



**Kamau v Del Monte Kenya Limited (Cause 1070 of 2018)
[2024] KEELRC 1985 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1985 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1070 OF 2018**

**L NDOLO, J
JULY 31, 2024**

BETWEEN

NANCY WANJIKU KAMAU CLAIMANT

AND

DEL MONTE KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant in this case, Nancy Wanjiku Kamau, was an employee of Del Monte Kenya Limited, employed in the position of Export Sales Manager. She brought this claim following the termination of her employment, on allegations of poor performance.
2. The claim is contained in a Memorandum of Claim dated 18th June 2018. The Respondent filed a Statement of Response dated 3rd August 2018. At the trial, the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Gerald Matoke. The parties further filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent in the position of Export Sales Manager, earning a monthly salary of Kshs 218,508. She claims to have served with diligence, dedication and loyalty.
4. The Claimant states that she fell ill in March 2017 upon which she took sick leave, with the knowledge of her superiors. The Claimant states that in October 2017, her line manager became cruel to her in regard to her illness. She accuses the line manager of harassment, mistreatment, intimidation and abuse intended to cause her to resign.
5. On 23rd May 2018, the Respondent terminated the Claimant's services on allegations of unsatisfactory performance.



6. The Claimant's case is that the termination of her employment was unjustifiable and unfair. She therefore claims the following:
 - a. A declaration that the termination of her employment was unlawful and unfair;
 - b. Compensation for unlawful and unfair termination;
 - c. Costs.

The Respondent's Case

7. In its Statement of Response dated 3rd August 2018, the Respondent admits having employed the Claimant but states that her gross monthly salary was Kshs 193,200.
8. The Respondent denies the Claimant's averment that she worked with diligence and loyalty. The Respondent further denies the allegations that the Claimant was harassed or mistreated by her supervisor on account of her illness.
9. The Respondent maintains that due process was followed in the termination of the Claimant's employment. The Respondent states that the termination was as a result of the Claimant's failure to achieve the regional export sales targets.
10. The Respondent states that the Claimant was put on a Performance Improvement Plan (PIP) on 29th December 2017 but she did not improve and was therefore issued with a notice to show cause on 3rd May 2018. The Claimant's employment was subsequently terminated on 24th May 2018.
11. According to the Respondent, the Claimant's dues were as follows:
 - a. Vehicle allowance arrears.....Kshs 260,000.00
 - b. Mileage claim.....4,060.00
 - c. Prorata leave.....153,722.80
 - d. Notice pay.....193,200.00
 - Total.....600,986.80
 - Less
 - a. C.U loan balance.....Kshs 375,772.00
 - b. Lumpsum tax.....182,081.09
 - c. AR deductions (electricity reserve).....15,000.00
 - Total.....(568,553.09)
 - Net pay.....42,133.71

Findings and Determination

12. 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

13. The termination of the Claimant's employment was communicated by letter dated 24th May 2018, stating as follows:

“Dear Nancy,

Sub: Termination Of Service

Reference is made to a show cause letter issued to you on 3rd May 2018 following a review of your Performance Improvement Plan (PIP) where Regional Export Sales has (sic) been declining as per sales targets agreed upon between you and your supervisor on 29th December 2017.

From your reply and explanations during a disciplinary hearing held on 11th May 2018, you were unable to provide sufficient reasons to absolve you from poor job performance.

As an Export Sales Manager, you are expected to deliver on sales targets based on the company business requirements which you did not as per records available.

Consequently, this is to inform you that you have been terminated from employment of this company effective 24th May, 2018 for failure to achieve sales targets.

Upon termination you will be entitled to the following less statutory deductions and liabilities owed.

1. Days worked up to 24th May 2018
2. 30 days' pay in lieu of notice
3. Pro rata leave due if any
4. Provident fund dues as per prevailing RBA Rules

Please note that it is a requirement of the company that an employee must clear before final dues are paid.

Yours faithfully,

Del Monte Kenya Limited

(signed)

Gerald N. Matoke

Human Resources Manager”

14. The reason for the termination of the Claimant's employment was stated as poor performance. In their written submissions, both parties proceeded as if this was a case of misconduct. Although the procedural fairness requirements set out in Section 41 of the *Employment Act* lump the termination grounds of misconduct, poor performance and physical incapacity, the actual roll out of antecedent processes vary materially depending on the ground of termination.



15. With regard to termination on account of poor performance, case law is fairly well developed. Early on in the case of *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd* (Cause No 273 of 2010) Rika J stated as follows:

“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.”
16. In the subsequent decision in *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR Mbaru J stated thus:

“...where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof.....to 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.”
17. Onyango J proceeded on a similar trajectory, in *Alois Makau Maluvu v Cititrust Kenya Limited & another* [2018] eKLR holding that:

“In cases of discipline on grounds of poor performance, all an employer has to prove is that the employee was aware of the applicable standards of performance and efforts were put in place to support the employee with time to allow for improvement as was stated in the case of *Fredrick Owegi v Cic Life Assurance And Jane Wairimu Machira* (supra).”
18. In the case now before me, the Claimant appeared to have performed well in the year 2016. However, in 2017 the Claimant’s performance dropped. She told the Court that she fell ill and was in and out of hospital throughout the period in question. There was documentary evidence to support the Claimant’s testimony in this regard.
19. In addition, the Claimant pointed to lack of facilitative support by the employer with respect to transport. Again, this was evidenced by the fact that at the time of termination, the Claimant was owed Kshs 260,000 in vehicle allowance arrears and Kshs 4,060 in mileage claim.

Further, the Claimant alleged an unfriendly business environment arising from the general elections and regulatory changes.
20. In assessing whether an employee has been availed adequate support to improve in performance, each case turns on its own facts. In this case, it is not in contest that the Claimant was unwell during the period when issues regarding her performance were raised. The Court was unable to understand why the Respondent would place an employee who was obviously struggling with her health on a PIP.
21. By nature and design, a PIP places an employee on notice that if their performance does not improve, their employment could well be on the line. In my view, an employee who is in and out of hospital, with multiple doctor’s appointments in between, cannot handle the pressure that comes with a PIP. What is more, there was only one review of the PIP, after which the Claimant was issued with a notice to show cause to which she was required to respond within 24 hours. This was soon followed by a disciplinary hearing which led to termination of employment.
22. Looking at the handling of the Claimant’s case in totality, it seems to me that the Respondent acted unreasonably in the circumstances. I therefore find and hold that the termination of the Claimant’s employment was substantively and procedurally unfair.



Remedies

23. Resulting from the foregoing, I award the Claimant six (6) months' salary in compensation for unlawful and unfair termination of employment. In making this award, I have considered the Claimant's length of service and the Respondent's failure to accord the Claimant the necessary support to improve on her performance.
24. Finally, I enter judgment in favour of the Claimant in the sum of Kshs 1,159,200 being 6 months' salary in compensation for unlawful and unfair termination of employment.
25. This amount will attract interest at court rates from the date of judgment until payment in full.
26. The Claimant will have the costs of the case.
27. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY JULY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Ombaso h/b for Mr. Wesonga for the Claimant

Mr. Uvyu for the Respondent

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