



Mbugua v Smart Applications International Limited (Employment and Labour Relations Cause 359 of 2019) [2024] KEELRC 2394 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2394 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 359 OF 2019
BOM MANANI, J
SEPTEMBER 30, 2024**

BETWEEN

DANIEL KANG'ETHE MBUGUA CLAIMANT

AND

SMART APPLICATIONS INTERNATIONAL LIMITED RESPONDENT

JUDGMENT

Introduction

1. The instant dispute challenges the legitimacy of the Respondent's decision to terminate the Claimant's contract of service. According to the Claimant, the decision was unjustified and as such unlawful.
2. On the other hand, the Respondent contends that the Claimant's interpersonal skills were wanting thus affecting productivity at the workplace. Consequently, his services had to be terminated.

Claimant's Case

3. The Claimant contends that the Respondent employed him as its Technology Director as from 23rd April 2018. He contends that prior to this, he was in the employment of Co-operative Bank of Kenya Ltd where the Respondent head-hunted him from.
4. The Claimant avers that following the Respondent's decision to hire his service, the two executed a contract of employment dated 23rd April 2018. He contends that the contract contained a probationary clause pursuant to which he was to serve on probation for a period of six months. He avers that this period was subject to extension at the discretion of the Respondent but in accordance with the applicable law.
5. The Claimant further contends that the contract entitled him to join the Respondent's pension scheme. He however says that this benefit was to be available to him only after he had successfully served the probationary term.



6. The Claimant contends that the Respondent's Employee Handbook provided that the job objectives for an employee were to be set and communicated to him (the employee) at the beginning of the year or upon one joining the Respondent as a new employee. He further contends that the Handbook provided that employees on probationary contracts were to be evaluated by their departmental heads during the final month of the probationary term.
7. The Claimant further avers that the Handbook specified that the evaluation process was to be two way taking on board the views of both the employee and his supervisor. As such, the employee was entitled to have his input in the process.
8. The Claimant also states that the Handbook required that an employee who did not meet the agreed performance targets was to be given an opportunity to improve. As such, the Respondent was required to place such employee on a Performance Improvement Plan during which he was to be assisted to improve.
9. The Claimant avers that upon signing the aforesaid employment contract, he begun discharging his mandate. He contends that he worked diligently with exceptional results.
10. Despite the foregoing, the Claimant contends that the Respondent did not provide him with a Job Description (JD) for his position. As such, he avers that his duties were not clearly defined. He contends that due to this lapse, he was forced to define the scope of his mandate by himself.
11. The Claimant further contends that during the period of his service, the Respondent's Managing Director seldom engaged him. As such, he worked with minimal supervision and guidance from him.
12. The Claimant avers that the Respondent did not inform him of the performance criteria which was to be applied in assessing his performance. And neither did it inform him about the performance targets which had been set for him.
13. The Claimant contends that on 30th October 2018, the Respondent issued him with a "Probation Extension Letter". He contends that the Respondent informed him that it had undertaken a 360 assessment of his performance during the probationary period and found him wanting in some respects. The letter indicated that he had scored 76% which was below the set pass mark of 85%.
14. The Claimant contends that the Respondent did not involve him in the evaluation of his performance contrary to the guidelines in its Handbook. He contends that he was not accorded an opportunity to sit with his supervisor to discuss his performance.
15. The Claimant further contends that the Respondent unilaterally extended his probationary term by another two months. He contends that the extended term was set to lapse at the close of December 2018.
16. He contends that although he was supposed to be placed on a management improvement program during the term of the extended probation, the Respondent maliciously failed to initiate this process. As such, he was not subjected to the weekly reviews that had been anticipated in the letter of 30th October 2018
17. He contends that at the end of the extended probationary term, the Respondent was expected to subject him to a secondary evaluation. However, it did not do so.
18. He contends that on 4th February 2019, the Respondent send him a letter asking him to show cause why his services should not be terminated for poor performance. He contends that the letter also notified him of the decision to send him on compulsory leave pending internal consideration of his matter.



19. The Claimant contends that the Respondent informed him that after undertaking a further 360 assessment of his performance, it had established that he still had not met its performance target. He had allegedly scored 41%.
20. The Claimant avers that once again, the Respondent excluded him from the evaluation process which yielded the purported score of 41%. He contends that he was not allowed to carry out a self-assessment contrary to the guidelines in the Handbook. The Claimant further contends that the evaluation covered the month of January 2019 which fell outside the extended probationary period.
21. The Claimant contends that the Respondent asked him to appear before its Disciplinary Panel on 20th February 2019. At the same time, it (the Respondent) required him to immediately clear with it. According to him, this development fortifies his belief that the Respondent had determined his fate and that the purported disciplinary process was a mere smokescreen to justify the decision to terminate his contract.
22. The Claimant disputes the Respondent's assertion that his performance during the probationary term was wanting. On the contrary, he believes that he performed exceptionally well over this period.
23. To support this belief, the Claimant argues that the Respondent asked him to represent it in an event in Dubai despite having sent him on compulsory leave. He contends that the Respondent would not have entrusted him with this assignment if it doubted his performance.
24. He also relies on an email by one of his supervisees in which the latter appeared to shower him with accolades for his superb performance. He contends that the employee would not have written such an email if his (the Claimant's) performance was poor as asserted by the Respondent.
25. The Claimant has also poked holes in the evaluation matrix which the Respondent relied on to evaluate its employees' performance at the time. He contends that the system was flawed and that the Respondent had owned up to this reality.
26. The Claimant contends that the Respondent subjected him to a sham disciplinary process during which its Managing Director assumed the roles of accuser, prosecutor and judge in violation of the dictates of natural justice. He contends that this flawed process was followed with the termination of his contract of service.
27. The Claimant avers that at the time that the Respondent terminated his employment, his contract had already been confirmed. He relies, inter alia, on his enrolment into the Respondent's pension scheme to anchor this belief. As such, he contends that the purported termination of his services for failure to meet the terms of the probationary contract was irregular and unlawful.

Respondent's Case

28. On its part, the Respondent denies that it headhunted the Claimant for appointment to the position of Director of Technology. The Respondent contends that it had offered the Claimant the position in 2016 after a competitive process. However, he allegedly declined the offer because he had purportedly been offered a better opportunity by Co-operative Bank of Kenya Ltd. The Respondent contends that owing to the Claimant's position, it proceeded to fill the vacancy with another applicant.
29. The Respondent contends that the position fell vacant once again in November 2017. Consequently, it (the Respondent) commenced the recruitment process in December 2017 in a bid to fill the vacancy.



30. The Respondent avers that when the Claimant learned of the vacancy, he applied for the position alongside other applicants. It contends that the Claimant was subsequently interviewed for and succeeded in being recruited to the position.
31. The Respondent's Managing Director contends that the Claimant shared with him his Curriculum Vitae (CV) the moment he (the Claimant) learned of the vacancy. In response, he (the Respondent's Managing Director) shared with him (the Claimant) the JD for the position.
32. The Respondent's Managing Director avers that after the recruitment exercise kicked off, the Claimant asked for the JD. In response, he (the Managing Director) informed him (the Claimant) that the JD for the position was the same one that he had shared with him earlier.
33. The Respondent contends that after the Claimant succeeded at the interview, he executed a contract of service which contained a probationary term for a period of six months. It (the Respondent) avers that it reserved the right to extend the probationary period.
34. The Respondent avers that after the Claimant was brought on board, he was taken through an induction process during which he was informed about the procedure for evaluation during the probationary period. It contends that the Claimant was briefed on what would go into the process.
35. The Respondent contends that two months into the Claimant's contract, he was able to prepare his work plan which was in consonance with his JD. According to the Respondent, the Claimant was able to execute this task because he was aware of his JD.
36. The Respondent's Managing Director states that although the Claimant was his supervisee, he (the Managing Director) was not required to micro manage him. He contends that the Claimant was required to execute his duties with minimal supervision.
37. As well, the Respondent contends that its management maintained an open door policy to enable its members of staff to consult on critical workplace issues as often as was necessary. It contends that the Claimant utilized this policy to regularly consult its Managing Director regarding his (the Claimant's) docket.
38. Besides, the Respondent contends that its management held weekly meetings with heads of departments, including the Claimant, during which the heads of departments received updates on management of their dockets. In the premises, the Respondent denies the Claimant's contention that he was left to his own devices whilst managing his docket.
39. The Respondent contends that when the Claimant's performance was reviewed during the initial probationary term, he scored below the pass mark of 85%. It contends that the Claimant was notified of these results by letter and informed of the decision to extend his probation by a further two months.
40. According to the Respondent, the Claimant accepted the decision to extend the probationary term. As a result, he continued to work under probation for the extended period.
41. The Respondent contends that during the Claimant's extended probationary period, its officers regularly engaged him regarding the areas for improvement. Similarly, it avers that all the assignments which its officers assigned the Claimant during this period were meant to assist him improve on his weak areas. As such, it disputes the Claimant's contention that he was not assisted to improve during this period.
42. The Respondent contends that after the second phase of the Claimant's probation, he was reviewed once more. However, his performance had dipped even further to 41%.



43. The Respondent contends that the Claimant had no challenge with his technical skills. However, his inter-personal skills were wanting. It contends that the Claimant was not able to gel with his supervisees thus impacting negatively on their performance.
44. The Respondent avers that when it became apparent that the Claimant was not able to improve on his inter-personal skills, it issued him with a notice to show cause. It contends that the Claimant responded to the show cause letter and was invited to a hearing in order to give him a chance to explain himself. The Respondent contends that it is only after this process that it terminated the Claimant's contract.
45. The Respondent contends that the Claimant was paid all his terminal dues. As such, his release from employment was fair, just and unbiased.

Issues for Determination

46. After evaluating the pleadings and evidence on record, I am of the view that the following are the primary issues for determination:-
 - a. Whether the Claimant's contract of service was unfairly terminated.
 - b. Whether the Claimant is entitled to the reliefs that he seeks through this action.

Analysis

47. Although the Claimant has expended considerable energy trying to persuade the court that he was headhunted by the Respondent, I do not think that much turns on this issue. Irrespective of how the parties entered into the employment relation, the fact of the matter is that the two entered into an ordinary contract of service.
48. Once they executed the contract, the two became subject to the statutory framework that governs employment relations as read with the terms of their contract. As such, the Claimant became amenable to the performance evaluation and disciplinary procedures which were in force at the Respondent's workplace subject to the applicable law.
49. Consequently and in my view, whether the Claimant was headhunted by the Respondent is of little value to the contest. What is critical is whether the contract between the parties was managed and subsequently terminated in accordance with the terms of their engagement as read with the applicable law.
50. The parties are divided on whether the Claimant was issued with a JD. Whilst one party contends that the JD was not issued, the other one maintains that it was issued.
51. According to the Claimant, the Respondent did not share the JD with him either at the time of his engagement or at all. The Claimant contends that the failure by the Respondent to supply him with this instrument contravened its Employee Handbook which obligates it to inform its employees of their job objectives at the commencement of the year for continuing employees and on engagement for new employees. As such, he avers that he was forced to hypothesize his tasks at the workplace with minimal input from his supervisor.
52. On the other hand, the Respondent contends that contrary to the Claimant's assertions, he was supplied with a JD for the position of Director of Technology before he joined the institution. The Respondent contends that the JD was shared with the Claimant after he forwarded his CV to its Managing Director. To support this contention, the Respondent relies on two pieces of evidence on the subject.



53. First, it relies on short text messages which were exchanged between its Managing Director and the Claimant just before the latter was hired. In the texts, the Claimant is indicated as asking for the JD. In response, the Respondent's Managing Director is indicated as informing him that the JD which had been shared with him earlier remained the same.
54. The Respondent also relies on the work plan which the Claimant developed shortly after he was engaged. The work plan indicates what the Claimant was to execute.
55. According to the Respondent, the Claimant could not have developed the work plan if he was not aware of his JD since it is the JD that informs the content of a work plan. As such, it (the Respondent) argues that the fact that the Claimant was able to develop the work plan is testimony of the fact that he had been furnished with and was aware of his JD.
56. The evidence on record suggests that the Claimant was given the JD for the position he was offered some time before he attended the interview in respect of it. Whilst it is not clear when exactly this was done, the text messages between the parties suggest that the JD was shared between 28th February 2018 and 9th March 2018.
57. The aforesaid texts read as follows:-
- “28th February 2018
- Dan Mbugua: Hi Harrison, good morning. I hope you got the CV I sent yesterday. Kindly share the job profile for the position.
- 9th March 2018
- Respondent's Managing Director: Hallo Dan.
- The interview is on at 10 am on the first floor of International House. See you at 9.40 am. The board decided that the JD should stand as is. All the best.
- Dan Mbugua: Thanks. I'll be there, God willing.”
58. The foregoing leaves no doubt in my mind that the Respondent shared with the Claimant the JD for the position in question at some point before the latter was recruited into it (the position). As indicated earlier, sharing of the JD happened between 28th February 2018 and 9th March 2018 after the Claimant forwarded a copy of his CV to the Respondent's Managing Director.
59. It would appear that after the JD was forwarded to the Claimant, he had discussions with the Respondent's management regarding its content. This explains why the Respondent's Managing Director indicated to him (the Claimant) by text that the JD stood as is.
60. The short text messages between the parties do not suggest that the Claimant pursued the issue of the JD further after the Respondent's Managing Director informed him on 9th March 2018 that the Respondent's board had opted to keep it as it was. One would have expected the Claimant to have informed the Respondent's Managing Director of the fact that he did not have the JD when the latter suggested otherwise through the aforesaid text. However, he did not. As such, it is apparent to me that contrary to what the Claimant now wishes to suggest, he was furnished with the JD before he was appointed into the position of Director of Technology for the Respondent.
61. Importantly, the record shows that the Claimant was able to prepare his work plan shortly after he was appointed by the Respondent. The work plan provided the road map of what he was to deliver on his new assignment.



62. It is implausible that an employee would set out to accomplish what he has no idea about. As such, it is improbable that the Claimant would have prepared his work plan without knowledge of his precise mandate at the Respondent institution. I therefore agree with the Respondent that the fact that the Claimant was able to develop the work plan demonstrates on a balance of probabilities that he was aware of his JD.
63. In effect and based on the evidence on record, I believe the Respondent's contention that the Claimant was furnished with his JD before he assumed the position of Director of Technology within its (the Respondent's) establishment. The ramifications of this finding will become clearer later in this decision.
64. The Claimant accuses the Respondent of having violated the guidelines on employee performance evaluation in its Employee Handbook when it evaluated his performance. He contends that the Handbook requires the evaluation process to be undertaken by an employee's immediate supervisor. He further contends that the regulations require that the employee be involved in the process.
65. It is his case that contrary to the foregoing, the Respondent failed to involve him in the evaluation. Further he contends that the Respondent allowed other employees, including his juniors, to undertake the exercise contrary to the guidelines which place this task on his supervisor.
66. The Claimant further contends that after the unilateral process, the Respondent notified him that he had scored 76% which was allegedly below the 85% pass mark. Yet, it (the Respondent) had not informed him about this pass mark at the commencement of his employment.
67. In response to these contentions, the Respondent called two witnesses: its Managing Director; and its Human Resource Officer. The Managing Director doubled up as the Claimant's supervisor.
68. The Managing Director avers that contrary to the Claimant's assertions, the latter was taken through an induction process during which the Respondent's policies and regulations were explained to him. He asserts that the Claimant was taken through the performance evaluation matrix and informed of its requirements. This evidence was supported by the evidence of the Respondent's Human Resource Officer.
69. It is apparent that the Respondent did not maintain a detailed record of its performance evaluation matrix. It is also apparent that the Respondent did not maintain a detailed record of the induction notes to demonstrate that the Claimant was taken through the evaluation process.
70. However, the Respondent has called two witnesses who have spoken to the matter in detail. The two maintain that they were involved in the induction process during which the Claimant was taken through the Respondent's performance evaluation procedures. They maintain that the evaluation procedure discussed with the Claimant during the induction provides for the grading system which sets a pass mark of 85%.
71. The two witnesses remained consistent on this issue. They corroborated each other's evidence on the subject rendering their testimony on the issue not only credible but also strong.
72. As noted earlier, the Claimant was less than candid on the issue of the JD. As the record demonstrates, he flatly denied that the Respondent shared with him this instrument notwithstanding that the record demonstrates the contrary.
73. The Claimant's insistence that the Respondent did not provide him with the JD for the position of Director of Technology in the face of evidence suggesting the contrary dents his evidence in the cause. It renders him an incredible witness.



74. Having regard to the foregoing, I am disinclined to believe the Claimant's testimony that the Respondent did not brief him on the performance evaluation matrix during the probationary period. Instead, I am inclined to believe the Respondent's evidence that the Claimant was briefed about this process during his induction.
75. In any event, the record demonstrates that the Claimant acquiesced to the impugned evaluation when he accepted to have his probationary term extended. It is noteworthy that the basis for extension of the probation was that he had scored below the alleged pass mark of 85%. Thus, when he agreed to the extension on this basis, he validated it (the premise).
76. Evidence of the Claimant's acquiescence to the extension lies in the fact that despite his contention that he did not consent to it, he continued to work for the extended probationary term of two months. As such and in view of the aforesaid acquiescence, the Claimant lost the opportunity and right to challenge the legitimacy of the first evaluation.
77. The Claimant has also challenged the second evaluation on the ground that it was undertaken after the close of the probationary period. However, the fact that the Claimant had served beyond the probationary term does not mean that the Respondent lost the right to evaluate his performance at any other stage of their engagement.
78. Employee performance evaluation is a continuous process. It affects both those on probation and those whose contracts have been confirmed.
79. The evidence on record shows that the Claimant's second evaluation happened after his extended probationary term had closed. This means that he was evaluated after his contract of service had been confirmed by operation of law. As such, when his second evaluation was carried out he was entitled to the protections which are offered by the Employment Act. Put differently, the Respondent was no longer entitled to release the Claimant without justification as would be the case for an employee serving on a probationary contract. The Respondent was now obligated to demonstrate the presence of a valid reason to release the Claimant and to further process his release in accordance with the dictates of fair procedure.
80. The evidence on record shows that the Respondent terminated the Claimant's employment because of performance concerns. As the three witnesses called by the Respondent stated, the Claimant's challenge was not about his competencies. Rather, it was about his soft skills.
81. The three witnesses stated that the Claimant was not able to gel with the Respondent's members of staff who were working under him thus affecting their productivity. I appreciate that the Claimant holds a view that is contrary to that expressed by the Respondent on the subject. However, I note that the Respondent called three witnesses to corroborate its version of the case as opposed to the Claimant who appeared as the sole witness in support of his case.
82. Although the Claimant produced an email from another employee (Kenneth Odhiambo) which painted him in good picture, this individual did not attend court to testify. As such, he was not cross examined on the contents of the email to determine the circumstances under which he wrote it.
83. Importantly, the employee who wrote the email is shown as having attended before the Disciplinary Panel to testify on behalf of the Claimant. Although he stated that the Claimant was a results oriented person, he faulted his (the Claimant's) approach which he indicated "brought in friction in the team."
84. As a matter of fact, the record shows that although all the witnesses that the Claimant called in his defence during the disciplinary hearing viewed him as an agent for change which in their view was a good thing, they nevertheless were of the view that he needed to work on his people skills and develop a



- sense of teamwork. This testimony by the Claimant's own witnesses before the disciplinary committee affirms the Respondent's concerns that he lacked people skills.
85. Having regard to the foregoing and in view of the doubts that I have expressed regarding the credibility of the Claimant's testimony on certain aspects of the case, I am inclined to accept the Respondent's evidence that he (the Claimant) had a challenge with his soft skills. As such, I find that the Respondent had valid reason to consider terminating his employment.
 86. It is perhaps essential to mention at this stage that section 43 of the *Employment Act*, does not require the employer to establish his case against an employee beyond reasonable doubt before he can terminate the employee's contract of service. It is sufficient if he (the employer) discharges this burden on a balance of probabilities. Having regard to the evidence on record, I am satisfied that the Respondent has met this threshold.
 87. The Respondent has been able to demonstrate that it genuinely believed that the Claimant had a challenge with his soft skills. It has provided evidence tending to demonstrate that the Claimant's workmates rated him at 41% because of this problem.
 88. Importantly, the fact that the Claimant's colleagues had reservations about his soft skills was alluded to by the Claimant's witnesses during the disciplinary hearing. In my view, this provided the Respondent with grounds to genuinely believe that the Claimant's soft skills were problematic.
 89. The foregoing satisfies the threshold that section 43 of the *Employment Act* sets. Under the section, the employer is entitled to terminate an employee's contract of service if he has genuine grounds to believe that a valid reason to terminate the contract has arisen. The court is not entitled to interfere with the employer's decision so long as it fits in the band of "reasonable responses" that any other employer would probably have made (see *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR).
 90. The Claimant has taken issue with the fact that the Respondent subjected him to a 360 performance evaluation process which is not provided for either in his contract of service or the Respondent's Employee Handbook. As such, he contends that the evaluation was a nullity.
 91. I do not think that much turns on this contention. In my view, the Respondent's description of the evaluation process as a 360 evaluation was a matter of semantics. What I understand the Respondent to have intended to communicate by this phrase is that it had subjected the Claimant to an all-round review. The fact that the Claimant was subjected to a wholesome review cannot be said to have contravened the requirement that he be subjected to performance review.
 92. Since the decision to terminate the Claimant's contract was made outside the probationary period, it is imperative to confirm whether the Respondent accorded him due process as required under section 41 of the *Employment Act*. The record shows that when the Respondent reached the conclusion that the Claimant had a challenge with his soft skills following the first evaluation, it extended his probationary contract in order to provide him a window for improvement. Although the Claimant contends that he was not assisted to improve during this period, his supervisor avers that he offered him this assistance but he did not improve.
 93. The record shows that after the Respondent formed the view that the Claimant was not improving in his soft skills, it issued him with a notice to show cause. This was followed with a hearing during which the Claimant was permitted to present his case.



94. In my view, the Respondent substantially complied with the requirements of statute as regards release of an employee who was no longer on probation from employment. As such, I arrive at the conclusion that the Claimant was accorded fair procedure in the process that resulted in his release.

Determination

95. Having regard to the foregoing, I find that the Claimant’s case against the Respondent is unmerited.

96. As such, the suit is dismissed.

97. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF SEPTEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

..... for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

