



**Boke v Neatworld Services (Cause E984 of 2021)  
[2024] KEELRC 2632 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2632 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E984 OF 2021  
SC RUTTO, J  
OCTOBER 25, 2024**

**BETWEEN**

**SANDRA BOKE ..... CLAIMANT**

**AND**

**NEATWORLD SERVICES ..... RESPONDENT**

**JUDGMENT**

1. The Claimant avers that on or about the month of December 2020, she entered into a contract of employment with the Respondent. She was to work on the Respondent’s recycling plant at Limuru in the position of Recycling Manager. That the Respondent was yet to set up its plant which was under construction hence she undertook site construction supervision work.
2. She avers that the company officially began its core work of handling waste on or about 7<sup>th</sup> June 2021. According to the Claimant, she worked diligently and effectively for the Respondent and the company was growing well. Seemingly, the employment relationship was short-lived as the Claimant avers that she began to notice hostility from the Respondent’s General Manager and other top management persons sometimes in September 2021. That she was subsequently issued with a notice to show cause and thereafter, was dismissed from employment.
3. On account of the foregoing, the Claimant seeks against the Respondent, the sum of Kshs 764,707.51 being unpaid salary, notice pay, accrued overtime, unpaid leave and payment of salary for the remainder of her contract period.
4. The Respondent countered the Claim through its Statement of Defence dated 15<sup>th</sup> July 2022, in which it avers that during the Claimant’s employment at the waste recycling plant, she was poor in planning and directing the activities of the plant. To this end, the Respondent denied the Claimant’s averments that she was a diligent employee.



5. According to the Respondent, it followed due process in terminating the Claimant's employment contract. The Respondent further avers that the grounds for termination of the Claimant's employment were justified. Consequently, the Respondent has asked the Court to dismiss the suit with costs save for the undisputed amounts in the sum of Kshs 42,974.51.
6. The matter proceeded for hearing on 25<sup>th</sup> April 2024 and 4<sup>th</sup> July 2024 during which both sides called oral evidence in support of their respective cases.

### **Claimant's Case**

7. The Claimant testified in support of her case and at the outset, sought to adopt her witness statement and the list and bundle of documents filed alongside her Memorandum of Claim to constitute her evidence in chief.
8. It was the Claimant's evidence that she worked diligently to set up the Respondent company together with other employees and its directors. This took around five to six months.
9. That the company was growing steadily considering the pandemic and the prevailing poor economic atmosphere.
10. The Claimant averred that she was totally shocked when she was issued with a show cause letter. That the allegations were based on poor profits that were being recorded yet the biodigester was always broken. Further, it was alleged that she was not able to bring in new business partners.
11. On 12<sup>th</sup> October 2021, she was dismissed from the company and never got her final dues. The Claimant contended that she was requested to sign her termination letter so as to get her final dues. She declined.
12. Upon her advocate's intervention, her salary for September and one month salary in lieu of notice was deposited into her account. She contended that this was an incorrect figure.

### **Respondent's Case**

13. The Respondent called oral evidence through two witnesses being Mr. Mwangi Ruoho and Ms. Faith Syokau. Mr. Ruoho was the first to go. He testified as RW1 and started by identifying himself as a Director of the Respondent. RW1 proceeded to adopt his witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
14. It was his evidence that the Respondent hired the Claimant on the strength of her expertise in waste management and recycling. That on the basis of her curriculum vitae that she was a Project Manager with extensive experience in developing project plans, project implementation, supervision and project commissioning, they decided to hire her before the plant began full operations. This was done so that she could advise the Respondent on the positioning of structures to ensure a good flow of the recycling plant. Her advisory role on the positioning of the structures as construction was ongoing, was vital.
15. They expected that they would not make much profit when they began, but were hopeful that it would improve in the subsequent months. The stakes were high because they had injected capital into the investment and for six months, they had been paying the Claimant for supervision work at the site.
16. RW1 further stated that when operations began in the month of June 2021, they realized after observing the Claimant's output that she was not meeting the Respondent's standards and was not meeting expectations.
17. They decided to observe the Claimant's output in the subsequent months. In the month of July 2021, the work intensified and staff were leaving the Limuru plant later than usual.



18. That he (RW1) would go to the site every week to supervise the ongoing work and he would find so many recyclable materials in the already sorted waste that was ready for disposal. That the recyclable materials if disposed would mean that the Respondent would not profit from the sale of those proceeds. He would therefore instruct staff to sort out the waste again. According to RW1, it was clear the Claimant was not keen on her role of supervision.
19. RW1 further stated that from time to time, he would meet sorters on site as late as 6:30 pm and the volume of work was not worth all the hours spent at the site.
20. That additionally, the truck team was under immense pressure since they began their work as early as 1:00 am. They would get to the sorting station and wait for hours for the sorting of the previous day's waste to be completed before they would begin offloading the truck. This would mean delays in their next job.
21. It was RW1's further testimony that the Claimant lacked proper planning and organisation at the site and this had a ripple effect on all the functions at the site.
22. That he (RW1) delegated the function of the disciplinary procedure to his co-director Faith Syokau (RW2) who saw it through to the end.
23. In RW1's view, the Claimant's termination was fair and the grounds were justifiable.
24. Ms. Faith Syokau who testified as RW2, identified herself as a Director of the Respondent company. Similarly, she adopted her witness statement to constitute her evidence in chief.
25. It is worth noting that the evidence of RW2 was by and large similar to that of RW1.
26. RW2 stated that in the month of August 2021 for a period of one week, she was stationed at the site to oversee the operations. Within that period, she noticed that the Claimant was not efficient in planning and organizing the team, thus they were always having backlogs to clear and left the site late.
27. She (RW2) came up with new procedures and in the one week she was stationed there, the unloading, sorting and separation of the organic waste from the recyclables was done in record time.
28. She tasked the Claimant with a few key roles as enumerated in her job description which included, driving the financial performance of the business. However, she realized that her negotiation skills were not up to par. Each time the Claimant negotiated a particular price for recycled goods, she would go back to those clients to renegotiate better terms.
29. She also tasked the Claimant to conduct a market survey to address the waste recycling needs of the companies within the environs. In addition to this, she requested that she (Claimant) conducts a market survey to establish how much waste recycling plants were buying used materials in order to gain a competitive advantage, and finally, to research how garden waste can be converted to organic fertilizer so as to increase revenues. The Claimant did not address any of these instructions and when asked the reason why, she indicated that she did not have the time to so do.
30. That in the month of September 2021, there were complaints at the site, she again went to the site and discovered that the Bio-digester machine had broken down for ten (10) days hence the backlog. When it was fixed, she ensured that the site was up and running, but the company still could not meet its expenses.
31. In the month of October, the Respondent issued the Claimant with a Notice to Show Cause. She responded and they went ahead to have a hearing.



32. Upon satisfactorily establishing that the Claimant was poor at planning and directing the activities of the plant; did not understand or drive the financial performance of the business; and did not seek out to develop new opportunities for increased business as was elaborated in her employment contract and job description, they proceeded to issue her with a termination letter. According to RW2, the Claimant declined to acknowledge receipt.
33. That on the material day, the Claimant was requested to collect her dues but there was an error on the face of the cheque. She was therefore requested to collect the cheque when all the signatories would be available to execute it. On the 12<sup>th</sup> of October 2021, the Claimant sent a demand letter from her advocates. Accordingly, the Respondent deposited the monies to her bank account being one month pay and one month in lieu of notice.
34. In RW2's view, the termination of the Claimant was fair and the grounds were justifiable.
35. The Respondent only assents to the accumulated leave days of (11.5) days calculated at Kshs. 29,047.51 and accrued overtime (33hrs 48min) calculated at Kshs. 416 per hour (Kshs.13,927).

### **Submissions**

36. The Claimant submitted that the reasons for her termination were invalid and were never proved in Court during the hearing nor in the Respondent's pleadings.
37. On the other hand, the Respondent did not file written submissions despite being granted an extension to do so on 26<sup>th</sup> July 2024.

### **Analysis and Determination**

38. Flowing from the pleadings, the evidence on record as well as the Claimant's submissions, it is clear that the Court is being called to resolve the following questions: -
  - i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
  - ii. Whether the Claimant was afforded procedural fairness prior to termination of her employment;
  - iii. Is the Claimant entitled to the reliefs sought?

### **Justifiable reason?**

39. From the record, the Claimant was terminated on grounds related to her performance. This is discernible from her letter of termination dated 8<sup>th</sup> October 2021 which reads in part:

#### **“RE” Termination Of Employment Contract**

After great consideration and lengthy discussions, the company hereby terminates your contract of employment effective on this date 8<sup>th</sup> October 2021...It was established during the hearing process that you willfully neglected to perform work and carelessly and improperly performed your roles which it was your duty to perform including but not limited to;

1. Planning and directing the activities of the plant and ensuring its successful operation;



2. Understanding and driving the financial performance of the business;
3. Identifying market opportunities for the company in terms of off-takers of the sorted waste material;
4. Seeking out and developing new opportunities for increased business;
5. Advising the Directors on the best practices in the industry;
6. Controlling costs within budgetary limits to achieve profitability.

These roles had been clearly indicated in your job description which you signed upon joining the organization.

Further, you knowingly failed to obey a lawful and proper command which it was within scope to obey by failing to aggressively look for new market opportunities.”

40. Pursuant to Section 43(1) of the *Employment Act* (Act) an employer is required to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. In addition, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee’s conduct, capacity or compatibility; or based on the operational requirements of the employer.
41. As stated herein, the Claimant’s termination from employment was on grounds related to her performance. In the letter of termination, the Respondent enumerated the areas they deemed the Claimant had failed to perform satisfactorily. These included; Understanding and driving the financial performance of the business; Identifying market opportunities for the company in terms of off-takers of the sorted waste material; Seeking out and developing new opportunities for increased business; and Controlling costs within budgetary limits to achieve profitability.
42. Looking at the areas the Claimant was alleged to have underperformed, it is evident that they ought to have been reduced into measurable targets which were to be assessed periodically. Indeed, the Claimant needed to know what her targets were, her key performance indicators, how her performance against the set targets would be measured and within what period. In this case, the Claimant’s specific targets and key performance indicators are conspicuously missing from the record.
43. For instance, the Claimant was alleged to have failed to drive the financial performance of the business and to seek out and develop new opportunities. The question is, what were her financial targets and over what period of time? Further, what was the volume of business she was to bring in and over what period of time?
44. In this case, the Respondent failed to indicate let alone suggest the Claimant’s targets, her key performance indicators, how her performance was assessed, hence the decision that she had failed to perform her duties as expected.
45. Further to the foregoing, the Respondent did not prove that it had put in place measures to evaluate the Claimant’s performance against any set targets. Most of all, there was no report or such other document constituting the Claimant’s overall performance evaluation during whatever period.
46. Indeed, this leads me to question how the Respondent was in a position to determine that the Claimant had not performed her duties as expected without any specific targets in place, key performance indicators, measures to assess her performance and evaluation of her overall performance against such targets.



47. On this score, I will follow the determination by the Court of Appeal in the case of National Bank of Kenya vs Samuel Nguru Mutonya [2019] eKLR, where the Learned Judges reckoned thus:

“The reason advanced by the Bank for terminating the respondent’s employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010*; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;

- a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act, 2007*. The employer must 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.
- b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

...We have considered the said reasoning in light of what we have set out above as the correct procedure for terminating an employee’s contract as restated by the Court in the Janet Nyandiko case (supra) and the observation of the ELRC in the Jane Samba Mukala case (supra). We find no basis for faulting the Judge’s finding that an appraisal ought to have been conducted on the respondent’s work performance in 2014 to confirm whether the respondent had improved on his 2013 performance rating before termination of his employment and that in the absence of such proof, termination of the respondent’s employment with the Bank was unfair.”

48. I entirely agree with the position taken by the Court of Appeal and find that for the Respondent to conclude that the Claimant had not performed her duties as expected, it needed to have put in place measures to assess her performance. This included but not limited to target setting and providing the manner of assessment of her performance against such targets and key performance indicators.

49. As this was not evident in this case, it follows that the decision by the Respondent to the effect that the Claimant had not performed her work as expected of her was not arrived at based on an objective assessment.

50. It is also notable that the Claimant was alleged to have failed in planning and directing the activities of the plant and ensuring its successful operation. Evidently, this issue is related to the Claimant’s quality of work. Having asserted that the Claimant was poor in planning and directing the activities of the



plant, it was reasonably expected that the Respondent would adduce evidence to prove as much. In this case, the Respondent did not do so. Besides the oral testimony of RW1 and RW2, the Respondent did not present any evidence in whatever form or manner to prove that the Claimant had failed in planning and directing the activities of the plant and ensuring its successful operation.

51. Revisiting the provisions of Sections 43(1) and 45 (2) (a) and (b) of the Act, the Respondent being the employer, had the onus to prove the reasons for the Claimant's termination from employment and as it has failed to do so, it goes without saying that her termination was unfair. To this end, her termination was not substantively justified.

### **Fair process?**

52. Pursuant to Section 45 (2) (c) of the Act, an employer is required to prove that it terminated an employee's employment in accordance with a fair procedure.
53. The specific requirements of a fair process are to be found under Section 41(1) of the Act which is couched 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 this explanation.
54. From the record, the Claimant was issued with a Notice to Show Cause dated 28<sup>th</sup> September 2021, highlighting the allegations against her. She was informed that for four (4) months, she had not fulfilled her end of the bargain and failed to meet expectations in her capacity as manager. To this end, the Claimant was asked to tender her response by 30<sup>th</sup> September 2021.
55. The Claimant tendered her response to the Notice to Show Cause and through a letter dated 1<sup>st</sup> October 2021, she was invited for a disciplinary hearing slated for 4<sup>th</sup> October 2021.
56. The record bears that the Claimant appeared for the disciplinary hearing and from the attendant minutes, she was given an opportunity to articulate her case.
57. In light of the foregoing, it is this Court's view that the Respondent fulfilled the spirit of Section 41(1) of the Act in that the Claimant was notified of the allegations she was to face at the disciplinary hearing and was afforded an opportunity to appear in person and render her explanation to the said allegations.
58. To this end, the Respondent cannot be faulted as it complied with the basic requirements of a fair hearing as stipulated under Section 41(1) of the Act.
59. All in all, despite the Respondent complying with the requirements of a fair process, it has failed to prove that it was justified in terminating the Claimant's employment on the grounds advanced hence I cannot help but find that the termination was unfair.
60. That said, I now turn to consider the reliefs available to the Claimant.

### **Reliefs?**

61. As the Court has found that the Claimant's termination was substantively unjustified, hence unfair, she is awarded compensatory damages equivalent to three (3) months of her gross salary. This award has considered the length of the employment relationship which I note was considerably short, as well as the circumstances attendant to the Claimant's termination from employment.



62. From the record, the Claimant has admitted that the Respondent deposited into her bank account, one month's salary in lieu of notice and her salary for the month of September 2021. To this end, the said claims do not lie.
63. As the Respondent conceded to the Claimant's claim for overtime and leave pay, the same is awarded in the sum of Kshs 42,974.51, there being no evidence on record to confirm that she is entitled to more than the sum admitted by the Respondent.

### Orders

64. It is against this background, that I enter Judgment in favour of the Claimant against the Respondent and she is awarded: -
- a. Compensatory damages in the sum of Kshs 225,000.00 being equivalent to three (3) months of her gross salary.
  - b. Unpaid leave in the sum of Kshs 29,047.51.
  - c. Accrued overtime pay being Kshs 13,927.00.
  - d. The total award is Kshs 267,974.51.
  - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
  - f. The Claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Mr. Kibe

For the Respondent Ms. Muchoki

Court Assistant Millicent Kibet

### ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

