v. Interest at court rates on the sum in (iii) above from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

