



REPUBLIC OF KENYA



KENYA LAW
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**Mori v Mitsumi Computer Garage Ltd (Cause E100 of 2022)
[2024] KEELRC 235 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E100 OF 2022
NJ ABUODHA, J
FEBRUARY 9, 2024**

BETWEEN

MOSES WAFULA MORI CLAIMANT

AND

MITSUMI COMPUTER GARAGE LTD RESPONDENT

JUDGMENT

1. The Claimant filed his statement of claim dated 14th February, 2022 and pleaded inter alia as follows: -
 - a. The Claimant was employed by the Respondent as a sales Executive on or about 1st July, 2017 at a monthly gross salary of Kshs 77,423/=
 - b. The Claimant averred that he executed his duties competently, diligently and faithfully throughout his employment with the Respondent and was able, ready and willing to continue with such service but was deprived of this by the wrongful termination by the Respondent.
 - c. The Claimant remained in the Respondent's employment until 15th February, 2019 the Respondent suddenly and unilaterally terminated his employment without any cause which was unfair and unlawful.
 - d. The Claimant averred when he reported to work on 15th February, 2019 as usual at 8.00 am he found he had been shut out from computer system. Upon inquiry he was directed by his supervisor to report to Human Resource Office where to his utter shock he was served with termination and payment agreement dated 15th February, 2019.
 - e. The Claimant averred that no reason was given for the termination in the termination letter and he was never given opportunity to make his representations or a hearing before termination.



- f. The Claimant averred that the Respondent practiced institutionalized and systematic scheme of racial discrimination where he was gross underpaid, discriminated and mistreated for no reason other than being black.
 - g. The Claimant averred that as a result of the Respondent's actions he suffered loss of income, humiliation and damage. That his economic rights and human dignity were trampled by the Respondent when it acted maliciously and unreasonably.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. One month salary in lieu of Notice Kshs 77,423.00/=
 - b. Cumulative pay disparity Kshs 1,509,748.50/= (1 year 7 months and 15 days)
 - c. Damages for harassment and racial discrimination Kshs 1,509,748.50/=
 - d. Service pay Kshs 122,328/=
 - e. 12 Months Compensation for unfair Termination Kshs 929,076/= Total Kshs 4,148,323/=
 - f. Costs of the suit and interests on present court rates.
3. The Respondent filed its defence dated 30th June, 2022 and they averred inter alia as follows;
- i. The Respondent denied the contents of the claim and averred that the contract of employment with the Claimant was terminated procedurally and that the allegations against it of discrimination and racism were unsubstantiated. That there are institutions that deal with such allegations.
 - ii. The Respondent averred that the Claimant never reported any incident of the harassment nor a formal complaint to human Resource department.
 - iii. The Respondent further averred that on the issue of pay disparity that every individual engaged as an employee with the Respondent had his own job description, terms and conditions of work, job groups and wages. That the Claimant voluntarily agreed to his terms of work and consequently signed an employment contract.
 - iv. The Respondent averred that the Claimant was procedurally terminated and duly paid his salary in lieu of notice and therefore provisions of section 35 of [Employment Act](#) were complied with.
 - v. In addition, the Respondent averred that the Claimant was invited for proceedings and termination explained to him after which the Claimant waived his right to institute any legal proceedings against the Respondent.
 - vi. The Respondent prayed that the statement of claim be dismissed as the Claimant was not entitled to reliefs sought.



Evidence

4. Both the Claimant's and Respondent's case were heard on 5th July, 2023 where Claimant had one witness himself and the Respondent had one witness.
5. CW 1 (the Claimant) testified and adopted the documents filed before the court as evidence in chief. He stated that his employment was terminated without any reason since the day he was given the said termination letter it was only him and Anita the Human Resource officer of the Respondent. It was his evidence that he was never given a hearing or a notice to show cause.
6. CW1 further stated that he felt discriminated as his colleagues were Indians and none Indians were never issued with contracts and that the Indians earned twice or thrice what they earned and they could use taxis for official business but them they could only use their own money.
7. CW1 stated that he raised the issue with the Human Resource who told him to come to work or quit. It was his evidence that his Indian colleague earned Kshs 180,000/ while he earned Kshs 70,000/. He prayed that his claim be allowed.
8. In cross examination CW1 confirmed that his net pay was Kshs 60,000/ and he applied for the job, got interviewed and got it on merit. He confirmed that he accepted his pay and complained to Human Resource of the discrimination around February 2018.
9. CW1 confirmed that he never made any formal complaint or escalate the same further as he wanted to keep his job. That he never informed the labour office. It was his evidence that he knew about the taxis because his Indian friends used to call them in his presence.
10. CW1 stated that he never signed any contract because he was not issued with one. That there was no document showing his job as his job was based on performance and no targets were set.
11. CW 1 confirmed having been paid Kshs 93,50/= upon termination which included days worked for in February,2019, Kshs 60,000/= on account of Notice and Kshs 3,500/= was for leave days and further that he never made any demand for salary increment.
12. On Re- examination, CW 1 clarified that his salary was Kshs 77,400/- and that they left for market the same time and his Indian colleague was picked by taxi while he walked yet they were of the same rank. That there were no performance reviews during his employment and he was never issued with any contract.
13. The Respondent on the other hand called its witness one Anita Pindoria its HRM, who testified and adopted the documents filed in court as her evidence in chief.
14. RW 1 stated that the Claimant never raised any complaint or issues about his work environment and that there was no pay disparity. That the Respondent has over 100 employees and if there was any pay disparity there would be so many complaints.
15. RW1 stated that the Respondent did not practice discrimination and that the Claimant was paid his terminal dues as agreed and he signed for it.
16. In cross examination RW1 testified that the Claimant was given a written contract. That they gave it to lawyers. That the Claimant never complained to her about discrimination. That all staff were provided cash to move around in the market as they signed cash vouchers. She confirmed that the vouchers were not before the court.



17. RW 1 testified that the Claimant was terminated on account of performance. That targets were not achieved even though they had not produced performance documents. That the Claimant was earning Kshs 60,000/ net pay and also paid house allowance.
18. On Re-examination, RW1 clarified that there was no discrimination on the Respondent company and it was the first time to hear about it. That the Respondent has several locals who have worked for years.
19. RW1 clarified that the termination was mutual and the Claimant was informed of the reason. That the Claimant did not produce any voucher so the Respondent did not pay him. Parties closed their cases.

Claimants' Submissions

20. The Claimant filed written submissions dated 20th July, 2023. On the issue of the Claimant's discrimination by the Respondent the Claimant submitted that he was discriminated on account of race and relied on section 5(7) of the *Employment Act*. Further he submitted that he was discriminated by being paid lower salary compared to the Indians holding equivalent roles within the same department.
21. The Claimant relied on the case of Louw v Golden Bus Services (PTY) Ltd(1999)ZALC 166 on the equal pay for equal work. He submitted that the Respondent did not adduce evidence before court to prove that all employees got same pay without any discrimination. That the Respondent never produced payment vouchers yet it was the custodian of the employment records.
22. On the issue of whether his dismissal was unfair he relied on the case of Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School and 2 others (2014) eKLR among others on requirement for both substantive and procedural fairness.
23. He relied on section 43 on substantive fairness and section 41 on procedural fairness. He also relied on section 45 which prohibits unfair termination. He submitted that he was dismissed without any valid reason without being heard. He was not invited for any disciplinary hearing.
24. The Claimant further relied on a number of cases including the case of David Gichana Omuya v Mombasa Maize Millers Limited(2014) eKLR on the import of section 41 of the *Employment Act*. He also relied on Article 47 of *the Constitution* on fair administrative action and Section 47(5) of the *Employment Act* on the duty of the Respondent to prove the grounds for termination.
25. On the reliefs sought, the Claimant submitted on reliefs under section 49 of the *Employment Act* and relied on the case of Kenfreight (E.A) Limited v Benson K. Nguti to request for the maximum compensation of 12 months' salary.
26. On the issue of costs, the Claimant submitted on the discretion of court in awarding costs and relied on case of Republic vs Rosemary Munene, Ex-parte Applicant vs Ihururu Dairy Farmers Co-operative society Ltd Judicial Review Application No 6 of 2014.

Respondent's Submissions

27. On the other hand, the Respondent filed its submissions dated 6th November, 2023. On the issue of whether the Claimant's termination was unlawful and unfair, the Respondent submitted that the Claimant was terminated in accordance with the provisions of the law and the proper procedure for termination was followed by the Respondent.
28. Counsel relied on section 41 of the *Employment Act* on the procedure followed and submitted that when the Claimant was appointed he was issued with job description with a key result that he was



supposed to achieve as a sales executive. He did not perform thereby causing losses to the Respondent. The claimant was given an opportunity to explain himself hence not terminated unfairly. Counsel relied on section 47(5) of the Employment Act on the burden of proof of each party.

29. On the issue of whether the Claimant was discriminated the Respondent submitted that the Claimant did not prove the allegations of pay disparity by producing his colleagues pay slips to demonstrate racial discrimination. Counsel further submitted that parties were bound by their contract which had terms and conditions of engagement and that the court could not rewrite a contract on behalf of the parties. Counsel relied on the case of National Bank of Kenya Ltd Vs Pipe Plastic Samkolit(K) Ltd(2002) 2 E.A. 503, (2011) eKLR. The Claimant was not forced to accept his salary and he never negotiated for a higher salary hence he was never discriminated against.
30. On the issue of the prayers sought the Respondent submitted that the Claimant did not provide documentary evidence to prove that he was entitled to the reliefs sought. He was therefore not entitled to them. Counsel further submitted that the Claimant was paid his dues together with one month notice as required by law.
31. Counsel submitted that the allegations of discrimination were raised as an afterthought since they were never raised before.

Analysis

32. I have reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. I have also considered authorities relied on by Counsels.
33. I have I have come up with three main issues for determination namely;
 - a. Aa. aa. Whether the Claimant's termination was unfair and unlawful
 - b. Whether Whether Whether the Claimant was discriminated against by the Respondent.
 - c. Whether Whe Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination was unfair and unlawful

34. In this case, the Respondent alleged that they summarily dismissed the Claimant on grounds of poor performance for not meeting targets as a sales executive.
35. Whereas the Claimant's case is that he was dismissed without any reason. The Court notes that the termination letter did not state the reason for termination as poor performance. The issue of poor performance was brought in the Respondent's witness, response and its submissions.
36. The Respondent was required to meet the substantive fairness and procedural fairness test before terminating the Claimant's case as was held in the case of Fredrick Saundu Amolo –vs–Principal Namanga Mixed Day Secondary School and 2 others (2014) eKLR.
37. On the issue of Substantive fairness, the Court is guided by Section 43 of the Employment Act which requires the employer to prove the reason for termination is valid and fair and failure to do so, the termination shall be deemed unfair under Section 45 of the Act.
38. In the case of Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:

“ There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment



contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

39. From the above provisions and caselaw, it is clear that even in summary dismissal on grounds of gross misconduct, the employer must prove the reasons for termination, the reasons must be justified and the employee be heard.
40. In addition, even if the reason for termination was poor performance, the employer must show that there was in place an appraisal policy and the employee was taken through a performance improvement plan before dismissal. The Respondent ought to have produced appraisal forms during hearing, however its witness confirmed there were none produced in court. The claimant was never subjected to any performance improvement plan.
41. In the case of Peter Kamau Mwaura and Another vs. National Bank of Kenya (2020) eKLR the court quoted Jane Samba Mukala Vs. Oltukai Lodge Limited [2010] KLR 225 and observed that–

“Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.”
42. In that regard, the Court finds and holds that the respondent did not have a valid and fair reason to terminate the Claimant’s employment.
43. Regarding procedural fairness, I am guided by the *Employment Act* on the said procedure under Section 41 which requires that before termination, an employee ought to be explained to in presence of a fellow employee of choice, the reason for termination in a language the employee understands and consider the representations by such an employee.
44. The Respondent has maintained that when the Claimant was called to Human Resource Office he was explained to, the reason for termination. The Respondent did not produce before this court minutes of the said meeting and the Claimant stated during hearing that at the office it was only the Human Resource officer and himself. He was not accompanied by any representative of his choice.
45. The Respondent did not give the Claimant any show cause letter or any warnings before the said termination. The Claimant was therefore condemned unheard. He was never given any opportunity to make any representations on the charges against him.
46. The fact that the Respondent paid the Claimant one month’s salary in lieu of notice and some leave days does not make the termination lawful where they did not give a reason for termination and follow the laid down procedures. Failure to adhere to the procedure made the process flawed hence unfair termination.
47. In the case of Samuel Nguru Mutonya v National Bank of Kenya Limited [2017] eKLR Justice Monica Mbaru observed as follows:-

Further to the above, where an employer fails to abide with the procedural requirements of section 41 of the *Employment Act*, even where pay in lieu of notice is paid immediately, such does not cure the procedural unfairness visited upon the claimant.



48. In conclusion the Court is of the view that the Claimant's termination was procedurally unfair and unlawful and for no valid reason.

Whether the Claimant was discriminated against by the Respondent.

49. The Claimant has maintained that there was discrimination on account of race. Section 5 of the [Employment Act](#) prohibits discrimination and provides that there should be equal pay for equal work done. Whereas it is the duty of the employer to prove that discrimination did not take place; the employee must specifically plead the issue of discrimination and nature thereof.

50. The Claimant has raised the issue of pay disparity with his Indian colleagues of the same rank. He has also raised the issue of his colleagues taking a taxi while going to market while he walked.

51. The Claimant did not produce any pay slip of his colleagues to show that there was pay disparity. The Claimant during hearing stated that he accepted his salary and never requested for any increment. He also confirmed that he never raised this issue of discrimination with the Labour Office. The claimant did not make an official complaint to the management of the Respondent. The Claimant did not produce any voucher for transport by taxi which the respondent refused to reimburse. The allegations of discrimination are therefore not substantiated and are therefore rejected.

Whether the Claimant is entitled to reliefs sought.

52. The prayer for one month salary in lieu of Notice is denied since the same was paid to the Claimant when he was terminated and he has not rebutted this fact.

53. The prayer for pay disparity and damages for harassment and racial discrimination fails for failure to proof these allegations specifically.

54. The prayer for service pay also fails since the Claimant was a member of NSSF as seen from his pay slips. Section 35(6) (d) of the [Employment Act](#) deprives an employee who is a contributor to a pension scheme such as NSSF from claiming service pay unless the parties contract provided otherwise which was not the case in this case.

55. The prayer for compensation for unfair termination succeeds. Taking into consideration the length of engagement with the Respondent which was about a year and seven months and the conduct of the Respondent the Court finds that six months' salary as compensation for unfair termination is reasonable.

56. In conclusion the Court awards the claimant the sum of Kshs 464,538/= being six months' salary as compensation for unfair termination. The award shall be subject to applicable taxes and applicable statutory deductions but shall attract interest at Court rates from the date of judgment until payment in full.

57. It is so ordered

DATED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024

DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY, 2024

Abuodha Nelson Jorum

Judge

