



**Awan v Canaan Developers Limited (Cause E588 of 2022)
[2024] KEELRC 1215 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1215 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E588 OF 2022
DKN MARETE, J
APRIL 24, 2024**

BETWEEN

NAGHMA SHELLY AWAN CLAIMANT

AND

CANAAN DEVELOPERS LIMITED RESPONDENT

JUDGMENT

1. This matter was originated by way of a Memorandum of claim dated 22nd August 2022. It does not disclose any specific issue in dispute on its face.
2. The Respondent in a Response to Memorandum of claim dated 12th September, 2022 denies the claim and prays that the same be dismissed with costs.
3. The Claimant in a Reply to the Respondent's statement of Response dated 6th October, 2022 reiterates his case and faults the defence for want of substance.
4. The claimant's case is that he was employed by the Respondent as a Human Resource Manager vide a contract of Employment dated 9th March, 2020 and earned a gross salary of Ksh.235,000.00 per months.
5. It is her further case that she served dedicatedly during her stint of service but experienced a harsh working environment. This was through unnecessary and uncalled for pressure from the Chief Operating Officer, one, Yohannes Kidane. He failed to take her professional recommendations on issues in her department.
6. The claimant other case is that her work was frustrated by the then COO who failed to take her recommendations on issues arising from the Human Resource Department and would have impromptu meetings and unattainable deliverables which caused the claimant a lot of stress and was subsequently over worked.



7. She avers that she worked in an aggressive environment and was discriminated upon by COO who always discriminated against Kenyans.
8. She was untimely, unfair, unilaterally and illegally terminated from employment and ordered not to report to the office effective 12th July, 2022. This was without cause and she was not accorded a hearing.

Further,

The Claimant states that through her advocate on record she wrote a letter dated the 12th July, 2022 demanding for answers but the said letter did not elicit any response. The Claimant avers that the Respondent instead of responding to her letter served her with her termination notice dated the 14th July, 2022 but curiously indicating that her employment was terminated effective the 9th July, 2022. The Claimant therefore states that the actions of the Respondent leading to her termination from employment was punctuated with discrimination, malice, unfairness, illegality, unreasonableness, bias, arbitrariness, was unsound, ill-founded and lacked any legal basis.

She claims thus;

- a. Salary for July and August, 2022 - Kshs.340,000/-
 - b. Damages for unfair termination for 12 months - Kshs.2,040,000/
 - c. Certificate of service.
 - d. Compensation for fuel and service for 11 months – Kshs.75,000/=
 - e. Service pay for 2 years – Kshs.170,000/=
 - f. Bonus for 2022 – Kshs.170,000/=
 - g. Unpaid leave days – 13 days – Kshs.75,000/=
- Total = KshS.2,870,000/=

She prays as follows;

- a. A declaration that the Claimant's termination was unprocedural, unfair and unlawful.
 - b. The Respondent to pay the Claimant damages for unfair termination as tabulated at paragraph 14 herein above being KshS.2,870,000/=
 - c. Damages for discriminating the Claimant during her employment.
 - d. Salary from the date of unlawful dismissal being 9th July, 2022 till the judgment date.
 - e. An order of immediate reinstatement of the Claimant to her employment.
 - f. Costs and interest in prayer (b), (c) and (d) above from the date of filing of this suit till payment in full.
 - g. Any other relief that this Honorable court deems fit.
9. The Respondent's case is a denial of the claim. It however does not raise any tangible issues in answer to the claim and remains as such, a denial. It is a sham defence.
 10. The issues for determination therefore are;
 1. Whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful.



2. Whether the Claimant is entitled to the relief sought.
 3. Who bears the cost of this cause.
11. The 1st issue for determination is whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant's submission is a reiteration of his case that she was dismissed unlawfully and without an justifiably cause or warning. She was not accorded her rights to a fair hearing before such termination.
 12. It is the Claimant's further submission that she was not summoned to any disciplinary hearing before her termination of employment and neither had she been served with warning for any alleged misconduct on her part. She seeks to rely on provisions of section 45 (3), (4) and (5) of the *Employment Act*, 2007 which elaborately provide for a case of unfair termination of employment.

Section 45(3) (4) (5)

- “(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where –
- (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider –
- (a) the procedure adopted by the employer in reaching the decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (e) the existence of any pervious warning letters issued to the employee.”

13. This was also a total violation of section 41, 43 and 45 of the *Employment Act*, 2007 which deride lack of a fair hearing and due process in termination of employment.



14. In the penultimate, the Claimant submits lack of compliance with section 47(5) of the *Employment Act*, 2007 in that the Respondent have not discharged his duty and obligation of justifying the termination in circumstances. A case of unlawful termination of employment therefore ensues.
15. The Respondent submits a case of procedural and lawful termination of employment. It is her case that the Claimant was employed on a fixed term contract for a specified period. This was for two (2) years with effect from 1st August, 2020 and this was not renewed.

She submits as follows;

18. . It is our submission that the Respondent did not unfairly terminate the Claimant. Our submission is buttressed in *Transparency International-Kenya versus Teresa Carlo Omondi* (KECA No. 174) (2023) eKLR where the court held that the non-renewal of a fixed-term employment contract does not amount to unfair termination of employment that warrants compensation.
19. Further in the authority of in *Samuel Chacha Mwita vs. Kenya Medical Research Institute* [2024] eKLR the court stated:

“Fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not a act by the employer.”
16. The claimant never admits the contents of paragraph 3 of the claim and further aver that the terms of the contract was revised in August, 2022 whereby the parties entered into a new contract of service for a period of 2 years.
17. The Respondent’s other case is that she is law abiding Employer with high regards to employees welfare and standards. It provides conducive working condition to all it employees. This is as follows;
 8. The Respondent admits the content of paragraph 8 of the Memorandum of Claim in so far as the claimant was invited to meet the Officials of the Respondent on 9/7/2022 where the Respondent discussed with the claimant about her Contract which was due to expire on 01/08/2022 and informed her that the Respondent did not intent to renew her contract of service.
18. The respective cases of the parties tilt this matter in favour of the Claimant. This is because despite the Respondent’s case of a fixed term contract, this is not clearly demonstrated in evidence. The Claimant as established that she worked for the Respondent but was not accorded substantive and procedural fairness in her termination of employment. It behoves the Respondent to come clean and disabuse the Claimant’s case for unlawful termination of employment once this is demonstrated per section 47(5) of the *Employment Act*, 2007. She does not do this.
19. The Respondent instead plants a case of a fixed term contract which is not ably demonstrated or establishes in evidence. I therefore find a case of unlawful termination of employment and hold as such.
20. On a test of balance of probabilities and preponderance of evidence, the matter to its in prove of the claim. I therefore find a case of unlawful termination of employment and hold as such.



21. The 2nd issue for determination is whether the Claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.
22. I am therefore inclined to allow the claim and order relief as follows;
- i. Salary for July and August 2022 the amount is Kshs.340,000.00
 - ii. Service pay Ksh.170,000.00
 - iii. Eight(8) months compensation for unlawful termination of employment
..... Ksh.235,000.00 x 8 months Ksh.1880,000.00
Total of claim Ksh.2,390,000.00
 - iv. The Respondent be and is hereby ordered to issue a certificate of service to the Claimant within thirty (30) days of this judgment of court.
 - v. The cost of the claim shall be borne by the Respondent.

DELIVERED, DATED AND SIGNED THIS 24TH DAY OF APRIL 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

- 1. Miss Achao hold brief for Yussuf instructed by SKY Advocated LLP for the Claimant.
- 2. Miss Manyanzi instructed by MMA Advocates, LLP for the Respondent.

