



REPUBLIC OF KENYA



**Momanyi v Primarosa Flowers Limited (Cause 852 of 2019)  
[2024] KEELRC 400 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 400 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 852 OF 2019  
L NDOLO, J  
FEBRUARY 28, 2024**

**BETWEEN**

**PHOKUS NYABUTO MOMANYI ..... CLAIMANT**

**AND**

**PRIMAROSA FLOWERS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 17<sup>th</sup> December, 2019 and filed in court on 18<sup>th</sup> December 2019, the Claimant lays a claim of wrongful dismissal, against the Respondent. The Respondent filed a Memorandum of Defence dated 7<sup>th</sup> March 2020 to which the Claimant responded on 2<sup>nd</sup> October 2020.
2. At the trial, the Respondent did not call any witness. The Claimant testified on his own behalf. Both parties filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on 1<sup>st</sup> December 2010 in the position of Human Resource Manager (PII) and deployed at Primarosa II situate at Oljororok. He earned a monthly salary of Kshs. 245,742.00.
4. On 20<sup>th</sup> September 2019, the Claimant was issued with a show cause letter, citing allegations of negligence of duty, poor performance, bribery, lack of practicing certificate and tribalism. The letter also served as an invitation to a disciplinary meeting on 23<sup>rd</sup> September 2019, which was subsequently rescheduled to 25<sup>th</sup> September 2019.



5. The Claimant attended the disciplinary hearing as scheduled. He claims to have requested for particulars and documents regarding the allegations levelled against him, to enable him respond sufficiently. He adds that his Advocate made a further request for particulars on 30<sup>th</sup> September 2019.
6. The Claimant avers that he was not provided with any particulars; instead, he was issued with a dismissal letter on 1<sup>st</sup> October 2019, citing the grounds of failure to obey a lawful command and insubordination.
7. The Claimant maintains that he was dismissed pursuant to invalid and unfair reasons and that he was not accorded an opportunity to be heard. He therefore terms his dismissal as wrongful and unfair, contrary to the mandatory provisions of the *Employment Act*.
8. The Claimant further alleges that he was a victim of discrimination. In this regard, he contends that the Respondent failed to apply the same disciplinary measures, when dealing with the Group Human Resource Manager, a Philippine National who did not have a work permit to carry out his duties.
9. The Claimant seeks the following reliefs:
  - a. A declaration that his dismissal was wrongful and unfair
  - b. 1 month's salary in lieu of notice.....Kshs. 245,742.00
  - c. 12 months' salary in compensation.....2,948,904.00
  - d. Leave pay for 47 days.....444,225.92
  - e. Gratuity for 9 years, 10 months.....1,870,722.64
  - f. Damages for discrimination
  - g. A proper certificate of service
  - h. Costs plus interest

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

10. In its Memorandum of Defence dated 7<sup>th</sup> March 2020, the Respondent admits having employed the Claimant on 1<sup>st</sup> February 2010, in the position of Human Resource Officer (PII) at a starting monthly salary of Kshs. 132,000 which was increased to Kshs. 245,745 after probation.
11. The Respondent claims to have carried out an internal audit between 16<sup>th</sup> and 19<sup>th</sup> September 2019, which established the following gaps in human resources administration:
  - a. There was no policy on acting allowance as per the CBA;
  - b. Employment records were not available for some subcontracted employees;
  - c. Promotions were not formalised with appointment letters;
  - d. Transfers were not supported with revised job descriptions;
  - e. There was no commitment on respecting employees' breaks;
  - f. Security staff were required to work for 70 hours per week against the CBA;
  - g. The Human Resource Manager had failed to organise/attend workers' committee meetings during the period under review;



- h. The employees were neither aware nor trained on grievance and disciplinary procedures.
12. The Respondent further claims to have received several complaints and allegations of tribalism and bribery by employees, against the Claimant. The Respondent states that it carried out investigations and recorded statements from employees.
13. The Respondent avers that the Claimant was issued with a show cause letter dated 20<sup>th</sup> September 2019 which required him to appear in person on 23<sup>rd</sup> September 2019. On 21<sup>st</sup> September 2019, the Claimant confirmed receipt of the show cause letter but requested for more time to prepare his response. His request that the hearing be rescheduled to 25<sup>th</sup> September 2019 was granted.
14. The Respondent states that on 25<sup>th</sup> September 2019, the Claimant appeared in the company of his Advocate but declined to make any representations. As a result, a decision was made to summarily dismiss the Claimant.
15. The Respondent denies having received any request from the Claimant for further documents.
16. The Respondent's case is that the Claimant failed to defend himself against the allegations levelled against him, upon which he was summarily dismissed. The Respondent maintains that the Claimant's dismissal was lawful and fair and that the claim is without merit.

### **Findings and Determination**

17. 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**

18. The Claimant's dismissal was communicated by letter dated 30<sup>th</sup> September 2019 stating thus:

“Dear Mr. Momanyi,

RE: Summary Dismissal From Employment

Our reference is made to our Notice to Show Cause dated 20<sup>th</sup> September 2019, your response via email on 21<sup>st</sup> September 2019 advising the Company of your attendance on 25<sup>th</sup> September 2019 at 2p.m without fail, and our response accepting your request dated the same.

Based on our email correspondences, both parties mutually accepted and confirmed the hearing for 25<sup>th</sup> September 2019.

We have noted with deep concern that you did not take kindly the directive orders issued to you via our letter dated 20<sup>th</sup> September 2019. Further, you blatantly refused/ignored to take note of the contents of the letter despite being given sufficient time to respond to the same. It is not clear to us whether you intend to respond or not.

We would also wish to draw your attention to the manner in which you presented yourself before the pre-disciplinary hearing on the 25<sup>th</sup> September 2019. You outrightly refused to answer to any of the allegations brought forth against you. You and your Advocate, Mr. Eric Nyamanga Achoki, during the meeting further stated that you will not be responding to any of the allegations in the Notice to Show Cause and that you were willing to leave



the Company. Your behaviour on that date clearly showed that you are not ready for any amicable hearing or give an explanation to the allegations in the Show Cause Notice.

It has been eleven (11) days since the Notice to Show Cause was sent to you and 6 days since we had your pre-disciplinary hearing and up to date we are yet to receive your response on the same. We accordingly consider your silence to the grave issues raised as another wilful disobedience and unwillingness to pursue the disciplinary hearing.

Your wilful failure or refusal to obey lawful and proper commands and insubordination is a clear expression of a fundamental breach of your obligations arising from your contract of employment. We accordingly have no choice but to terminate your contract with immediate effect.

These gross misconducts are cited under the Termination Clause at page 6 of your employment contract and sections 44 (1), (3), 4 (c), (d), (e) and (g) of the [Employment Act](#) Cap 226 Laws of Kenya.

In view of the foregoing, you have by your conduct indicated a fundamental breach of your obligations as stipulated in your employment contract. Consequently, in accordance with Section 44 of the [Employment Act](#) Cap 226 Laws of Kenya we regret to inform you that you have been summarily dismissed from employment with this company with effective immediately (sic).

You will be entitled to salary for the month of September 2019 and your accrued leave days.

Kindly ensure that you clear with the company and return all the company's properties within your custody before your dues are handed over to you.

Kindly arrange and collect your certificate of service from your previous work station today at 4 p.m.

We take this opportunity to thank you for your service and wish you all the best in your future endeavors.

Yours faithfully,

For Primarosa Flowers Limited

(signed)

Chief Operating Officer”

19. Prior to this letter, the Claimant had received a notice to show cause dated 20<sup>th</sup> September 2019, by which he was accused of negligence, poor performance, bribery, lack of practicing certificate and tribalism. This letter invited the Claimant to a show cause meeting on 23<sup>rd</sup> September 2019 at which he was required to present a written explanation. The letter notified the Claimant of his right to be accompanied by a witness of his choice.
20. The Claimant's case is that the Respondent withheld critical information regarding the allegations levelled against him, which prevented him from mounting a defence. The Claimant therefore maintains that he was not availed an opportunity to be heard prior to his dismissal, which he terms as unlawful and unfair.
21. In his written submissions dated 8<sup>th</sup> June 2023, the Claimant cited several decisions where it was affirmed that the right to a fair disciplinary process includes the right to notice of allegations, proper particulars and documentary evidence plus adequate time to prepare a suitable defence (see Jonathan Chepkwony v George Makateto, Acting Chief Executive Officer, Export Processing Zones Authority



(EPZA) & 2 Others [2021] eKLR, Willie Kipkoech Langat v County Public Service Board & 2 Others [2022] eKLR and Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR)

22. According to the evidence on record, the Claimant requested for extension of time to prepare his defence and his request was duly granted by the Respondent with his appearance being deferred to 25<sup>th</sup> September 2019.
23. However, when the Claimant appeared on 25<sup>th</sup> September 2019 in the company of his Counsel, he declined to participate in the proceedings. The Claimant claims to have made a request for further information to enable him respond to the charges but he did not adduce any evidence to support this averment.
24. In its decision in Mary Wagikuyu Komu v The Kenya Hospital Association t/a The Nairobi Hospital [2016] eKLR this Court held that an employee cannot, without justifiable cause, decline to participate in a disciplinary inquiry initiated by the employer.
25. Further, as held by the Court in Jackson Butiya v Eastern Produce Limited [2012] eKLR an employee who squanders an opportunity availed to them to present their defence cannot turn around and claim that they were not heard.
26. In this case, the Claimant was availed the date he himself had chosen to appear for a disciplinary hearing but when he appeared, he came with his Counsel who is said to have advised him not to participate in the proceedings.
27. While an employee facing disciplinary proceedings is entitled to the company of their chosen Counsel, they are not at liberty to refuse to participate in the proceedings because their Counsel has said so. The employee, much like the employer, has obligations under the employment contract that they are expected to discharge.
28. Having declined to participate in the disciplinary proceedings, the Claimant left the Respondent with no option but to terminate the employment contract. In the premises, I find and hold that the dismissal was lawful.
29. The claims for compensation and notice pay are therefore without basis and are disallowed.

#### **Other Claims**

30. There is evidence that the Claimant was paid in lieu of accrued leave days and this claim is therefore without basis and is dismissed.
31. The claim for gratuity was not supported by any evidence and no basis was established for the claim for damages for discrimination. These claims therefore also fail and are disallowed.
32. The issues raised by the Claimant regarding the certificate of service issued to him have no basis in law.
33. Ultimately, the Claimant's entire claim fails and is dismissed.
34. Each party will bear their own costs.
35. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY 2024**

**LINNET NDOLO**

**JUDGE**



Appearance:

Mr. Muli for the Claimant

Ms. Matu for the Respondent

