



REPUBLIC OF KENYA



KENYA LAW
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**Mugo v Farmers Choice Limited (Cause 242 of 2019)
[2024] KEELRC 95 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 95 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 242 OF 2019
J RIKA, J
JANUARY 31, 2024**

BETWEEN

JANE NJERI MUGO CLAIMANT

AND

FARMERS CHOICE LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 11th April 2019.
2. She states that she was employed by the Respondent as an Export Administration Manager, on 14th November 2016.
3. Her commencement salary was Kshs. 354,000 monthly. It was improved to Kshs. 370,000.
4. She was dismissed by the Respondent on 26th July 2018, on allegations of inefficiency and poor performance.
5. She was not issued a letter to show cause, and was not heard. She was denied her full terminal benefits. Termination was unfair and unlawful.
6. She states that the Parties' Advocates negotiated voluntary settlement, and she was paid a sum of Kshs. 1,151,650 as a result of the negotiation.
7. She prays the Court to grant: -
 - a. Declaration that refusal to pay the Claimant her full terminal dues is unfair and unlawful.
 - b. Salary for July 2018 at Kshs. 370,000.
 - c. 3 months' salary in lieu of notice at Kshs. 1,110,000.
 - d. Pro-rata leave, at Kshs. 569,230.



- e. 12 months' salary in compensation for unfair termination, at Kshs. 4,400,000.
Total...Kshs. 6,489,230.
Less paid...Kshs. 1,151,650.
Total amount payable...Kshs. 5,337,580.
 - f. Costs.
 - g. Interest.
 - h. Any other suitable relief.
8. The Respondent filed its Statement of Response on 4th July 2019. It is conceded that the Claimant was employed by the Respondent as Export Administration Manager, on 14th November 2016.
 9. She previously worked for the Respondent as Credit Control Manager and Export Administrator, under contracts dated 20th December 2006, and 5th April 2012, respectively. Her contracts were terminated on account of unsatisfactory performance.
 10. She exhibited inability to reconcile clients' accounts. She was warned by her supervisor, but did not improve. Her work continued to be marred with errors. She did not prepare invoices for clients on time. She did not deny these accusations contained in an e-mail from her supervisor, dated 6th July 2018.
 11. The Respondent issued the Claimant a stern warning letter dated 9th July 2018. She was told that failure to improve would lead to severe disciplinary action.
 12. Her supervisor escalated the Claimant's poor performance to the Human Resource Office.
 13. She was invited to a show cause hearing. She was advised to nominate a representative of her choice. She was informed to attend hearing on 26th July 2018. She did not, and the Respondent decided to summarily dismiss her. She was issued a letter of summary dismissal, dated 26th July 2018.
 14. She wrote an e-mail to the Respondent on the same date, asking that summary dismissal be reduced to regular termination.
 15. She was paid terminal benefits through her Advocates on 12th September 2018, at Kshs. 368,047 after-tax.
 16. There were subsequent negotiations involving the Parties' Advocates, where the Respondent paid the Claimant 3 month's salary in lieu of notice at Kshs. 782,503 after-tax. The Claimant's Advocate was paid a sum of Kshs. 95,000 in legal fees. The Respondent is of the view that the Claim was fully settled.
 17. The Claimant gave evidence, and closed her case, on 23rd February 2023. Export Manager Betty Mwathi, gave evidence for the Respondent on 26th July 2023, closing the hearing.
 18. The Claimant adopted her Witness Statement and exhibited 14 Documents, in her evidence-in-chief. She restated that her contract was terminated on allegation of poor performance. There was no letter to show cause. It is not true that she was invited for disciplinary hearing, which she failed to attend. There were no minutes of the disciplinary hearing. She acknowledged that she was paid Kshs. 1,151,650, comprising 3 months' salary in lieu of notice, annual leave and salary for days worked.
 19. Cross-examined, the Claimant told the Court that she was first employed in 2006. She was rehired in 2012. In both instances she was told that her contract was terminated for poor performance. She did not challenge the manner or reasons for termination on these earlier contracts.



20. Her supervisor Betty Mwathi complained that the Claimant's work was full of errors. The Claimant was not aware about a warning letter allegedly issued to her by the Respondent on account of this complaint. She had received a first warning letter, but was not given a chance to improve. Betty complained to the Claimant about reconciliation of accounts. It was after the warning had issued.
21. The Claimant did not decline disciplinary hearing invitation. She was advised that she would be paid terminal benefits. She was paid as advised. Her Advocate was paid his costs. Redirected, she clarified that the amounts paid were not in full and final settlement. She wrote to the Respondent asking that summary dismissal is commuted to regular termination.
22. Betty Mwathi relied on her Witness Statement dated 3rd June 2018, and 21 Documents filed by the Respondent, in her evidence-in-chief.
23. She had worked for 16 years for the Respondent. The Claimant was her colleague. Betty supervised the Claimant. She confirmed that the Claimant was first employed by the Respondent in 2006. She was re-engaged in 2012. The Claimant's contracts were terminated on account of poor performance. She was invited for disciplinary hearing. She declined invitation, and was summarily dismissed. The Respondent paid her terminal dues at Kshs. 368,047, and also paid Kshs. 1,110,000 to compromise the Claim. The Claimant accepted the payments.
24. Cross-examined, Betty told the Court that the Claimant worked with her, on all contracts. The Claimant did not keep deadlines. Betty had discussions with her. She was issued warning but did not improve. Betty did not have evidence showing that the stern warning letter, was received by the Claimant. Betty referred the Claimant to the Human Resource Office.
25. Betty did not see the letter to show cause, issued upon the Claimant. She was invited for hearing. There was no specific date set, for the hearing. There were no minutes recording any disciplinary hearing. There was no evidence that the Claimant declined representation. Kshs. 1,110,000 and Kshs. 368,047 were separate sums received by the Claimant. There were separate cheques. There was no evidence that the sum received was in full and final settlement. The Claimant's Advocates received the amounts without prejudice. They proposed to reduce the amount claimed in compensation from 12 months' salary to 6 months' salary.
26. Redirected, Betty told the Court that the warning letter was exhibited by the Claimant, and must therefore, have been received by her.
27. The issues are, whether the Claimant's contract was terminated on valid ground; whether termination was carried out fairly; and whether she merits the remedies sought.

The Court Finds: -

28. The Claimant was initially employed by the Respondent as a Credit Control Manager, on 20th December 2006. This contract was terminated on 30th January 2009, on account of unsatisfactory performance.
29. Despite the concerns about unsatisfactory performance, she was re-employed as Export Administrator, on 23rd April 2012. She was to work under probation for 6 months, which could be extended further by 6 months.
30. This 2nd contract was terminated at the end of the extended probation period, on 30th November 2012.
31. The Respondent appears not to have been deterred by what is deemed as unsatisfactory performance by the Claimant, and recalled her for the 3rd time, employing her as Export Administration Manager,



- on 14th November 2016. She was again placed on probation of 6 months, extendable for a further 6 months.
32. The Respondent confirmed her employment through a letter dated 4th May 2017, which also offered the Claimant what was described as ‘exceptional salary increment.’ There was further salary increment in January 2018.
 33. The Respondent nonetheless went back to complaining about the Claimant’s performance, by July of 2018.
 34. There was a stern warning letter, dated 9th July 2018 issued by the Respondent upon the Claimant. She does not acknowledge receipt of the stern warning. The letter alleges that “ the current state of affairs within your job description and in performance of your duties is extremely appalling to say the least.” The Claimant was accused of lacking in attention to detail, while preparing crucial documents for customers. It was alleged that “in a nutshell, there is gross mismanagement by you all round...” The Respondent advised that poor performance would “ordinarily constitute justifiable grounds for summary dismissal under Section 44[4] [c] of the *Employment Act*, 2007.”
 35. The stern warning was not expressed to be the first, second or third and last warning; it was just stated to be a stern warning. Service of the stern warning letter, upon the Claimant, is not documented. Receipt is not acknowledged.
 36. After this there was an e-mail generated by Betty Mwathi, sent on 23rd July 2018 to Head of Human Resource, Tabitha Ngigi, which contained a litany of complaints by Betty against the Claimant.
 37. Betty complained that the Claimant was taking over 1 month, to balance export debtors’ accounts. Bollore invoices, which were to be summarized on a specific date, had not been summarized. Betty complained that she had requested the Claimant for unspecified information on suckling pigs. The information on suckling pigs was not supplied and Betty had to make a follow-up herself. Betty complained further about late posting in week 27 of something identified as TZ GRR for June.
 38. Lastly, Betty complained that the Claimant had not made any response to the stern warning letter. She ominously ended the e-mail with the statement that “ in summary, Jane’s performance as the Export Administration Manager is wanting and she has become a liability that I am not prepared to carry any longer.”
 39. The Respondent states that it then notified the Claimant of a show cause hearing. It was not made clear to the Court if this show cause hearing, was the same thing as a disciplinary hearing.
 40. The Respondent however, did not issue a letter to show cause to the Claimant, detailing the charges the Claimant was required to answer.
 41. Instead, the Respondent alleges it issued the Claimant with a ‘Notification and Hearing Nomination Form Before Employee’s Termination / Dismissal from Employment.’
 42. A copy of this form, exhibited by the Respondent, is completely blank. It does not bear the Claimant’s name, identity card number or signature. Even assuming the Claimant declined to supply her details for purposes of filling the form, the space for the Respondent’s Human Resource Representative to sign, is similarly blank. The form does not communicate any charges against the Claimant. It does not suggest where and when the disciplinary hearing would be held. It is a blank, sample form, with no information, and therefore no evidential value.
 43. It is quite disturbing that the blank form, bears some handwritten comments, whose author is undisclosed, alleging that the Claimant had been taken through a disciplinary hearing. The author



- invokes Section 41 of the *Employment Act*. It is stated, “ Jane has been taken through the hearing and notification process prior to issue of the letter and has declined representation and further declined to sign. She has however accepted dismissal letter which confirms she was taken through Section 41[1] [2] of the *Employment Act*.”
44. There are no minutes of any disciplinary hearing, or any meeting alluded to in this blank form, that had the semblance of a disciplinary hearing under the cited provision of the law.
 45. Tabitha Ngigi, Head of Human Resource then issued the letter of summary dismissal dated 26th July 2018, stating that there were various discussions held between the Claimant and the Head of Exports, pertaining to the Claimant’s laxity and lack of detail in performance of her duties. The letter also refers to the stern warning. No reference is made to any letter to show cause. It refers to the activities surrounding the blank form, captured above, as a disciplinary hearing done in accordance with Section 41 of the *Employment Act*.
 46. Betty and Tabitha repeatedly quoted the *Employment Act*, to lay ground for submission that the Respondent was cognisant of the requirements of the law, and that the Respondent observed the law. Evidence of observance is however not in plain sight.
 47. The main ground advanced by the Respondent in terminating the Claimant’s contract, was poor performance.
 48. The Claimant had been employed in 2006, and left in 2009. She was reemployed in 2012, and left at the end of her probation the same year. Poor performance was alleged to have occasioned the earlier termination of the Claimant’s contracts. Yet the Respondent still employed the Claimant for a 3rd time, offered her a role higher in the organization than she previously discharged, and on improved terms and conditions of service. But in the end, the 3rd contract was terminated on the same allegations of poor performance.
 49. On all occasions, the Respondent did not take the Claimant through a structured, performance appraisal. The documents supplied to the Court, do not include performance appraisal forms. It is not known what targets were set for the Claimant, and what process she was taken through to assess if she met those targets. The Respondent through Betty, just put out complaint upon complaint against the Claimant, concerning poor performance. In the end unconventional stern warning, and hearing notification issued, leading to summary dismissal.
 50. In Peter Kamau Mwaura & Another v. National Bank of Kenya Limited [2015] e-KLR, the Court emphasized that there must be a high level of proof, where poor performance is cited as justification in termination of employment. An Employer must show that it had in place, an employment policy or practice, to assess performance. Measures to address poor performance, once evaluation has taken place, must be available.
 51. It is a universally acclaimed principle of employment law, and human resource practice, that a poor performer is subjected to a Performance Improvement Plan [PIP]. Termination on account of poor performance should only come after the particular Employee has failed the test of a PIP.
 52. Thrice, the Respondent employed the Claimant, and thrice the Respondent terminated her contract alleging poor performance. At no time was the Claimant taken through a PIP. There is not a single appraisal form on record.
 53. The Court is satisfied that termination was not based on a fair procedure, and was not grounded on valid reason. It did not meet the minimum statutory standards of fairness under Sections 41, 43 and 45 of the *Employment Act*. Termination was unfair.



54. The Parties, through their Advocates negotiated voluntary settlement and covered substantial ground, but were not able to cross over the line to full settlement.
55. The Claimant was paid salary for days worked in July 2018, annual leave, and 3 months' salary in lieu of notice. She was paid separately, Kshs. 368,047 and Kshs. 1,110,000. It included payment of Kshs. 95,000 in costs. With a little more mutual goodwill from the Parties and their representatives, this Claim ought to have been settled voluntarily. The Claimant had in person written to the Head of Human Resource Tabitha Ngigi, requesting that summary dismissal be reduced to regular termination. Her request appears to have been met, in that she was subsequently paid terminal benefits, including notice of 3 months.
56. The Court would, against this background, conclude that termination was unfair. Procedure was defective, and valid ground was not established. It is acknowledged, that Parties engaged at their own level, to redress the injury, and substantial ground towards settlement was covered.
57. The Court grants the Claimant equivalent of 3 months' salary in compensation for unfair termination, at Kshs. 1,110,000.
58. No order on costs.
59. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

In Sum, it is Ordered: -

60.
 - a. It is declared that termination was unfair.
 - b. The Respondent shall pay to the Claimant equivalent of 3 months' salary in compensation for unfair termination, at Kshs. 1,110,000.
 - c. No order on the costs.
 - d. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF JANUARY 2024.

JAMES RIKA

JUDGE

