



**Wanjala v Devyani Food Industries (K) Limited (Cause 990 of 2017)  
[2024] KEELRC 1238 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1238 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 990 OF 2017**

**L NDOLO, J**

**MAY 23, 2024**

**BETWEEN**

**DUNCAN NYONGESA WANJALA ..... CLAIMANT**

**AND**

**DEVYANI FOOD INDUSTRIES (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. In his Statement of Claim dated May 18, 2017, the Claimant sued Sameer Agriculture & Livestock Kenya Limited, seeking relief for wrongful dismissal. A response dated January 24, 2018, was filed on behalf of Sameer Agriculture & Livestock Kenya Limited.
2. Pursuant to a Notice of Motion dated October 21, 2021, Sameer Agriculture & Livestock Kenya Limited was granted leave to amend its name to Devyani Food Industries (K) Limited. The Response was therefore amended on January 16, 2022.
3. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called Paul Maina. The parties further filed written submissions.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent in the year 2010. He worked until September 6, 2016, when he was summarily dismissed. At the time of leaving the Respondent's employment, the Claimant earned a monthly salary of Kshs. 27,600.
5. The Claimant faults the Respondent for terminating his employment without justifiable cause and in violation of due procedure. He therefore seeks the following remedies:
  - a. A declaration that his dismissal was unlawful and unfair;



- b. Pay in lieu of 4 months' leave @ Kshs. 27,600.....Kshs. 111,040
- c. Payment for the remainder of the contract.....138,000
- d. 12 months' salary in compensation.....331,200
- e. Certificate of service
- f. Costs plus interest

### **The Respondent's Case**

- 6. In its Memorandum of Response as amended on January 16, 2022, the Respondent states that the Claimant was employed on March 1, 2015, in the position of Senior Merchandiser, earning a monthly salary of Kshs. 27,600.
- 7. The Respondent states that the Claimant started off well but his performance later deteriorated. The Respondent claims that the Claimant was issued with several notices on poor performance, upon which he promised to improve but did not do so.
- 8. The Respondent avers that the Claimant was accorded a hearing, where he was asked to explain what the problem was, but he failed to give a satisfactory explanation.
- 9. The Respondent maintains that the termination of the Claimant's employment was lawful. The Respondent denies the Claimant's entire claim and asks the Court to dismiss it.

### **Findings and Determination**

- 10. There are two (2) issues for determination in this case:
  - a. Whether the termination of the Claimant's employment was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.

### **The Termination**

- 11. The Claimant's employment was terminated by letter dated September 6, 2016 stating thus:

“Dear Dancan,

Re: Termination of Employment

Reference is made from your explanation dated September 1, 2016. Your wrong attitude and non-execution of strategies as instructed by your senior are unacceptable, and it is for this reason that the management has concluded with regret to terminate your employment with Sameer Agriculture and Livestock Kenya Limited with effect from September 6, 2016.

Please arrange to hand over company properties to the Human Resource upon which your terminal dues if any will be calculated and paid to you.

Yours faithfully,

For Sameer Agriculture & Livestock K Limited

Kind regards,

For Sameer Agriculture & Livestock K Ltd

(signed)



**Human Resource Advisor**

12. By this letter, the Claimant is accused of failure to execute strategies as instructed by his superiors. The Respondent states that the Claimant's employment was terminated on account of poor performance. This is one of the grounds for termination of employment, provided under the Employment Act. The procedure to be adopted is contained in Section 41 of the Act, which provides as follows:
  41.
    - (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 the 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.
13. In *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanui and Magnate Ventures Ltd* (Cause No 273 of 2010) it was held:

“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.”
14. The Claimant's complaint is threefold; first, that there were no clear targets upon which his performance could be measured; second, that he was not subjected to any performance appraisal and third, that he was not given an opportunity to be heard.
15. In *Jane Samba Mkala v Ol Tukai Lodge Limited* [2013] eKLR it was held that an employer fronting poor performance as the reason for terminating the employment of an employee must demonstrate the existence of a policy or practice of performance measurement. In addition, the employer must prove that the affected employee was subjected to a fair process.
16. In this case, the Claimant was issued with a warning letter on August 9, 2016 and on September 6, 2016, his employment was terminated. The warning letter cites poor execution in outlets, improper integrity and laxity as areas of concern. There was however, no known plan as to how the Claimant would be supported to improve.
17. In addition, the Claimant was not given clear targets upon which his performance could be measured. Moreover, there were no clear areas of improvement and the Claimant was not allowed adequate opportunity to improve. Further, the Claimant was not subjected to a capability hearing, prior to the termination of his employment, as contemplated under Section 41 of the Employment Act.
18. For the foregoing reasons, I find and hold that the termination of the Claimant's employment was substantively and procedurally unfair.



## **Remedies**

19. I therefore award the Claimant four (4) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this award, I have considered the Claimant's length of service and the Respondent's failure to avail him an adequate opportunity to improve on his performance.
20. The claim for leave pay was not particularised and was therefore not proved.
21. No basis was established for the claim for payment for the remainder of the contract which therefore fails and is disallowed.
22. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 110,400 being 4 months' salary in compensation for unlawful and unfair termination of employment.
23. This amount will attract interest at court rates from the date of judgment until payment in full.
24. The Claimant is also entitled to a certificate of service plus costs of the case.
25. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Nyangi for the Claimant

Mr. Maina for the Respondent

