



**Gatahi v Simba Fresh Produce Limited (Cause E482 of 2020)
[2024] KEELRC 772 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 772 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E482 OF 2020
SC RUTTO, J
MARCH 20, 2024**

BETWEEN

MARIA ANGELINE WANJIRU GATAHI CLAIMANT

AND

SIMBA FRESH PRODUCE LIMITED RESPONDENT

JUDGMENT

1. The Claimant avers that on or about 1st July 2019, she was employed as a Commercial Manager vide a contract of employment dated 11th June 2019. She avers that throughout her employment, she performed her duties with due care and diligence until 23rd March 2020 when without notice, she was dismissed from employment on grounds of alleged non-performance. She contends that she was never granted a fair hearing in the presence of an employee of her choice prior to being summarily dismissed. Consequently, the Claimant seeks the following reliefs against the Respondent:
 - a. The Respondent to pay the Claimant three month's salary in lieu of notice Kshs 750,630/=.
 - b. The Respondent pay the Claimant the amount unlawfully deducted from the Claimant's pay in December 2019 – Kshs 27,999.55
 - c. The Respondent to pay the Claimant Twelve (12) month's salary being damages for unlawful termination - Ksh3,002,520/=
 - d. The Respondent to issue the Claimant with a certificate of service.
 - e. Costs of this suit be payable by the Respondent.
 - f. Interest at Bank rates on (a) (b) and (c) above.
 - g. Such other reliefs as this Honourable Court may deem fit and proper.



2. The Respondent countered the Claim through its Memorandum of Response dated 30th June 2023, in which it avers that the services of the Claimant were lawfully terminated due to gross misconduct. The Respondent further avers that the Claimant had a poor disciplinary record with numerous warnings and absenteeism.
3. According to the Respondent, the Claimant was duly notified of the reasons for the termination and her representations were considered before the final decision to terminate was made. That further, the Claimant was given an opportunity to be heard and defend herself through a disciplinary process before her employment was terminated.
4. The Respondent further states that the Claimant was assigned a motor vehicle for official use only but on various occasions, she misused the said vehicle for her own personal engagements and had been involved in various accidents causing loss to the Respondent. On this account, the Respondent contends that the Claimant is not entitled to the sums claimed or any form of compensation as the termination of employment was lawful. To this end, the Respondent has asked the Court to dismiss the Claim with costs.
5. During the hearing which proceeded on 23rd October 2023, the Claimant testified in support of her case, while the Respondent elected not to call oral evidence.

Claimant's Case

6. The Claimant sought to adopt her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed alongside the Memorandum of Claim as her exhibits before Court.
7. It was the Claimant's evidence that her employment contract provided for a three (3) months' probation which she successfully completed on 1st October 2019.
8. She further averred that in December 2019, an amount of Kshs 27,999.55/= was deducted from her pay without any explanation or justification whatsoever.
9. It was her further evidence that in the course of her employment, she was never taken through a performance evaluation nor was she ever reprimanded, asked to improve her performance, issued with any warning letters on account of poor performance or placed in any performance improvement programme.
10. That further, she was never granted a fair hearing in the presence of an employee of her choice prior to being summarily dismissed from employment on alleged grounds of non-performance.
11. The Claimant further testified that the Respondent's Chairman informed her in an email on 23rd March 2020, that he met with the Chief Executive Officer, in her absence and without notifying her, and made a decision to terminate her employment with immediate effect.
12. When she inquired from the Human Resource Officer about her terminal dues, she was provided with a tabulation sheet indicating that she would be paid 30 days in lieu of notice instead of three months as provided for in her employment contract. The reason she was given for this was that she had not completed her probation.
13. She further stated that when she successfully completed her probation period on 1st October 2019, she never received any official confirmation on her role nor was she given any extension of her probation and she continued working until 23rd March 2020 when her employment was terminated.



14. She tried to explain to the Human Resource Officer that when probation is unsatisfactory, the employer is at liberty to either extend the probation period or terminate the contract. That failure to do either, confirmation is implied. Her pleas did not yield any fruit.
15. She further averred that she was never paid the 30 days salary in lieu of notice as indicated in the terminal dues tabulation sheet and neither was she issued with a Certificate of Service.

Respondent's Case

16. As stated herein, the Respondent elected not to call oral evidence hence its case was as per its Memorandum of Response.

Submissions

17. The Claimant submitted that the lapse of the probation period without any word from the Respondent deemed her confirmed into employment by effluxion of time. In support of this position, the Court was invited to consider the determination in the case of David Namu Kariuki v Commission for the Implementation of *the Constitution* (2015) eKLR.
18. It was the Claimant's further submission that failure by the Respondent to issue her with a written notice to terminate her employment is a contravention of Section 35 and Section 44(2) of the *Employment Act*.
19. The Claimant further argued that she was never granted a fair hearing in the presence of an employee of her choice, prior to being summarily dismissed from employment on alleged grounds of poor performance as required by Section 41 of the *Employment Act*. She contended that the manner in which her employment was terminated is unfair as prescribed by Section 45 of the *Employment Act*.
20. The Respondent did not file written submissions despite being given a further extension on 6th February 2024.

Analysis and Determination

21. Flowing from the pleadings, the evidence on record as well as the Claimant's submissions, it is clear that the Court is being called to resolve the following questions: -
 - i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant
 - ii. Whether the Claimant was afforded procedural fairness prior to termination
 - iii. Is the Claimant entitled to the reliefs sought?

Justifiable reason?

22. The starting point in determining this issue is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. In addition, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove: -
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or



ii. based on the operational requirements of the employer; ...

23. In the case herein, it is apparent that the Claimant was terminated on grounds related to her performance. This is discernible from the email through which her termination was communicated. I will reproduce the same for context purposes:

“Dear Maria,

Following from (sic) my meeting with Steve on Saturday 21st March 2020, arising from realization that since you joined the company, you have not lived to the expectation(sic) of the farm, your attitude towards work has been dismal to say the list(sic).

Since your engagement you have failed to discharge your duties as expected despite me raising concerns of your performance from your second month of engagement. In the last few weeks you have not bothered to send the weekly reports and generally your attitude has been that you care less as you continue receiving your salary. Its apparent that no firm can afford to pay for nonperformance.

In this respect, with immediate effect from today, hand over to Steve any asset or company property in your possession. Steve ENSURE ALL PROPERTY OR RECORDS ARE HANDED OVER.

Its been quite expensive o(sic) SFP and quite painful to me that I have paid a premium salary for the last 8 months without commensurate services to the farm. I will instruct Mark to work out your final dues to be paid by the end of this month.

Regards

Paul Ndungu.”

24. Despite the Respondent terminating the Claimant’s employment on account of her non-performance, there is no evidence on record to demonstrate that she was evaluated and if so, against what targets.
25. As it is, the Respondent did not adduce evidence to demonstrate that the Claimant had been issued with specific measurable targets that she was required to meet within specified timelines. Further, the Respondent did not prove that it had put in place measures to evaluate the Claimant’s performance against any set targets. Most of all, there was no report or such other document constituting the Claimant’s overall performance evaluation.
26. Indeed, I am led to question how the Respondent was in a position to determine that the Claimant had not lived up to its expectations without any specific targets in place, measures to assess her performance and evaluation of her overall performance against such targets.
27. On this issue, I will follow the determination by the Court of Appeal in the case of National Bank of Kenya vs Samuel Nguru Mutonya [2019] eKLR, where the Learned Judges reckoned thus:

“The reason advanced by the Bank for terminating the respondent’s employment was poor performance. In Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;

- “a. 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.

- b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

...We have considered the said reasoning in light of what we have set out above as the correct procedure for terminating an employee’s contract as restated by the Court in the Janet Nyandiko case (supra) and the observation of the ELRC in the Jane Samba Mukala case (supra). We find no basis for faulting the Judge’s finding that an appraisal ought to have been conducted on the respondent’s work performance in 2014 to confirm whether the respondent had improved on his 2013 performance rating before termination of his employment and that in the absence of such proof, termination of the respondent’s employment with the Bank was unfair.”

28. I wholly adopt the position taken by the Court of Appeal and find that for the Respondent to arrive at a determination that the Claimant’s performance was not up to its expectations, it needed to have put in place measures to assess her performance. This included but not limited to target setting and providing the manner of assessment of her performance against such targets. As I have stated, this was not evident in this case hence it follows that the decision by the Respondent that the Claimant had not performed her work to its expectations was not arrived at based on an objective assessment.
29. To this end, I am led to conclude that the Respondent has failed to discharge its evidential burden by proving that it had a justified reason to terminate the Claimant’s employment based on her performance. To this end, her termination was not substantively justified.

Procedural fairness?

30. Pursuant to Section 45 (2) (c) of the Act, an employer is required to comply with the provisions of fair process and prove that it accorded an employee a fair hearing. The specific requirements of a fair hearing are provided for under Section 41 of the Act in the following manner: -
 - (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 this 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.
31. The Claimant herein has averred that she was never granted a fair hearing in the presence of an employee of her choice prior to being summarily dismissed from employment. The Respondent disagrees and holds that the Claimant was given an opportunity to be heard and to defend herself in a disciplinary process before her employment was terminated.
32. Despite the Respondent's assertions, the record states otherwise. I say so because one, there is no evidence that the Claimant was issued with a notice detailing the allegations levelled against her and informing her that the Respondent was considering terminating her employment based on the same.
33. Similarly, there is no evidence that a hearing was convened and the Claimant invited to make her representations and to defend herself against her non-performance.
34. Indeed, from the email communicating the Claimant's termination, it is apparent that the decision to terminate her employment was arrived at between the Respondent's Chairman and one Mr. Steve, to the exclusion of the Claimant. As a matter of fact, it is apparent from the record that the Claimant was only brought into the picture after the decision to terminate her employment had been made.
35. In the premises, I am led to conclude that the Respondent did not act in compliance with the requirements stipulated under Section 41 of the Act, hence the Claimant's termination was procedurally unfair hence unlawful within the meaning of Section 45 (2) of the Act.
36. The total sum of my consideration is that the Claimant's termination was both unfair and unlawful in terms of Sections 41, 43 and 45 of the Act.

Reliefs?

37. As the Court has found that the Respondent has not proved that it had a justifiable reason to terminate the Claimant's employment, she is awarded compensatory damages equivalent to three (3) months of her gross salary. This award has considered the length of the employment relationship which I note was considerably short, as well as the circumstances attendant to the Claimant's termination from employment.
38. The Claimant is further awarded three (3) months' salary in lieu of notice. This is noting that the Respondent had indicated that it would pay the Claimant one (1) month's salary in lieu of notice upon her termination. This is despite her contract of employment providing for a notice period of three (3) months. It is worth pointing out that there is no evidence that the Claimant's probation period was mutually extended pursuant to Section 42(2) of the *Employment Act*. Therefore, upon lapse of the three (3) months probationary period and without mutuality for a further extension of the probation, the Claimant's appointment was deemed to have been duly confirmed by operation of law. Thus, she was entitled to a notice period of three (3) months prior to termination.
39. The Claimant in her testimony stated that she was not paid one (1) month's salary in lieu of notice stated in her letter of termination. This position was not refuted by the Respondent and no evidence



was adduced to prove that the Claimant was paid accordingly. As such, I return that the Claimant is entitled to be paid three (3) months' salary in lieu of notice.

40. The Claimant is further awarded the sum of Kshs 27,999.55 which was deducted from her pay for December 2019. As the Respondent did not provide any justification for the said salary deduction, the Claimant is entitled to be reimbursed appropriately.

Orders

41. It is against this background, that I enter Judgment in favour of the Claimant and she is awarded: -
- a. Three (3) months' salary in lieu of notice being the sum of Kshs 750,630.00.
 - b. Compensatory damages in the sum of Kshs 750,630.00 being equivalent to three (3) months of her gross salary.
 - c. The sum of Kshs 27,999.55 being the salary deducted from her pay slip in December 2019.
 - d. The total award is Kshs 1,529,259.55.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
 - f. The Claimant shall also have the costs of the suit.
42. As the employment relationship has not been disputed, the Claimant shall be entitled to a Certificate of Service in line with Section 51(1) of the Act. This shall issue within 30 days from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Mullomi

For the Respondent Mr. Masinde

Court Assistant Millicent Kibet

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

