



**Mwaura v Sala Terrena Creative Construction Limited (Cause E004 of 2023) [2024] KEELRC 1425 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1425 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
CAUSE E004 OF 2023**

**M MBARŪ, J  
APRIL 26, 2024**

**BETWEEN**

**JOSEPH MBOGO MWAURA ..... CLAIMANT**

**AND**

**SALA TERRENA CREATIVE CONSTRUCTION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent company on 1<sup>st</sup> September 2022 as a construction project manager. His primary duties were pre-contract planning, project documentation, site management and project management. He was paid a gross salary of Ksh.162, 812 per month which was later reviewed to Ksh.177, 098.
2. The claim is that on 22 April 2023, the claimant raised concerns about the new billing system which was in the process of being adopted by the respondent. However, the project manager rejected his proposals and initiated a process of terminating his employment. The respondent used the disciplinary clause in the letter of employment on the basis that employment could be terminated summarily for neglect of duties, absenteeism, insubordination or lateness at work.
3. On 5 May 2023, the respondent issued the claimant with a first warning notice on the grounds of poor performance and neglect of duty. He was given a week to improve.
4. On 16 May 2023, the respondent alleged that the claimant had not improved on his duties and a second warning letter was issued. On 26 May 2023, the respondent issued the claimant a third warning on the grounds that he was unwilling to improve.
5. On 29 May 2023, the claimant asked whether he had been dismissed based on the 3 warning letters and in response, he was issued with an invitation to a disciplinary hearing held on 5 June 2023. The respondent confirmed that he had not been dismissed and was expected to continue performing his duties as the project manager.

6. The claim is that during the disciplinary hearing, the respondent introduced 11 new accusations and the claimant struggled to defend himself. After the hearing, the general manager tried to persuade the claimant to tender his resignation in exchange for a good recommendation but he declined. On 13 June 2023, the respondent dismissed the claimant citing the issuance of 3 warnings occasioned by indiscipline at the workplace. Such was without due process and hence unfair.
7. The claimant sought to rely on the salaries paid and that he was entitled to a 15% house allowance which was not paid. That termination of employment was unfair and with malice and meant to injure his employability since upon refusal to resign, the respondent served the Kilifi Labour Officer with his notice of termination before serving him. The respondent cited that the claimant had been a good worker save there were clashing interests. This was contrary to section 41 of the [Employment Act, 2007](#) and unfair.
  1. The claimant claimed the following dues;
  2. One month notice pay Ksh.129,894;
  3. Unpaid house allowances Ksh.235,790;
  4. 12 months compensation Ksh.1, 558,728.
  5. Costs of the suit.
8. The claimant testified in support of his case that upon employment he was assigned duties and worked well at various sites in Watamu and Tsavo but the respondent would not facilitate his work attendance at these sites. Differences emerged when he proposed that the new billing system was not working and when the project manager proceeded to issue him with warning letters culminating with a disciplinary hearing on 5 June 2023. Despite a lapse in due process, on 13 June 2023 the respondent urged him to resign and when he refused, his employment was terminated. For lapse in due process, the claims made should be paid with costs.
9. The claimant testified that the nature of his duties was affected by delays. This did not relate to neglect of duty. Upon being issued with the first warning, the claimant asked his line manager Andrew for time to respond. He informed Brenda that he was thus attending. On 16 May 2023, the claimant sent an email and noted that he had recorded his absence with Andrew. He had been away at work and informed the respondent that he was getting married. He took 4 days off and he was not paid for these days. He had not applied for leave.
10. The claimant testified that the Clerk of Works was employed after he had started on his contract. As the project manager, he had the authority to get a contractor and he noted that he needed more staff since the ones recruited by the respondent were attending at other sites. The foreman was doubled up to minimize resources. Hence the alleged termination of employment on the grounds of poor performance and neglect of duty had no basis. The claimant had not been issued with a scope of his work and was not given time to respond to the 11 new charges introduced during the disciplinary hearing. This resulted in unfair termination of employment based on the fact that the respondent had wanted him to resign and when he refused to do so, a termination notice was issued.
11. In response, the respondent admitted that the claimant was employed through a contract dated 19 August 2022 and put on 3 months' probation. On 13 June 2023, the employment was terminated under the terms and conditions of the contract due to neglect of duties and poor performance. The claimant was paid all his terminal dues.

12. From September to December 2022 the claimant was paid as agreed without making any complaints. The claimant proposed changes to the billing system which the respondent rejected and well explained to him through email dated 26 April 2023. Before termination of employment, due process was followed. The claimant was allowed to appeal but opted not to. In the claimant's letter dated 8 June 2023, he admitted that he was taken through the due process of a disciplinary hearing and the Kilifi Labour Office was informed as required by law. The claimant also noted that he was still young in the profession and had a bright future with multiple opportunities.
13. The claimant never complained about the salary paid and the claims made are without merit and should be dismissed with costs.
14. In evidence, the respondent called Dorsilah Obuya the project administrator who testified that as the company accountant, the claimant was paid his dues salaries from September 2022 until his time of exit in June 2023. A disciplinary hearing was conducted on 5 June 2023 over 11 allegations. This was after the claimant had been issued with 3 warnings on 5, 16 and 26 May 2023 all including the 11 allegations. The claimant was found to have neglected his duties per his contract and he failed to improve on them despite communication by the respondent. The contract allowed for summary dismissal for neglect of duty or poor performance. The claimant had several confrontations on WhatsApp personal account and company group address regarding his work. On several occasions where the claimant was given a direct order by the general manager, he would blatantly refuse to follow instructions and resort to arguments or involve other staff members on matters deemed confidential or private.
15. Obuya also testified that the summary dismissal of the claimant was lawful and he declined to appeal. His claims are without merit since he has been fully paid.
16. Obuya testified that she prepared payment statements for all employees. There is basic and gross pay. The payment statement for Pius Nikoche and the claimant are both correct. Pius was paid as a procurement officer and company driver. The claimant had consolidated pay.
17. The witness also testified that during the disciplinary hearing, the claimant was advised to bring another witness of his choice but this is not captured in the minutes of 5 June 2023. When a termination notice was issued, a notice was also served upon the labour officer, Kilifi.
18. Brenda Kimindu the general manager testified that soon after the claimant was confirmed into his position he changed his work ethic. He had been issued with a contract and a job description but he failed to adhere to the same. His performance and behaviour changed. He started complaining that his team was not listening to him. He started attending to emergencies and absenting himself from work claiming to be working from home without notice to his team or supervisor. He never stepped into some work sites assigned on the reasons that he was newly married and this left the team to perform their duties in his absence. The claimant clashed with everyone at the workplace including the managing director, Andrew Melesi, Clerk of Work, Janice Ohongo and the witness.
19. Kimindu testified that the claimant never asked for help in his duties but instead, he brought in another Clerk of Work despite having another employee undertaking the same duties. The claimant put this new employee on his budget to clear his workload and to speed up his confirmation of employment. Despite being advised to use the company Clerk of Works he refused to comply. Any advice to improve work was not taken well and resulted in 3 warning letters.
20. Through a letter dated 29 May 2023, the witness invited the claimant for a disciplinary hearing on 5 June 2023 and he attended. A total of 11 charges were levelled against the claimant from the 3 warning letters. Two more allegations included contract management and the use of insulting language while at work.

21. After the claimant was issued with the warning letters, he started clearing and informed his colleagues that he had been dismissed and continued to be absent from work. Upon the conclusion of the disciplinary hearing, he was advised to appeal but he declined. The communications exchanged and advice given was to secure relations on a friendly basis and his future employability. A certificate of service was offered but the claimant declined to attend the office to collect it. All his salaries were paid in full.
22. At the close of the hearing, both parties filed detailed written submissions which are analyzed and addressed in the findings of the court.
23. The claimant submitted that his employment was terminated unfairly contrary to Section 26(1) of the *Employment Act*, 2007 (the Act) as held in the case of *Karisa v Texas Alarms (K) Limited Cause No. 292 of 2018*. The law requires a disciplinary process to be taken against the employee and the employee to be given a fair opportunity to defend himself. In his case, by 5 June 2023, the respondent had already decided to dismiss him from his employment. The new charges introduced during the disciplinary hearing were without proof and the claimant had no time to address them.
24. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR* the court held that in summary dismissal, under Section 47(5) of the Act, the employee who alleges such matter places the employer under a duty to justify the reasons for dismissal which the respondent failed to address.
25. The claimant submitted that he is entitled to his claims. He was not paid a house allowance which is due as held in *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] eKLR*.
26. The claimant is seeking general damages for defamation on the grounds that in an email dated 12 June 2023, the director wrote to the claimant acknowledging that he was working under pressure but was a hardworking person. This letter was a contradiction as it was followed by a notice terminating employment over alleged neglect of duty and poor performance. This was an effort to embarrass and tarnish his name and to reduce chances for future employment. In the case of *Naqvi Syed Omar v Paramount Bank Limited & Another [2015] eKLR* the court held that where the employer causes to be published statements which stigmatize the employee, such is defamatory and general damages should be paid. In *Miguna v Standard Group Limited & 4 others [2017] eKLR* the court held that the burden of proving a defamatory matter is on the claimant. In this case, the respondent published defamatory matters to the Kilifi Labour Office and on this basis, he claims damages of Ksh.2, 500,000 plus his unpaid employment dues in compensation for unfair termination of employment.
27. The respondent submitted that termination of employment was lawful justified and reasonable in the circumstances of the claimant. The respondent submitted that in the case of *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR* the court held that internal disciplinary proceedings are non-judicial in nature. However, 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.
28. The respondent submitted that the salary paid was consolidated as required under the law. The response relied on the case of *Trevar Marambe v For You Chinese Restaurant [2021] eKLR* where the court held that Section 31(2) of the *Employment Act*, 2007, envisages such consolidation where then, the employer is not expected to pay a separate amount as house allowance. Nothing was produced in evidence to show that indeed, the Claimant's salary was not consolidated. For the claimant, the pay slip indicates the salary paid in full.

## Determination

29. On the pleadings, evidence and written submissions, the issues which emerge for determination are where there was an unfair termination of employment; whether there is defamation; and whether the remedies sought should be issued.
30. On 13 June 2023, the respondent dismissed the claimant from his employment on the grounds that he had been issued with 3 warnings and thereafter a disciplinary hearing due to breach of some of your obligations as stipulated in your contract of service.
31. The alleged breaches are not outlined in the notice of dismissal but can be discerned from the 3 warning letters.
32. The 1<sup>st</sup> warning dated 5 May 2023 related to alleged neglect of duties. The 2<sup>nd</sup> warning related to neglect of duties and the 3<sup>rd</sup> warning related to neglect of duties. In particular, these matters include;
  1. Failure to prepare the scope of work to be shared with contractors and subcontractors for quotation purposes.
  2. Failure to follow up on and or review quotations in good time.
  3. Failure to oversee concept design management.
  4. Failure to do proper cost management and value engineering.
  5. Delayed decision-making leading to project delays.
33. Alleged neglect of duty places the burden on the employer to prove such a matter. Neglect of duty infers an employee's failure to do things correctly due to capability or implicitly, a complete neglect to do things correctly. Lack of due diligence. The failure to analyze the requirements for the job.
34. Under Section 44(4) (c) of the Act, the law allows an employer to summarily dismiss an employee for willfully neglecting to perform his duties which in their nature is for the subject employee to perform or where the employee careless or improperly performs his duties leading to loss to the employer. The law provides that;
  - (c) An employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly or improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.
35. In the case of *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another* [2022] eKLR the court in addressing a case where the employee is alleged to have failed to undertake her cleaning duties properly and hence endangered the lives of others held that this is permissible under Section 44(4) of the Act but the employee must be subjected to the due process of the law.
36. The claimant was also said to be of poor performance. The principles governing an assessment of poor performance are addressed by the court and the Court of Appeal. The parameters are in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR;
  - 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.
37. The respondent called two witnesses. Brenda Kimindu gave emphasis that upon the claimant being employed, he was placed on 3 months' probation. It was observed that he hired other employees to assist him in undertaking his duties to be confirmed in his employment. She painted a very bad view of the claimant. In that, immediately after his employment was confirmed, he neglected his duties and was of poor performance.
38. The period of probation allows the employer to assess the capabilities of the subject employee and whether he fits into the business. The respondent knew the claimant had hired other employees to assist him in his duties. It is noted that he was under pressure and this affected his performance. This notwithstanding, he was confirmed in his employment and his salary increased. The respondent cannot blame the claimant for going all out to prove his employability.
39. To cite neglect of duty or poor performance, this called for objective criteria in place used and applied to assess the claimant in his work performance. The basis of finding that he was neglecting his duties should have been understood in advance and applied objectively to him in a bid to assist him to improve on his work performance. Issuance of warning letters before this assessment and evidence of the support system put in place to support the employee go contrary to the principles outlined above.
40. Whereas the employer has the right to organize the shop floor and allow the employee to undertake his work as contracted to do, where the employer alleged poor work performance and or neglect of duties, the burden is on the employer to prove such matter.
41. The concept of neglect of duty implies deliberate or wilful action on the part of the employee. To qualify as negligence, the conduct in question must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as dereliction of duty. It must demonstrate, a complete obtuseness of mind or, a total failure to take care. If something less were required, the distinction between ordinary and negligence would lose its validity.
42. Therefore, where the employer applies alleged neglect of duties; the reference should be Section 44(4) (c) of the Act. This requires that;
- An employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.
43. Through a letter dated 19 August 2022, the claimant was appointed as a construction project manager. The letter noted that his job description would be in charge of all our construction sites.

44. To this letter, the respondent attached Duties and Responsibilities of the Project Manager. Various aspects of the claimant's job are outlined including;
- a. pre-contract planning;
  - b. project documentation;
  - c. site management; and
  - d. Project management.
45. Was the claimant assessed, appraised, reviewed, or evaluated in his core functions to arrive at finding that he neglected his duties?
46. As analyzed above, once the employer alleges that there is a negligence of duties, the employee's conduct in question must be objectively assessed based on an objective standard of the reasonable person. An employer cannot wake up one morning and allege that the employee is neglecting his duties. Modalities established and known to the employee must be in place. These must be objectively applied to the employee in assessing his work duties for a finding that he is negligent.
47. The question to pose by the employer is what standards are in use in measuring the employee alleged to be neglecting his duties? Are these standards known to the employees, particularly the subject employee?
48. The rationale is that the employee noted as neglecting his duties, portrays a lack of grasp about the nature of his job. There was a standard set but the employee failed to apply. The measurement of what was to be done was present at the point of commencement of duty.
49. Fundamentally, even where the claimant was found to have neglected his duties or was of poor performance calling for summary dismissal, the motions of Section 44 of the Act are all subject to the provisions of Section 41(2) of the Act. The employee must be taken through the due process in the presence of another employee of his choice.
50. On 5 June 2023 at the disciplinary hearing, present were the following persons;
1. Andrew Melesi – director
  2. Joy Brenda Kimilu – general manager
  3. Dorsilah Obuya – administrator
  4. Joseph Mbogo Mwaura – the claimant
51. The respondent was well represented by the senior officers. The claimant's rights under Section 41(2) of the Act were not secured.
52. MS Obuya in her evidence noted that the claimant was asked to bring another witness with him but that such matter was not recorded in the minutes of the meeting. Indeed, in the notice inviting the claimant to the disciplinary hearing dated 29 May 2023, no such matter was addressed.
53. This compromised a very fundamental requirement of the law. In the case of [\*Okoth v Jamii Telecommunication Limited \(Cause 1556 of 2018\)\*](#) [2023] KEELRC 1643 (KLR) (10 July 2023) (Judgment) the court held that Section 41 of the Act prescribes the mandatory procedural elements which characterise a fair termination of employment. This position is reiterated by the Court of Appeal decision in *Postal Corporation of Kenya v Andrew K Tanui* (2019) eKLR.

54. In *Mary Chamweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR the court held that;
- Section 41 of the *Employment Act* is couched in mandatory terms. That is where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or the presence of a fellow employee of their own choice. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets
55. For lapse in adherence to the legal duty under Section 41 of the Act, the outcome of the disciplinary hearing on 5 June 2023 is unlawful. Assessed under the provisions of Section 45 of the Act, employment was terminated unfairly.
- The claimant is entitled to notice pay and compensation.
56. The claimant was last earning a gross salary of Ksh.177, 098 per month. He has claimed a notice pay of Ksh.162, 812. What is due under Section 49(2) of the Act, is the gross salary last earned. Notice pay is awarded at ksh.177, 098.
57. Compensation is also due based on the findings above. In assessing what is due, the court is required to take into account the record of the employee in terms of Section 45(5) (b) of the Act. The claimant was not of particularly good conduct. He was issued 3 notices. He admitted absence from work for 4 days without prior permission or approval by his supervisor. He has exchanges of communication with fellow employees who do not speak well of him.
58. Putting these matters into context is necessary. The claimant was paid his due terminal dues immediately after employment was terminated. the respondent made an effort to take him through a disciplinary process save for want of one key component under Section 41 of the Act The claimant worked from September 2022 to June 2023, less than a year. Had he been allowed the lawful course and support for his position, he had hoped to work for the respondent for longer. Compensation at two months' gross salary is hereby found appropriate at Ksh.354, 196.
59. On whether there was defamation or not, defamation is employment is abhorred. Where such matter exists, the impact is wide and large and prejudices the employee. The principles are well outlined in the case of *Naqvi Syed Omar v Paramount Bank Limited & Another* [2015] eKLR, cited above.
60. In this case, the claimant asserts that the respondent through communication dated 12 June 2023 copied the Labour Officer, Kilifi and the contents therein were defamatory, meant to embarrass him and damage his future employability. He does not cite other persons copied to this email save for his internal supervisors.
61. Under Section 18 of the Act, an employer is required to inform the Labour Officer upon termination of employment. This is a legal duty though rarely addressed.
62. Section 18(5)(b) of the Act directs that upon the termination of a contract of service;
- (b) By dismissal, the employer shall, within seven days, deliver to a Labour officer in the district in which the employee was working a Written report specifying the circumstances leading to, and the Reasons for, the dismissal and stating the period of notice and the Amount of wages in lieu thereof to which the employee would, but

For the dismissal, have been entitled, and the report shall specify the Amount of any wages and other allowance earned by him since the Date of the employee's dismissal.

63. In this regard, the court finds no matter of defamation. The respondent was undertaking its legal duty by submitting a report to the Labour Officer upon the dismissal of the claimant.
64. On the claim for unpaid house allowance, the employment between the parties was regulated under a written contract. The salary earned at ksh.177, 098 is not a basic wage protected with the benefit of a house allowance as required under the Wage Orders. This benefit is removed from the claimant based on his salary under his written contract.
65. On the claim for a certificate of service, this is a legal requirement under Section 51 of the Act. Brenda Kimilu testified that she called the claimant to collect his certificate but he declined. This should be posted to his last stated address or submitted to the Labour Officer for his collection.
66. On costs, the claim is partially successful, the claimant is entitled to half his costs.
67. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
  - a. A declaration there was unfair termination of employment;
  - b. Compensation Ksh.354,196;
  - c. Notice pay Ksh.177,098;
  - d. 50% of costs.
68. The claimant is to collect his Certificate of Service within 14 days after which the respondent is to deposit the same with the Labour Officer.

**DELIVERED IN OPEN COURT AT MALINDI THIS 26TH DAY OF APRIL 2024.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Nasra

..... and .....