



**Gatwiri v Top It Up Distributor (Cause E895 of 2022)
[2024] KEELRC 932 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 932 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E895 OF 2022**

**B ONGAYA, J
APRIL 17, 2024**

BETWEEN

JACKLINE GATWIRI CLAIMANT

AND

TOP IT UP DISTRIBUTOR RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 30.11.2022 through K. Kibiku & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a. A month's salary in lieu of termination notice Kshs.180, 000.00.
 - b. Bonus payment at 15% of 6, 800,000 making Kshs.102, 000.00.
 - c. 12 months' salary Kshs.180, 000.00 x 12 = Kshs.2, 160, 000.00.
 - d. Costs of the suit.
 - e. Certificate of service.
 - f. Interest on (a), (b), (c), (d), and (e) above at Court rates until payment in full.
 - g. Any other relief that the Honourable Court may deem just and fit to grant.
2. The claimant pleaded as follows:
 - a. The respondent employed the claimant on 02.08.2021 as a Sales and Marketing Manager at Kshs.180, 000.00 plus allowances and bonuses per contract.
 - b. The claimant worked diligently until 15.10.2022 when the respondent unlawfully, unfairly and unprocedurally terminated her employment. She was not given a termination notice and



it was in breach of section 35(1) of the *Employment Act*, 2007. The claimant alleged unfair labour practice contrary to Article 41 of the *Constitution*.

3. The respondent filed the statement of response dated 03.03.2023 and through Wachira Wanjiru & Company Advocates. The respondent prayed that the suit be dismissed with costs. The respondent pleaded as follows:
 - a. The respondent admitted employing the claimant from 02.08.2021 to 01.08.2022 at Kshs.180,000.00 and being a fixed term contract. The respondent denied that it dismissed the claimant unlawfully or unfairly but that her fixed term contract lapsed.
4. To answer the 1st issue, the evidence is that the parties entered a fixed term contract running from 02.08.2021 to 01.08.2022 as duly exhibited.
5. The 2nd issue is whether the termination was unfair. The claimant has confirmed that she worked until 17.06.2022 when she applied for her annual leave as well as her maternity leave and she was scheduled to resume duty at the end of the leave effective 12.10.2022. For that purpose, she completed the relevant leave forms. The respondent paid all the salary until end of September 2022. The claimant testified that by agreement the resumption date was moved to 14.10.2022. Further, she reported back per plan and proceeded to her office without objections. It was submitted for the claimant that her employment with the respondent continued after 01.08.2022. The leave application forms showed she would resume duty on 12.10.2022 and that Samuel Maundu would act in her place while on leave. Further, it was urged that by signing the resumption date on the leave form, the respondent's Director (RW) introduced the legitimate expectation that the claimant's contract of service would be renewed.
6. For the respondent it is submitted that the parties were in a fixed term contract per section 10(3) (c) of the *Act* which states,

“(c) Where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end.”

Further, the contract between the parties had no renewal clause and the renewal would be in the respondent's discretion. After the lapsed contract, the parties negotiated a renewal of contract but the claimant rejected the offer and demanded final dues.

7. The evidence is that despite the contract lapsing as was agreed, the respondent paid the claimant for three months of maternity leave. The email correspondence between parties show that the claimant alleged that the conversations were that she was offered a lower position of Sales Representative at a reduced salary or her contract terminated immediately. The Director, Safaraliiev Oleksandr (RW), clarified by an email to the claimant that she was not being terminated because her contract had lapsed in August 2022 but was not closed due to maternity leave. Further, she would be paid up to 15.10.2022; she would be paid gratuity at 15 days worked for the one year of service; and she would be offered the lower position of sales representative being a new contract. The claimant received Kshs.122, 581.65 by cheque being the agreed terminal dues and forwarded by the letter dated 17.10.2022 which the claimant signed the same date and partly stating,

“By signing this letter, you acknowledge that you have no claims against the company.”

Having signed and taking all the evidence into account, the Court returns that the parties separated by mutual agreement. The contract of service had lapsed in early August as per the contractual terms. The respondent honoured the arrangements on maternity leave as per the signed leave forms. Thereafter,



the respondent offered fresh employment but the claimant declined the offer. The agreed separation terms took effect per letter of 17.10.2022 and parties' conversations. The Court finds that there was no unlawful and unfair termination as alleged for the claimant.

8. The 3rd issue is whether the claimant is entitled to bonus as claimed. The contract provided for

“1% turnover bonus payable on achievement of 6,000,000 KES monthly sales target. 15% turnover bonus payable on sales above 6,000,000 KES monthly sales target.”

The claimant relies on an email dated 03.10.2022 by Samuel addressed to members of management stating that in the last month (September) there had been tremendous growth on revenue generation achieving 6.8 M surpassing the 6M Focus target by 0.8M. It should be obvious that in September 2022, the claimant was on leave and the performance was not attributable to her at the time Samuel Maundu was actually in office and not the claimant. The claimant has not therefore established that the claim falls within the relevant contractual provision. The respondent's submissions in that regard are upheld.

9. The claimant is entitled to a certificate of service per section 51 of the Act and in that consideration each party to bear own costs of the suit.

In conclusion, the suit is hereby determined with orders the respondent to deliver the certificate of service by 01.05.2024 and each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 17TH APRIL 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

