



**Mugo v Sanden Intercool [Kenya] Limited (Cause 20 of 2019)
[2024] KEELRC 1444 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1444 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 20 OF 2019**

**J RIKA, J
JUNE 14, 2024**

BETWEEN

JOYCE WANJIKU MUGO CLAIMANT

AND

SANDEN INTERCOOL [KENYA] LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 16th January 2019. She states that she was employed by the Respondent as a Human Resource and Logistics Administrator, on 1st April 2011. Her last monthly salary was Kshs. 180,308.
2. She states that on 18th July 2018, she exercised her right to terminate her contract, by issuing notice to the Respondent, effective 31st October 2018.
3. Her decision was based on three grounds: discrimination by the Respondent; unfair treatment at work by the Respondent; and risk of losing her Human Resource Management practicing licence as the Respondent had not complied with government requirements.
4. Discrimination was on account of race, and lack of equality of pay, for work of equal value.
5. Unfair treatment was founded on verbal threats for deduction of the Claimant's salary if the Respondent made losses; denial of bonuses; being forced to work from home when sick; and deduction of sick off days from her annual leave entitlement.
6. Termination was unfair. The Respondent's Managing Director accused the Claimant of reporting the Respondent to NEMA for failure to comply with regulations. It was alleged that the Respondent stocked coca cola and other consumables which had expired.
7. The Managing Director coerced the Claimant to make a quick decision on whether to terminate her contract on Saturday 13th October 2018, and get her full terminal benefits. She declined to resign



- with immediate effect as directed, insisting on seeing out her notice period, to 31st October 2018. The Managing Director insisted that she would lose her terminal benefits if she did not resign immediately.
8. She reported the threats to the Parklands Police Station. Police visited the Respondent, and confirmed that the Respondent stocked expired coca colas and other consumables. The Managing Director denied making threats on the Claimant, and withholding her terminal benefits.
 9. On 13th October 2018, after she engaged the Police, she reported to work, and was denied access to her office. Her biometric data was deleted on the instructions of the Managing Director.
 10. She was called to a meeting by the Respondent, and informed that the Managing Director had decided she was no longer welcome at the Respondent. She was handed a cheque for the sum of Kshs. 612,560 in terminal dues.
 11. She was asked to sign the clearance forms. She declined. She insisted that she intended to serve her notice period.
 12. She was surprised later on, when she received a call from Parklands Police Station, informing her that the Managing Director had made a complaint, that the Claimant stole a cheque from the Respondent. The report was malicious. The Respondent cancelled the cheque.
 13. The Respondent sent her an e-mail on 14th October 2018, placing her on compulsory leave, and summarily dismissing her, invoking paragraph 9.4 of the Respondent's Guide Book. It was alleged that the Claimant had assaulted other Employees and used abusive language to the Managing Director.
 14. The Claimant states that summary dismissal was unfair and unlawful. The reasons were not valid. There was no letter to show cause and no disciplinary hearing. There was no notice of termination. The decision was extremely harsh, the Claimant having served without blemish for many years.
 15. To sanitize its wrongdoing, the Respondent paid a sum of Kshs. 599,306 to the Claimant, after her Advocates issued demand before instigation of the Claim.
 16. She prays for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. 1-month salary in lieu of notice at Kshs. 140,308.
 - c. Equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 180,308 x 12 = Kshs. 2,163,696.
 - d. Damages for trauma and making a false report to the Police at Kshs. 100,000.
Total... Kshs. 2,404,004.
 - e. Costs and interest.
 - f. Compensation for underpayment.
 17. The Respondent filed its Statement of Response on 28th February 2019. It is conceded that the Claimant was employed by the Respondent. She voluntarily resigned, and other pleadings about coercion and discrimination, are made in afterthought.
 18. There was no race discrimination. Her salary was frequently reviewed up. There were no threats made on the Claimant. NEMA officers made a routine inspection of the Respondent. No complaint was raised by NEMA on any lack of compliance by the Respondent.



19. NEMA visited on 11th October 2018. The Claimant had already resigned, on 18th July 2018. The visit was statutory, with no bearing on the Claimant's resignation. There were no accusations made by the Managing Director against the Claimant, with regard to NEMA visit.
20. On 12th October 2018, while the Claimant was serving her notice period, she created a scene at the Respondent, shouting and hurling insults at the Managing Director, in the presence of other Employees. This was after she was asked by the Respondent, why she reported to work late. She answered that she had other issues to attend to. She stormed out of the office, shouting at the Managing Director that, " I will sort you out. I am not done with you. I will show you what I can do!" She proceeded to the Operations Manager's office and told him, " your MD does not know what he is doing." She walked out only to return later in the company of two Police Officers, to intimidate the Managing Director. The Officers interrogated the Managing Director, did not record a statement from him and left, never to return.
21. The Managing Director later convened a meeting of top Managers, where it was resolved that the Claimant's conduct was not acceptable. The Claimant was on 13th October 2018, offered dues for the remainder of the notice period, ending 31st October 2018. She went to the Operations Manager, grabbed and took off with the terminal benefits cheque, while refusing to sign clearance forms. The Respondent therefore stopped payment, and reported theft of the cheque to the Police.
22. The Respondent states that it never summarily dismissed the Claimant. Compulsory leave was imposed on the Claimant, for the remainder of her notice period. It was to last 17 days, leading to the effective date of resignation, 31st October 2018. At no time did the Respondent summarily dismiss the Claimant. The entire Claim is founded on deceit and distortion.
23. The Claimant states that she was given a personal and unsecured loan of Kshs. 504,000 by the Managing Director. This is not the act of a racist Managing Director, but that of a caring and kind-hearted gentleman.
24. The Respondent urges the Court to dismiss the Claim, with costs.
25. The Claimant gave evidence on 28th July 2022, 5th October 2022 and 16th December 2022, when she rested her Claim. Managing Director Avnish Bhandari, gave evidence for the Respondent on 16th December 2022 and 26th September 2023, when the Respondent's case closed. Parties confirmed filing and exchange of their Closing Submissions, on 26th January 2024.
26. The Claimant restated the contents of her Statements of Claim and Witness, in her evidence-in-chief. She adopted her documents on record. She felt discriminated against. Unqualified Employees earned higher salaries. Her insurance limit was lowered to Kshs. 2 million, from Kshs. 8 million. She never had a salary raise, since 2013. Regional Managers in her category received over Kshs. 500,000. Her gross monthly salary was Kshs. 180, 803. Her duties included handling of NEMA. She received e-mail saying she was summarily dismissed for assaulting other Employees and insulting the Managing Director. She was sent on compulsory leave. The Managing Director imported a motorbike which arrived with a scratch. Repair cost USD 2,000. The Managing Director stated that the Claimant, would pay for the cost of repair, because she had failed to insure the motorbike. It was company policy not to insure its motorbikes. The Claimant felt discriminated. Employees of the same race as the Managing Director, earned higher salaries.
27. Cross-examined, the Claimant stated that she received annual salary increment at 10%. She agreed to the salary paid, when she was employed. She did not complain about discrimination directly, for fear of victimization.



28. In her resignation letter, she states that she had 7 beautiful years with the Respondent. She states that she had joyous experience and was leaving on a sad note. She was addressing herself to her colleagues, not the Respondent. She did not allude to racial discrimination in her letter. She asked the Managing Director for salary raise, but was instead given a personal loan.
29. She was familiar with grievance handling procedure, as the Human Resource Manager. She did not invoke this procedure on her discrimination complaint, because she was afraid. Her docket was responsible for ensuring compliance with statutory requirements. She still held that the Respondent's lack of compliance, would imperil her human resource management licence.
30. She did not invite NEMA and even if she did, it was within her mandate. She was advised by the Managing Director to continue reporting on time during the notice period, and wrote back 'noted,' upon this advice. She did not yell at the Managing Director and embarrass him, in the presence of colleagues. Police Officers came to keep peace at the workplace, not to threaten the Managing Director.
31. She did not pick her terminal benefits cheque, and refuse to clear. She undertook to clear, once the cheque cleared. She was sent on compulsory leave and summarily dismissed.
32. She was paid gratuity at Kshs. 599,306 after her Advocates issued demand letter. It was not a full payment. Insurance premium for the remainder of the unserved year was deducted. Peterson who was African, rose from a Warehouse Caretaker, to a Technical Manager. She could not confirm that another African, rose from Sales Assistant, to Country Sales Manager. She reiterated that there was racial discrimination, but did not know about the terms of service of Asian Employees, because she was not involved in their recruitment. She conceded that she received salary increment annually, but at a lower rate, than she merited. She was paid bonuses twice annually. She does not claim bonus discrimination.
33. Redirected, she told the Court that discrimination was on salary. She was summoned by the Managing Director, and accusations thrown at her. Procedure was flawed. She was not allowed to call a witness at the meeting called by the Managing Director, preceding dismissal. She refused to sign the clearance certificate, leading to cancellation of her cheque.
34. Managing Director Avnish Bhandari, relied on his Witness Statement and exhibited Documents [1-21], in his evidence-in-chief. The Respondent is an equal opportunity Employer. It does not discriminate on any ground.
35. There was no discrimination against the Claimant. She resigned, stating it was for personal reasons. Friction between the Parties was on the last 3 weeks leading to expiration of her notice of termination. She reported to work late daily during the period. She called Police Officers, and shouted at colleagues. She was not summarily dismissed. She was told to leave earlier, before the effective date of her notice, in order to protect her colleagues from her belligerency. She was to be paid her dues to the end of notice.
36. She called NEMA alleging that the Respondent sold expired food. The Respondent did not sell food, but only displayed food in its machines. The food was not for sale. Police Officers were brought in by the Claimant, disrupting work, and intimidating staff.
37. The Respondent employed on negotiated contracts, not on account of race. It had 37 Kenyans, and 1 Egyptian. The Managing Director was highest paid. The highest paid Managers were all Kenyans. The Claimant was the 6th highest paid Manager. There were Managers senior to her, who earned less than her. The size of the salary was determined by the length of service.



38. Wang'ombe started off as a Warehouse Worker, and rose to become a Regional Manager. Lynn started off as a Receptionist, and today serves as the Country Manager. Kilonzo was a Messenger, and now a Senior Technician. He has worked with the Respondent for 19 years. The Respondent did not treat any Employee discriminatively.
39. The Claimant received bonus every March and December. She received annual salary increments. At one time, her increment was at 17%.
40. Her resignation letter was peaceful and voluntary. She said she was grateful to the Respondent for assisting her personal development. She stated that she had acquired skills, important to her future career. She did not allude to any ill-treatment of discrimination.
41. She confided in the Managing Director that she was going through difficult personal challenges. The Managing Director had lunch with the Claimant at Sarit Centre. She confided that she was building, and she had run out of money. She asked the Managing Director for a personal loan, and he gave her Kshs. 504,000. She partly repaid the sum, with a balance of Kshs. 290,000, by the time she left. The Managing Director did not counterclaim this, because it was his personal debt. She made an out-of-court settlement proposal, which was for a higher figure, than claimed before the Court.
42. The Managing Director told the Court that the motorbike was imported for the Respondent, not for his personal use. It was damaged. It was not insured. The Respondent had to pay. The Claimant failed to advise the Respondent on import details.
43. The Claimant did not attend any disciplinary hearing in the company of a colleague. There were no charges communicated to her. Redirected, the Managing Director told the Court that she had already resigned, before termination. She was placed on compulsory leave for the period of notice. She was paid for the remainder of her notice period.
44. The issues are whether the Claimant left employment on resignation or summary dismissal; whether termination, if instigated by the Respondent, was unfair; whether she was discriminated against; and whether she merits the prayers sought.

The Court Finds:

45. The Claimant was employed by the Respondent, in the position of Human Resources and Logistics Administrator. This is not disputed by the Parties. The terms and conditions of her employment and the number of years served, are not contested. It is also common evidence that she tendered her resignation, through a notice addressed to the Managing Director, dated 18th July 2018.
46. She served the Respondent with notice of 3 ½ months' notice, which was to take effect on 31st October 2018.
47. She writes: -
"Please accept this letter as my formal resignation from employment, in the position of Human Resources & Logistics Administrator at Sandem Intercool [K] Limited.

I am hereby serving the company with three-and-a-half-month resignation notice, to enable smooth transition handover. My last day of work will therefore be 31st October 2018.

I wish to thank you for all the support that you gave me during the seven and a half years, which we worked together. I have learnt quality skills which will help me in my future career, and I am also grateful for the opportunity which I was given to grow with the Organization.



I do wish all the best and hope that we shall continue to interact in the near future. ‘‘

48. Resignation or summary dismissal? The Respondent accepted the resignation notice, through the e-mail of the Managing Director to the Claimant, dated 20th July 2018. He writes: -
- ‘‘ Sorry for the delay in acknowledging your below mail and resignation letter.
- This is to confirm acceptance of your decision and the 3.5 months’ notice period provided to clear and update all Employees’ records. As discussed, you can request Khalid & Co. to assist in reviewing the Employee records to confirm all is up to date if required.
- In the meantime, I will arrange to have your replacement start from 1st of 15th September, in order to ensure smooth transition and handover
- Kindly forward me the JD [Job description] for your position so I can share it with the recruitment agency
- It has been a pleasure to work and grow with you over the last 7 and a half years and I wish you success and happiness, as you progress in your career ‘‘
49. Up to this point, there was consensus and civility, in the process of resignation, initiated by the Claimant, and accepted by the Respondent.
50. Problems arose between the Parties in the notice period. The Respondent complained that the Claimant took the liberty to report for duty at her own time. She did not observe working hours. This prompted an e-mail written to her by the Managing Director, dated 12th October 2018. Bhandari writes: -
- ‘‘ I understand you have already resigned, and are serving your notice period. However, please ensure you keep office timings as you are still an Employee of this Organization, until your notice period is complete.’’
51. The effective date was slightly under 3 weeks at the time the Managing Director wrote this e-mail.
52. The Claimant did not deny that she reported to work late, attributing lateness to morning traffic jam.
53. The e-mail appears to have exacerbated the belated bad blood, between the Claimant and her Managing Director Bhandari.
54. She was alleged to have shouted at and insulted the Managing Director on 12th October 2018. She did so in the full glare of the other Employees. She went on to bring 2 Police Officers to the workplace, alleging that she did so, for maintenance of law and order. The Managing Director rightly felt that the Claimant called the Police Officers to intimidate him.
55. While there is suspicion on the Claimant’s engagement with NEMA officers on 11th October 2018, it is noted that the Respondent told the Court that NEMA was on routine inspection of the premises. Nothing much therefore turns on this evidence, but notably, the visit took place a day before the Police Officers were called in by the Claimant. The Claimant told the Court that when she brought Police Officers, they confirmed that there was expired food at the premises. Why would she be calling in Police Officers to confirm that there was expired food, while NEMA officers had been there the previous day? The Respondent sold refrigerators, and sodas in the refrigerators were not for sale, but solely for display. There was no reason for the Claimant to escalate the issue about expired food. She was aware that the sodas were for display, not for sale and consumption. Her motive in engaging the Police and interaction with NEMA, was suspicious, and came in close proximity with her insults to the Managing Director, a few days before her resignation notice, took effect.



56. She had shouted at the Managing Director saying, "I will sort you out! I am not done with you! I will show you what I can do!" Bringing of the Police Officers at the workplace appears to the Court, to have fallen within the Claimant's scheme of things. She was intimidating the Managing Director, or sorting him out, to borrow from her language.
57. The cancellation of her terminal benefits cheque, was done because she collected the cheque by force, and declined to sign clearance as had been agreed. There was nothing wrong in the Respondent reporting the incident to the same Police Station the Claimant had introduced to the Respondent. In the end the Claimant was paid a sum of Kshs. 599,306 in terminal benefits.
58. Encountered with this belligerency, the Respondent through its Managing Director, wrote the Claimant an e-mail dated 14th October 2018.
59. She was advised that her presence at the workplace, for the remainder of her notice period, was no longer tenable. The Managing Director states that the Claimant's behaviour, was stressful to him and other Employees. She was instructed to proceed on compulsory leave, and all her dues would be settled, as had been agreed when she resigned.
60. The Court does not think that the Respondent summarily dismissed her. The Respondent merely asked the Claimant to keep away for the remainder of the notice period. This was a period of 17 days. There was no letter of summary dismissal issued by the Respondent.
61. Termination was at the instance of the Claimant. She issued a notice of termination of 3 ½ months, which took effect on 31st October 2018.
62. She did not at any time withdraw her notice. The Respondent accepted her decision way back in July 2018. The Parties had exchanged their goodbyes. They thanked each other and were grateful for knowing each other, and working with each other, over the past 7 and a half years.
63. This respectful separation was tainted by the Claimant's misconduct while serving notice. The Respondent rightfully asked her to keep away from its workplace, but did not change the mode of separation.
64. The Court is satisfied that the Respondent did not summarily dismiss the Claimant; she voluntarily resigned.
65. Unfair termination? Having concluded that termination was at the instance of the Claimant, through resignation, it is not possible to make a finding that the Respondent unfairly dismissed her.
66. There was no action taken by the Respondent, other than instructing the Claimant to keep off the workplace, that would be read as a summary dismissal decision.
67. No useful purpose is therefore served, in exploring Pleadings and Evidence relating to substantive justification and fairness of procedure, regarding the Claimant's exit from the Respondent.
68. Discrimination. This was a serious allegation, which called for corresponding seriousness on the part of the Claimant, in presentation of her Pleadings and Evidence.
69. She alleged racial and pay discrimination. She did not place before the Court evidence of racial and pay discrimination. She did not establish direct or indirect discrimination at the workplace.
70. Discrimination at the workplace is prohibited under Section 5 of the [Employment Act](#), and Article 27 of [the Constitution](#) of Kenya.



71. An Employer discriminates against an Employee [including potential Employee], where the Employer applies to the Employee, a provision, criterion or practice which is discriminatory, in relation to a relevant protected characteristic of the Employee.
72. Discrimination is established, if there are facts which the Court could decide, in the absence of any other explanation, that an Employer contravened anti-discrimination laws. The subject of proof, in discrimination at the workplace was discussed in this Court's decisions *David Wanjau Muhoro v. Ol Pejeta Ranching Limited* [2014] e-KLR and *GMV v Bank of Africa Limited* [2013] e-KLR. The Employee must first, prove facts, which the Court could uphold as constituting discrimination, in the absence of an adequate explanation from the Employer. The Employer will be found to have committed, or is to be treated as having engaged in acts of discrimination, in the absence of an adequate explanation. The second stage comes into effect, if the Employee has proved those primary facts, requiring the Employer to show other legitimate purposes for its decision or actions. The Claimant at first would be required to show that pay discrimination indeed took place. The onus would be on the Respondent to show that pay inequality, was based on legitimate grounds, such as an Employee's length of service, rather than her race.
73. In UK Supreme Court decision, *Hewage v Grampian Health Board* [2012] 4 All ER 447, it was clarified that the two stages in proof of discrimination claims, are not to be understood as hearing of evidence and argument from the Parties in two stages. The Court will have heard all the evidence in a case, before it embarks on a two-stage analysis, in order to decide first, whether the burden of proof has moved to the Respondent and if so, whether the Respondent has discharged the burden of proof.
74. Having heard the totality of the Parties' evidence, the Court does not think that the Claimant established facts, which are sufficient to require the Court into going into stage two, by examining in detail, the explanation given by the Respondent.
75. The Claimant alleged that unqualified Employees earned more than she did. She did not supply the Court with details of her comparators on this. She did not bring the employment pay and race details of these unqualified Employees who earned more than her. Her academic and professional certificates were not exhibited, against those of her comparators. The allegation about qualifications were made in a vacuum. She referred to the lowering of her insurance cover, from Kshs. 8 million to Kshs. 2 million. She did not supply the Court with evidence showing at what rate, other Managers' insurance covers, were lowered. There was nothing placed before the Court, to show that adjusting of the insurance cover limits was discriminatively targeted at the Claimant, or that it was tied down to one's race.
76. She received salary raise annually at 10%, and on one occasion at 17%. She incorrectly told the Court that she never received a salary raise, from 2013. She made generalized statements about favourable treatment, accorded to the Managing Director's racial colleagues. There were no details supplied to the Court, about these colleagues, and their pay slips were not exhibited. The incident concerning the scratched motorbike, was somehow linked to racial discrimination by the Claimant. There was no evidence that the Managing Director demanded the Claimant meets the costs of repairing the motorbike, on account of her race. The Managing Director felt correctly or incorrectly, that the Claimant was the responsible officer, and failed to insure the imported motorbike, and therefore liable to pay for its repair.
77. The organogram exhibited by the Claimant as 'JWM1,' is not adequate evidence of discrimination, requiring that the Respondent gives evidence discounting the it. The document does not establish the race of the holders of various positions indicated on the organogram. The salaries, including that of the Managing Director, are inserted by hand, presumably by the Claimant. The organogram does not speak to other factors, significant in salary determination. There is no evidence of years worked, which



- would affect the level of monthly salaries. The organogram exhibited by the Claimant, is just a cold organizational structure, which does not disclose race or salary discrimination.
78. The Claimant did not establish facts, requiring the Court to look into the explanation by the Respondent. If this was necessary, it was explained by the Respondent, and the Court agrees, that the Respondent is an equal opportunity Employer. Its workforce is multi-racial and Employees from the Claimant's race, have risen from the bottom of the pyramid, to the top echelons.
79. The Claimant was well treated as borne out in her letter of resignation. Many Officers of African origins had ascended the top echelons of Management at the Respondent, from the very bottom of the organizational ranks. Race was not a bar. The Claimant was the 6th highest paid Employee at the Respondent. She was taken out on a lunch date at Sarit Centre by her Asian-born Managing Director Avnish Bhandari, and granted a personal loan of Kshs. 504,000. These acts of human-kindness, do not appear to the Court to be the acts of a racial bigot.
80. The Claimant does not appear to have treated her claim for discrimination with the seriousness it deserved.
81. There is indeed no specific prayer, declaratory or monetary, for discrimination at the workplace, in the Statement of Claim.
82. There was no discrimination against the Claimant. The claim that she was discriminated at the workplace is rejected.
83. Remedies. The Claimant was offered terminal benefits to the effective date of her resignation, 31st October 2018. She is not entitled to additional benefits.
84. She does not merit notice pay at Kshs. 140,308 as claimed. She does not merit compensation equivalent of 12 months' salary for unfair termination. Termination was initiated by the Claimant. There is no evidence to support the prayer for general damages for trauma and false report to the Police. There was justification in cancellation of the cheque drawn in favour of the Claimant and report of its forcible collection by the Claimant, to the Police. The forcible collection and banking, was akin to stealing, and report to the Police was not a false report, traumatizing to the Claimant. Eventually the Claimant was paid her terminal benefits at Kshs. 599,306. The prayer for damages for trauma and making false report to the Police, quantified at Kshs. 100,000, has no foundation and is declined.
85. Termination was at the Claimant's instance, and declaratory order sought, that termination was unfair and unlawful, has no merit and is declined.
86. Costs to the Respondent.
- In Sum, it is Ordered;
- a. The Claim is declined.
 - b. Costs to the Respondent.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

