



**Otieno v Sameer Agri & Livestock Kenya Ltd (Cause 290 of 2018)  
[2024] KEELRC 1157 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1157 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 290 OF 2018  
DKN MARETE, J  
APRIL 24, 2024**

**BETWEEN**

**WINNIE ANYANGO OTIENO ..... CLAIMANT**

**AND**

**SAMEER AGRI & LIVESTOCK KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a statement of claim dated 3rd April, 2018. The issues in dispute are therein cited as;
  - i. Discrimination on the ground of pregnancy
  - ii. Unfair and Unlawful termination of employment
  - iii. Harassment, intimidation and frustration at work
  - iv. Refusal to pay terminal dues
  - v. Refusal to pay notice
  - vi. Refusal to pay leave days
  - vii. Refusal to pay terminal dues
  - viii. Refusal to issue certificate of service
  - ix. Refusal to pay service.
2. The Claimant further issues a Reply to Defence dated 2nd April, 2019 in which she denies and rubbishes the defence and also reiterate her case as claimed.



3. The Respondent in a Statement of Defence dated 15th August, 2018 denies the claim and prays that the same be dismissed with costs.
4. Oddly, the Respondent has filed another Response to Statement of Claim dated 12th July, 2019 basically denying the claim in toto.
5. The claimant's case is that at all material times to this cause, she was an employee of the Respondent as Sales Representative. She earned a gross pay of Ksh.22,000.00 throughout her stint of service.
6. The claimant's further case is that the issues with the Respondent started when she discovered that she was expectant of a child. It is her further averment that on that occasion, she was immediately moved to far duty stations and denied her usual allowances. She was also removed from route plan and placed without notice while still in active duty. She was verbally abused and severally threatened.
7. The Claimant's other case is that her salary was withheld without due cause as the Respondent continued to pay other employees. She was also subjected to unrealistic targets which she did her best to meet.
8. The claimant's penultimate case is that on 9th October, 2017, her services were terminated without notice as was expected of her contract of employment. This decision was discriminatory, irregular, malicious and made in bad faith and outrightly unjustifiable. She had not been issued with any warning letter and or subjected to disciplinary process before this episode.
9. She prays thus;
  - a. A declaration that the Claimant was discriminated against on grounds of pregnancy.
  - b. A declaration that the termination of the Claimant by the Respondent was unfair, unprocedural and unlawful.
  - c. An Order for compensation of the Claimant for frustration, intimidation, harassment and discrimination.
  - d. An Order that the Respondent does forthwith:-
    - I. Issue the Claimant with a certificate of service as provided for under the law.
    - II. Pay the Claimant:
      - a. General damages for discrimination on account of pregnancy.
      - b. 1 month in lieu of notice Kshs.22,000/-
      - c. Compensation for wrongful termination calculated at  $12 \times 22,000 = \text{Kshs.}264,000/-$
      - d. Service pay calculated at  $22,000 \times 20 \text{ onths} \times 15/30 = \text{Kshs.}220,000$ .
      - e. Payment in lieu of leave days earned calculated at  $22,000 + \{4/12 \times 22,000\} = \text{Kshs.}29,333.33/-$ .
      - f. Salary from June to date calculated at  $22,000 \times 6 \text{ months} = \text{Kshs.}132,000/=$ .
      - g. Costs of the suit.
      - h. Interest on "II" above at Court's rate.
      - i. Any other relief the Honourable Court may deem fit to grant.



10. The Respondent's case is that the claimant's performance was not up to the mark. This was despite several warnings and was up to 33% below the output average and target.
11. The Respondent's further case is that; On 5th September, 2017 the Claimant was served with a letter of reprimand for poor performance. On 18th July, 2017 the Claimant was issued with a warning letter for poor performance. In June, 2017, she was issued with a letter for failure to achieve targets. On 29th September, 2017, the Claimant was issued with a show Cause as to why she should not be dismissed for failure and refusal to attend to her work place and poor performance. On 6th October, 2017, she was properly and procedurally issued with a notice of termination.
12. The Claimant was therefore fairly and procedurally terminated and is not entitled to compensation, or at all.
13. 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.
14. The 1st issue for determination is whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant submits a case of unlawful termination of employment for the Respondent's violation of Section 41, 43, 44, 45 and 47 of *Employment Act, 2007*. It is her case that Section 45 above provides that a termination of employment would be unfair if the employer fails to prove that; It was grounded on valid and fair reasons. That fair procedure was followed.
15. The Claimant's further case and submission is that whereas the letter of termination indicated that she was dismissed for poor performance, the notice to show cause indicated a different reason. This was that she had neglected her responsibilities by not reporting to work from September to the date of termination and further is that she had a behaviour of absenteeism.
16. It is also her case and submission that the Respondent's claim on the reprimands on performance and support for apt performance are untrue and unproven and therefore should not be relied on in a determination in their favour. On the contrary, the Claimant had in her response to show cause stated that she had been at work as expected and required and had continued to perform her duties as usual. She denies any issue of warning and reprimand letters and submits that the once produced in evidence are merely forgeries. She has not appended her signatures on them in receipt. In all, she was a diligent worker who is being victimised for no good cause.
17. The Claimant seeks to rely on the authorities of *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause No. 823 of 2010 [2010] LLR 255 (ICK) the court observed as follows;

“...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...It will not suffice to say that one has been terminated for poor performance as the effort leading to this decision must be established.”



18. Further, in *Jane Wairimu Machira v Mugo Waweru & Associates* [2012] eKLR, the court opined:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

19. There is no evidence that this element of poor performance was brought to the attention of the Claimant or that she was given an opportunity to improve on it. There is no evidence of absents from duty either. Further, the Respondent’s Human Resource Manager has also acknowledged through her witness statement dated 18th July, 2019 that they did not provide the Claimant with any job training all.

20. The Claimant’s further submission is that her termination of employment flouted the provisions of the substantive and procedural fairness as enunciated by Sections 41 and 42 of the *Employment Act, 2007*. She was not subjected to a fair and procedural hearing before termination of employment.

21. She further seeks to rely on Articles 47 and 50(1) of the *Constitution* 2010 which provides as follows;

“(1) Every person has the right to administrative action, that is, expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, the person has right to be given written reasons for the action.

On the other hand article 50(1) provides that:

“Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

(2) Every accused person has a right to a fair trial which includes the right-

(k) ...to adduce and challenge evidence.”

22. All these procedural failures must have lead to an unfair and unlawful termination of employment.

23. The Respondent in a written submissions dated 15th January, 2024 reiterates her case of denial of the claim. She at the onset denies a case discrimination on ground of pregnancy for lack of evidence to this extent.

24. In reliance to the authority of *GMV v Bank of Africa Kenya Limited* [2023] eKLR, the Respondent discounts this accusation and provides that court has established the following criteria for proof of protection to this extent as follows;

i. Establish she belongs to a protected class.

ii. Demonstrates she qualifies for the job she lost

iii. Show she suffered adverse employment action, directly as a result of her pregnancy. She must provide *prima facie* proof, that the other explanations by the employer are pretextual, and the real reason for termination was the pregnancy.



- iv. The employee must as a minimum, establish that there is anexus between the adverse employment decision and her pregnancy
25. The Respondent further submits a case of fair termination of employment in compliance with Section 45(2) of Employment Act, 2007 in that the reason for termination was valid. It is her case that unsatisfactory performance was demonstrated through the evidence of Paul Maina who stated that during the course of employment, the Claimant exhibited unsatisfactory performance through her failure to meet sale targets. This was evidenced by the monthly reviews conducted by the sales representatives performances.
  26. Overall, the Claimant's case overwhelmed that of Respondent. This is because the Respondent does not display any evidence of a thorough fare performance evaluation programme that was communicated inter partes. It is not clear as to whether performance evaluation procedures were agreed between the parties and therefore the fallacy of heaping this on the Claimant.
  27. Two, the Respondent did not walk the Claimant through the rigmarole of due process in the process of termination. She was merely issued with a letter of termination without taking her through due disciplinary process. I therefore find a case of unlawful termination of employment and hold as such.
  28. The 2nd issue for determination whether the Claimant is entitled to the relief sought. She is. Having succeeded on a case of unlawful termination of employment, she becomes entitled to the relief sought.
  29. I am therefore inclined to allow the claim and order relief as follows;
    - i. A declaration be and is hereby issued that the termination of employment of the Claimant by the Respondent was wrongful, unfair, unprocedural and unlawful.
    - ii. One(1) month's salary in lieu of notice .....Kshs22,000.00.
    - iii. Twelve(12) month's salary as compensation for unlawful termination of employment =12x22,000.00.....Kshs.264,000.00.
    - iv. Service pay calculated at 22,000.00x20monthsx15/30=..Kshs.220,000.00  
Total of claim .....Kshs.506,000.00
    - v. The Respondent is ordered to issue the Claimant with a certificate of service within 30 days of this judgment of court.

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

**D. K. NJAGI MARETE**

**JUDGE**

**Appearances:**

**1. Annette Mbugua hold brief for Ms Bukachi instructed by Owino Bukachi & Company Advocates for the Claimant.**

**2. Maina instructed by Elud Maina Karanja Advocates for the Respondent.**

