



Mburu v Insight Management Consultants Limited & another (Cause 2442 of 2016) [2024] KEELRC 2123 (KLR) (9 August 2024) (Judgment)

Neutral citation: [2024] KEELRC 2123 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2442 OF 2016
J RIKA, J
AUGUST 9, 2024**

BETWEEN

JOHN KIRONJI MBURU CLAIMANT

AND

INSIGHT MANAGEMENT CONSULTANTS LIMITED 1ST RESPONDENT

HENKEL KENYA LIMITED 2ND RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, on November 28, 2016.
2. He states that he was employed by the 2nd Respondent, through the 1st Respondent. The 1st Respondent is an Employment Agency.
3. He worked as a Sales Representative. He executed his first contract with the 1st Respondent, for a period of 1 year, with effect from 15th August 2013. The contract was subsequently renewed.
4. His last contract was renewed for a period of 5 years, on 1st April 2015. It was to expire on 31st March 2020.
5. He states that the Respondents terminated his contract prematurely, unfairly and unlawfully, on 21st September 2016.
6. The Respondents, through one Japheth Gichohi, who was the Claimant's Supervisor, defamed the Claimant on termination, advertising that the Claimant was no longer an Employee of the 2nd Respondent, and was not authorized to transact any business, on behalf of the 2nd Respondent.
7. His position is that, termination was unfair and unlawful, because the Respondents did not grant him an opportunity to be heard; failed to issue him notice; failed to pay him terminal benefits; breached his contract; and treated him with malice.



8. His last salary was Kshs. 138,725 monthly.
9. He prays for Judgment against the Respondents, jointly and severally, for:-
 - a. 1-month salary in lieu of notice at Kshs. 68,725.
 - b. Salary for the remainder of the contract at Kshs. 2,886,450.
 - c. Car allowance at Kshs. 1,890,000; airtime allowance at Kshs. 420,000; and fuel allowance at Kshs. 630,000.
 - d. N.S.S.F contributions deducted but not remitted.
 - e. An order for retraction of the defamatory e-mail authored by Japheth Gichohi.
 - f. Specific performance against the Respondents.
 - g. Certificate of Service.
 - h. 12 months' salary in compensation for unfair termination.
 - i. Costs.
 - j. Interest.
 - k. Any other suitable remedy.
10. The 1st Respondent filed its Statement of Response on 13th January 2017. It is conceded that the Claimant was an Employee of the Respondents. His contract was extended for 5 years, to enable him obtain and service a car loan, whose repayment was pegged to a 5-year period.
11. His performance deteriorated. His sales averaged 30% against a target of 53%. He failed to follow up on customer orders. His reports were not presented on time. The Claimant was unprofessional. He was placed on Performance Improvement Plan [PIP].
12. Performance did not improve. At last performance review meeting on 5th September 2016, his performance averaged 29%. He had expired stock. His market penetration was zero. He was summarily dismissed for poor performance on 5th September 2016.
13. Summary dismissal was commuted to regular termination on appeal. He was paid 1-month salary in lieu of notice, and issued Certificate of Service.
14. If any correspondence was made to the 2nd Respondent's customers upon the Claimant's exit, it was made in good faith, and was not defamatory. He was no longer an authorized agent of the 2nd Respondent.
15. The 1st Respondent urges the Court to dismiss the Claim with costs.
16. The 2nd Respondent filed its Statement of Response on 3rd January 2017. Its position is that the Claimant was employed solely, by the 1st Respondent. He was deployed to the 2nd Respondent. There was no contract between him and the 2nd Respondent. Clause 6 of the contract of employment between the Claimant and the 1st Respondent stated that, "nothing in in this agreement shall be deemed as creating an employer-employee relationship between our client and yourself."
17. His contract was terminated by his Employer, the 1st Respondent, for poor performance. The message sent to 2nd Respondent's customers, on termination of the Claimant's contract, was not defamatory; it was to inform them, in the normal course of business, that the Claimant was no longer an Employee.



18. The 2nd Respondent prays that the Claim is dismissed with costs.
19. The Claimant gave evidence on 15th July 2021, 11th November 2021, 17th March 2023, and 28th July 2023, when he rested his case. The 2nd Respondent's witness Philippe Huernemann, gave evidence on 28th July 2023. The 1st Respondent was scheduled to present its witness on 30th November 2023. The witness was not presented, and the Court directed that proceedings are closed. Parties confirmed filing of their Closing Submissions at the last mention before the Court, on 8th February 2024.
20. The Claimant told the Court that he was employed by the 2nd Respondent in 2013. He was sent to the 1st Respondent to execute an employment contract. He was a Sales Representative at the 2nd Respondent. He worked under the 2nd Respondent's Regional Sales Manager, Gichohi.
21. The Claimant's contract was renewed on account of good performance. He was dismissed in September 2016 for poor performance. He explained that he had been assigned a sales trainee. The Claimant's own sales were cascading to the trainee. The 5-year contract was not pegged to the car loan. It did not mention the car loan.
22. The Claimant was not issued notice. His letter of termination stated the reason to be poor performance. He was alleged to have failed to meet performance targets. He met his targets. He brought in orders of about Kshs. 2.4 million. If his supervisor had admitted the orders, he would have exceeded the targets. He was still working on 20th September 2016. He gave an order on 20th September 2016.
23. He had a meeting with the 2nd Respondent's President. He gave his part of the story. He was not accompanied by a colleague to the meeting. The President apologized to the Claimant. The meeting was not captured through minutes.
24. He was paid a cheque of about Kshs. 61,000 on termination. It was his salary for August 2016. He was not paid his terminal dues. There was no warning before termination. He was defamed by the Respondents upon termination.
25. He adopted his witness statement and documents on record in his evidence-in-chief.
26. Cross-examined by the Advocate for the 1st Respondent, the Claimant told the Court that he signed contract with the 1st Respondent, which was subsequently renewed. The last contract was for 5 years, 2015-2020.
27. The car loan facility was availed to other Employees also. It was to enable Salespersons to deliver on their roles. The Claimant's performance was good. Japheth Gichohi, Head of Sales, was his supervisor.
28. He attended a meeting with Management to discuss his performance. He was told he could not continue working, unless performance improved.
29. He told the Court that he seeks salary and allowances for the remainder of his contract period. Some of the allowances were operational. The Claimant wrote an e-mail saying he was at his Kirinyaga home, on 20th September 2016. It is true that he was still working.
30. He had an appeal meeting with Management after termination. He stated that his stories were summarily dismissed without a hearing. He did not say that he was himself, summarily dismissed. Notice was offered in the letter of termination. He was placed on PIP. He was introduced to the Respondents, by Japheth Gichohi who was a friend of his, before employment. He did not have deals with Gichohi, which went sour. The Claimant donated his sales to his trainee. It was logical to do so, while he was on PIP.



31. He told the Court that he was not accompanied to the meeting with the Management, by a colleague. He did not sign any minutes at the meeting. His relationship with Japheth broke down from the start of 2016, when Key Performance Indicators were introduced. He worked until 20th September 2016. He travelled to Kirinyaga around midday.
32. Cross-examined by the Advocate for the 2nd Respondent, the Claimant told the Court that he was employed by the 1st Respondent. Appraisal was done by the 2nd Respondent. Salary was paid and reviewed by the 1st Respondent. The defamatory correspondence is dated 21st September 2016. It did not state that the Claimant was a thief. It stated that he was no longer an Employee of the 2nd Respondent, and was no longer authorized to transact business for the 2nd Respondent. Customers would have the impression that he was a thief. He did not have any such customer, as his witness. It is usual to inform colleagues and customers that an Employee has left employment. The 1st Respondent, not the 2nd, terminated the Claimant's contract.
33. The 2nd Respondent's witness Phillippe, adopted his witness statement as his evidence-in-chief. He emphasized that whenever an Employee left employment, it was usual to inform customers about the departure. Cross-examined by the Advocate for the Claimant, Phillippe told the Court that notification to customers was factual. He was not aware about the breakdown of the relationship between the Claimant and his supervisor Japheth.
34. There was no cross-examination of the 2nd Respondent's witness, by the 1st Respondent.
35. The Claimant submits that he was unfairly and unlawfully dismissed by the Respondents, and is entitled to the remedies claimed.
36. The 1st Respondent submits that the Claimant's performance deteriorated, justifying termination. His explanation about donating his sales to his trainee, while he was on PIP for plummeting performance, was illogical. The 1st Respondent, relying on E&LRC decisions, *Jane Samba Mukala v. Ol Tukai Lodge Limited* [2013] e-KLR; and *Galgalo Jarso Jillo v. Agricultural Finance Corporation* [2021] e-KLR, submits that termination was based on valid reason under Section 43 of the *Employment Act*. There was poor performance. The Claimant was heard, and granted an opportunity to appeal. He appealed and summary dismissal was reduced to regular termination. The 1st Respondent submits that the Claim is unmerited.
37. The 2nd Respondent submits that the foundation of any employment right, is the presence of an employer-employee relationship, as held in E&LRC decision in *Kaiga v. Das* [Claim No. 2 of 2023] KEERC 2194 [KLR]. The Claimant's salary was paid by the 1st Respondent, his performance was reviewed by the 1st Respondent, and disciplinary process was undertaken by the 1st Respondent. No reasonable person, applying ordinary intelligence, reading the notice sent out to customers, informing them about the Claimant's departure, would have considered the notice to be defamatory. The 2nd Respondent relies on *Kudwoli & Another v. Eureka Educational Training Consultants & 2 Others* [1993] KLR, in urging the Court to find that the notice did not carry defamatory imputation.
38. The issues are whether, the Claimant was an Employee of both Respondents; whether he was unfairly and unlawfully dismissed; whether he was defamed; and whether he merits the prayers sought from the Respondents, jointly and severally.

The Court Finds: -

39. The Claimant executed a contract of employment with the 1st Respondent, which is dated 8th August 2013. The contract was between him and the 1st Respondent. It was effective 15th August 2013, to



- expire 14th August 2014. He was to work at the 2nd Respondent as a Sales Representative, Automotive Repairs and Maintenance Hardware.
40. He states that his contract was subsequently renewed. The last renewal was for 5 years, on 1st April 2015, to expire on 31st March 2020.
 41. The Claimant pleads that his contract was terminated on or about 21st September 2016.
 42. The 1st Respondent exhibited a letter of termination dated 9th September 2016. Termination was stated to be with immediate effect.
 43. The Certificate of Service issued by the 1st Respondent states that the Claimant left employment on 5th September 2016.
 44. The Claimant insisted upon trial that he was still working on 20th September 2016, while conceding that he was in Kirinyaga, on the same date. He explained that he left for Kirinyaga at midday.
 45. The Court does not think the precise date, when the Claimant left employment is conclusive. It has no significant bearing on the prayers sought. There is no prayer based on the years of service for instance, which would be affected, by the exact date of termination.
 46. The Court holds that the Claimant's contract was terminated sometime in the month of September, 2016.
 47. Who employed him? Although he worked at the 2nd Respondent's business throughout, he was clearly an Employee of the 1st Respondent.
 48. All his contracts were executed between him and the 1st Respondent. His demand letter before action, was directed to the 1st Respondent. His Advocates described him as a former Employee of the 1st Respondent. His remuneration was determined and paid by the 1st Respondent. His contract was administered by the 1st Respondent. His performance was evaluated by the 1st Respondent.
 49. The 1st Respondent exercised full supervisory, including disciplinary control, over the Claimant. It was the 1st Respondent who terminated the Claimant's contract. His Certificate of Service was issued by the 1st Respondent. It recognized the Claimant as a former Employee of the 1st Respondent.
 50. From the very first day of his employment, it was clarified under clause 6 of the contract of employment, that, "nothing in this agreement shall be deemed as creating an employer-employee relationship, between our client and yourself."
 51. The Claimant did not present any evidence that would lead the Court to deem him, in any proportion, as a former Employee of the 2nd Respondent. There was nothing in his contract, or in the contract for supply of manpower between the Respondents, which would suggest that he was a shared Employee of the Respondents.
 52. The Claim against the 2nd Respondent is declined, with no order on the costs.
 53. Whether termination was fair and lawful: The 1st Respondent pleads at paragraph 4 of its Statement of Response, that it extended the Claimant's contract for a period of 5 years. The Claimant testified that this was from 2015, and the expiry date would be 2020.
 54. The reason advanced by the 1st Respondent for extension of the contract, that it was to enable the Claimant secure and repay a car loan, is not material to the dispute. The fact is that the contract was extended for 5 years, to expire in 2020, and was terminated prematurely 4 years before, in 2016.



55. The Claimant testified that the 1st Respondent raised issues on his sales performance. He was called to performance review meetings. He conceded on cross-examination by the 1st Respondent's Advocate, that he attended the meetings. He was advised that he would not continue working, if his performance did not improve. The 1st Respondent exhibited minutes of a three-way meeting, held on 5th September 2016, involving the Claimant, 1st Respondent's Human Resource Officer Linda Ouma, and 2nd Respondent's Sales Manager Japheth Gichohi. It was concluded after hearing the Claimant, that his performance had deteriorated.
56. Parties had held a previous meeting on the subject, on 10th June 2016. The Claimant had been given adequate opportunity to improve. He had been placed on PIP, but no improvement was noted.
57. It was recommended in the meeting of 5th September 2016 that the Claimant is dismissed.
58. He was availed the opportunity to appeal. He lodged an appeal through his letter to the 1st Respondent's Human Resource Manager, dated 15th September 2016. The appeal was considered and rejected.
59. There is nothing of note in the procedure applied by the 1st Respondent, which was in deviation from the minimum statutory standards of fair procedure, prescribed under Section 41 and 45 of the [Employment Act](#), which would warrant remedy from the Court.
60. Validity of reason: The Court entertained some doubts on the reason advanced by the 1st Respondent, in justifying termination, that is, until the Claimant was cross-examined by the Advocate for the 1st Respondent, on 28th July 2023.
61. He conceded that his sales were under par. He explained that his sales were low, because he donated his sales to his trainee Daniel. He stated rather startlingly, that his donation of sales to his trainee, was logical, considering that he did so, while on PIP. The Court has no reason to look beyond this evidence, in finding that the Claimant's performance was under par, that he was placed on PIP and that he did not meet the objective of the PIP.
62. The reason, or reasons for termination of a contract, are the matters that the Employer at the time of termination of the contract, genuinely believed to exist, and which cause the Employer to terminate the services of the Employee. This is the standard of establishing fair and valid reason, under Section 43 of the [Employment Act](#), and as underscored in a catena of judicial decisions at different levels of the Judiciary.
63. Termination was founded on fair and valid reason, under Section 43 and 45 of the [Employment Act](#).
64. Defamation: The 2nd Respondent through Japheth Gichohi, put out an e-mail addressed to 'Esteemed Customers Kenya,' informing them that the Claimant was no longer its Employee. It informed the Customers that the Claimant was no longer authorized to transact business for or on behalf, of the 2nd Respondent.
65. The notice, in the respectful view of the Court, was not in any way defamatory. It was not malicious, ill-intentioned, or damaging to the Claimant. It was a statement of fact, and made within the spirit of the restrictive covenants contained in clauses 24 and 25 of the Claimant's contract. He was a salesperson, and had direct contact with the 2nd Respondent's customers. It was conceivable that he could take customers away with him on leaving the 2nd Respondent, or continue to do business with them, while they remained the 2nd Respondent's customers. It was permissible under the Claimant's contract, to restrict what the Claimant could do, post-employment, with regard to the business associated with the 2nd Respondent. Employers are entitled to restrictive covenants against former Employees, which cover



areas such as non-competition, non-solicitation, non-dealing, and non-poaching of existing Employees by former Employees.

66. The 2nd Respondent was, in simplified language, communicating to its customers that the Claimant had ceased employment and was restricted from doing business for, or on behalf of the 2nd Respondent. The notice was not defamatory, but was made in the spirit of the restrictive covenants, agreed to by the Parties in the contract of employment.

It Is Ordered:

- a. The Claim is declined against both Respondents.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 9TH DAY OF AUGUST 2024.

JAMES RIKA

JUDGE

