



**Dayo v Ecart Services Kenya Limited (Cause 553 of 2019)  
[2025] KEELRC 139 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 139 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 553 OF 2019  
L NDOLO, J  
JANUARY 30, 2025**

**BETWEEN**

**NANCY DAYO ..... CLAIMANT**

**AND**

**ECART SERVICES KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. On 24<sup>th</sup> April 2018, the Respondent wrote to the Claimant as follows:

“Re: Termination of Employment

The above matter refers.

Further reference is made to the disciplinary hearing held on 16<sup>th</sup> April 2018 of which after careful consideration and evaluation of your submissions we have arrived at a decision.

As per the enabling sections of our Employee Handbook and the *Employment Act* No 11 of 2007, this is to hereby inform you that your employment has been terminated with immediate effect due to poor performance of your duties and lack of standard care and confidentiality required of your role.

You will be paid one month’s salary in lieu of notice, your salary for the month of April 2018 and any pending leave days as at the date of this letter.

The company will further offset any loans and advances given to you in the term of your employment against these final dues.

You shall be required to clear and hand over all property and equipment in your possession belonging to the company to your supervisor; thereafter you will receive your entitlements.



You shall further be issued with a certificate of service once you have been cleared.

We thank you for your time and service to the company and wish you all the best in your future endeavours.

Sincerely,

Siham Frindi

Human Resources

(signed)

2. This letter marked the beginning of the dispute now before me. The Claimant states her claim in a Statement of Claim dated 23<sup>rd</sup> August 2019. The Respondent filed a Reply dated 7<sup>th</sup> October 2019, to which the Claimant responded on 18<sup>th</sup> October 2019.
3. At the trial, the Claimant testified on her own behalf and thereafter called Brian Kiprotich. The Respondent called its Head of Legal and Compliance, Kennedy Ngugi. The parties also filed written submissions.

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

4. The Claimant states that she was employed on 3<sup>rd</sup> April 2017 as Head of Human Resources of Jumia Kenya. She claims to have had a feedback session on 29<sup>th</sup> May 2017, with her supervisor, during which her performance was rated as follows; Growth-Average, Business Trajectory-Outstanding, Action Plan-Outstanding.
5. The Claimant further states that on 27<sup>th</sup> June 2017, she had an appraisal session at which she received the following comments; Engagement-Good, Impact-Average, Leadership-Average.
6. On 30<sup>th</sup> June 2017, the Claimant was notified that a decision had been made that her probation would be extended for a period of three (3) months. The Claimant states that the extension of her probation was unreasonable and unjustifiable. She was subsequently confirmed in September 2017.
7. The Claimant complains that she faced numerous difficulties in the execution of her duties, stating that she was overworked and was not allowed to delegate tasks.
8. She avers that a feedback session with her supervisor scheduled for December 2017 took place 27<sup>th</sup> January 2018 and she was ranked 'Average' on Growth, Business Trajectory and Action Plan. According to the Claimant, the overall feedback was that her performance had improved from the previous review.
9. A further review was undertaken on 12<sup>th</sup> March 2018 with the outcome being 'Warning' on Engagement, Impact and Leadership. The Claimant complains that this appraisal was conducted after a very short period and that it was not conducted fairly or objectively.
10. The Claimant states that on 20<sup>th</sup> March 2018, she mistakenly sent an email containing previous employee bonus payment to the Respondent's Chief Executive Officer. She adds that she was unable to recall the email and despite her attempts to explain the error to her supervisor, she was asked to leave the company premises immediately.
11. On 21<sup>st</sup> March 2018, the Claimant received a text message from her supervisor, notifying her that she had been suspended and on 27<sup>th</sup> March 2018, she was issued with a show cause letter.



12. On 28<sup>th</sup> March 2018, the Claimant sent an email to the Respondent's IT Manager, requesting him to allow her to access her email inbox to aid in preparation of her response to the show cause letter.
13. The Claimant states that the IT Manager responded that he had been advised that the Claimant was leaving the Respondent's employment; he therefore asked her to seek approval to access the system from the Managing Director. The Claimant accessed her emails on 5<sup>th</sup> April 2018, and she submitted her response to the show cause letter on 11<sup>th</sup> April 2018.
14. The Claimant attended a disciplinary hearing on 16<sup>th</sup> April 2018 and on 24<sup>th</sup> April 2018, she was issued with a termination letter. According to the Claimant, the disciplinary meeting, which was conducted via Google Hangout did not meet the requirements set out in the Respondent's Local Code of Conduct.
15. The Claimant asserts that the decision to terminate her employment was neither warranted nor justified. She states that the decision was pre-determined and the entire disciplinary process was a charade with a defined outcome. She adds that if indeed there were concerns about her performance, she was not afforded an opportunity to improve, over a reasonable period of time.
16. The Claimant therefore claims the following:
  - a. Kshs, 6,600,000 being 12 months' salary in compensation;
  - b. Exemplary/aggravated damages;
  - c. Damages for violation of fundamental rights.

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

17. In its Reply dated 7<sup>th</sup> October 2019, the Respondent admits that the Claimant was employed on 3<sup>rd</sup> April 2017, in the capacity of Jumia Kenya Head of Human Resources. She was placed on probation for a period of three (3) months.
18. The Respondent states that on 29<sup>th</sup> May 2017, a feedback session was conducted between the Claimant and her supervisor. It is pleaded that the Claimant was advised by her supervisor on areas in which her performance was required to improve.
19. On 27<sup>th</sup> June 2017, the Claimant's 1<sup>st</sup> performance appraisal was conducted. The Respondent states that whereas the Claimant received positive responses on some of the assessment parameters, she was required to improve on other performance indicators. Arising from this appraisal, the Respondent resolved to extend the Claimant's probation period by a further three (3) months.
20. The Respondent disagrees with the Claimant's averment that the decision to extend her probation period was unreasonable and states that the Claimant was duly notified of the reasons for the extension, which she acknowledged and confirmed.
21. The Respondent refutes the allegation that the Claimant was overworked and denied an opportunity to delegate tasks.
22. A further feedback session between the Claimant and her supervisor was conducted on 27<sup>th</sup> January 2018. The Respondent states that whereas some improvement had been noted, the Claimant's performance still needed to further improve, with recommendation on building a healthy work team, proper personal organisation and reliability as a partner.



23. The Respondent points out that a second appraisal was conducted on 12<sup>th</sup> March 2018, more than eight (8) months from the date of the first appraisal. The Respondent maintains that the appraisal was conducted fairly and objectively, with a 5% bonus pay being awarded to the Claimant.
24. The Respondent avers that on 20<sup>th</sup> March 2018, barely eight (8) days after the appraisal, the Claimant sent out a master file containing highly sensitive and confidential employee information on employee salaries, inclusive of senior management, to an unauthorised recipient. The Respondent accuses the Claimant of breach of confidentiality.
25. The Respondent defends the Claimant's dismissal which it terms as justifiable and procedural. The Respondent asserts that the Claimant was granted adequate opportunity to respond to the charges levelled against her. The Claimant's allegation that her dismissal was pre-determined and that the disciplinary process was in violation of the Respondent's Local Code of Conduct is denied.

### **Findings and Determination**

26. There are two (2) issues for determination in this case:
  - a. Whether the Claimant's dismissal was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

27. According to the dismissal letter dated 24<sup>th</sup> April 2018 and as confirmed by the parties' pleadings and the evidence adduced in court, the Claimant was dismissed on two grounds; poor performance and breach of confidentiality, which borders on misconduct.
28. At the outset it is important to point out that the disciplinary procedure in addressing cases of poor performance is distinct from the one employed in allegations of misconduct. The procedure for dealing with cases of poor performance was established in Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No 273 of 2010) as follows:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”
29. In her final submissions dated 22<sup>nd</sup> November 2024, the Claimant made reference to the decision in Jane Samba Mkala v Ol Tukai Lodge Limited [2013] eKLR where my sister Mbaru J held that an employer alleging poor performance by an employee must demonstrate the existence of an objective performance evaluation system as a benchmark for assessing the performance and providing support for improvement.
30. In the present case, the Respondent's Employee Handbook provides an elaborate system for evaluating the performance of employees; ranging from periodic mid and end year reviews, lead time for concurrence between the employee and their supervisor, performance improvement plan to performance warning prior to termination.
31. From the record, there were concerns regarding the Claimant's performance, necessitating extension of her probation period. There is evidence however, that the Claimant improved in some of her key performance indicators.



32. Significantly, the Claimant’s first and second feedback sessions as well as first appraisal returned outcomes ranging from ‘outstanding’ to ‘average’, with only the second appraisal returning an outcome of ‘warning’. The Respondent’s witness, Kennedy Ngugi told the Court that the Claimant was not placed on a performance improvement plan as required by the Employee Handbook.
33. Moreover, the suspension letter issued to the Claimant on 20<sup>th</sup> March 2018 had nothing to do with her performance. Rather, it makes reference to the distinct charge of breach of confidentiality. This charge was reiterated in the show cause letter dated 27<sup>th</sup> March 2018. Yet, the disciplinary hearing proceedings attempted to convolute issues of performance and breach confidentiality.
34. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR this Court stated as follows:
- “...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”
35. The Claimant complains and the Respondent does not deny that her request to the IT Manager to access her email inbox was not granted; instead, the IT Manager informed the Claimant that he had information that she was leaving the Respondent’s employment.
36. The Claimant was instructed to direct her request to the Managing Director and when she was allowed access, she was given a mere three (3) hours to go through her inbox. In my view, the Respondent’s conduct in this regard, compromised the Claimant’s right to prepare a credible defence to the allegations levelled against her.
37. The email dated 28<sup>th</sup> March 2018 addressed to the Claimant by the IT Manager, Michael Mumo is worth reproduction:
- “Hi Nancy,
- We cannot grant you access to your email or elsewhere as instructed by Sam. We have been advised you are leaving Jumia.
- For any access/information requests you will need to directly get approval from Sam. Please contact him and not us going forward.
- Regards,
- Martin

38. This express communication from a senior manager within the Respondent’s establishment, coupled with an internal communication issued to various employees on 4<sup>th</sup> April 2018, to the effect that plans to replace the Claimant were underfoot, confirms the Claimant’s assertion that the decision to terminate her employment was pre-determined.
39. Section 41 of the *Employment Act* provides the following mandatory disciplinary procedure for employees whose employment is on the line:

41.(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is



considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

- (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.
40. Additionally, under Section 12 of the Act, an employer who has more than 50 employees within its establishment is required to document and apply internal disciplinary rules.
41. The Respondent in this case, not only failed to adhere to statutory law but also flouted its own internal disciplinary rules. I therefore have no hesitation in reaching the conclusion that the termination of the Claimant's employment was substantively and procedurally unfair.

### **Remedies**

42. Pursuant to the foregoing, I award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's mishandling of her case. I have further considered the slim chances of the Claimant securing alternative employment of equal stature.
43. I find no basis for the claims for general and exemplary/aggravated damages. These claims therefore fail and are disallowed.
44. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 3,300,000 being 6 months' salary in compensation for unlawful and unfair termination of employment.
45. This amount is subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
46. The Claimant will have the costs of the case.
47. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**LINNET NDOLO**

**JUDGE**

#### **Appearance:**

Ms. Aluvale for the Claimant

Ms. Wamuyu for the Respondent

