



**Bhurji v Express Kenya Limited (Cause E426 of 2022)
[2024] KEELRC 13404 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13404 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E426 OF 2022
DKN MARETE, J
NOVEMBER 27, 2024**

BETWEEN

BALDEV BHURJI CLAIMANT

AND

EXPRESS KENYA LIMITED RESPONDENT

JUDGMENT

1. This matter came to court vide a Statement of claim dated 20th June, 2022. It does not disclose any issue in dispute and its face.
2. The Respondent in a Respondent's Statement of Reply dated 14th July, 2022 denies the claim and prays that the same be dismissed with costs.
3. The Claimant in a Reply to Respondent's Reply to the Respondent's Statement of Response dated 11th October, 2023 reiterates his case and rubbishes the response as a nonstarter.
4. The Claimant's case is that by an employment contract dated 13th August, 2009 he was engaged by the Respondent to serve as a Workshop Manager in the workshop department with effect from 15th August, 2009. He was placed on four months' probation and confirmed on employment by a letter dated 25th February, 2010. This was to be effective on 1st March, 2010.
5. The Claimant's further case is that he was entitled to a basic pay of Kshs.120,000.00 and a house allowance of Kshs.60,000.00 all totalling to a consolidated sum of Kshs.180,000.00.
6. The Claimant's other case was that he served dedicatedly until 31st July, 2018 when he was issued with a redundancy notice of the same date. This redundancy was to take effect on 31st October, 2018 and a consequence of the Respondent's restructuring programme.
7. The Claimant's further case is that an employment contract letter dated 1st November, 2018, he was engaged to serve as the Respondent's Yard Manager with effect from 1st November, 2018. This was



at a monthly basic pay of Kshs.115,493.00 and housing allowance of Kshs.20,382.00 all totalling to Kshs.135,875.00 and a net pay of Kshs.100,000.00.

8. The Claimant continued to work diligently for the Respondent until March 2020 when the Respondent Company issued a letter dated 18th March, 2020 in which the CEO unilaterally resolved to vary the claimant's terms of employment. The CEO resolved that monthly pay salaries would only be for the days worked. The days not worked were treated as unpaid leave. The Claimant was never consulted by the Respondent before variation of the employment terms. It is his case that he was forced to sign the variation notice dated 18th March, 2020.
9. The Claimant's further case is that by a show cause notice dated 13th March, 2021, he was issued with a show cause letter on grounds of unsatisfactory performance on tasks given. This letter bore the same dates and was received on 31st May, 2021.
10. The show cause notice alleged poor performance on his part. He was asked to respond as soon as possible on the uncompleted tasks given and also explain why he overspent funds as compared to the quotation on some of assignments awarded to him.
11. The Claimant's avers that he responded to the show cause by a letter dated 25th May, 2021 giving his written representations and explaining the delay in the supply of materials and delayed completion of assignments. He had always updated the Respondent on the progress of the various projects besides explaining the exceeded budget and quotations. This was due to increased pricing of materials due to inflation.
12. The Claimant performed his duties diligently and faithfully as Yard Manager until 1st June, 2021 when he was unlawfully and unfairly terminated from employment vide a letter of even date on account of rising issues and cases to do with performance on several tasks given. Prior to this, no performance appraisal had been conducted on the Claimant and neither had he been reprimanded or issued with a warning letter or any disciplinary process. No evaluation process had been carried out in this regard.
13. The Claimant avers that the termination of his contract on grounds of poor performance was unjustified, unlawful, unfair and malicious. The Respondent did not provide valid reasons to warrant the termination. The Respondent failed to adhere to the procedure under Sections 41, 43 and 45 of the Employment Act. The Respondent further violated the fair labour practices enshrined in the Constitution; the Employment Act and the judicial precedence.
14. The Claimant's termination on account of alleged poor performance and negligence was not justified, was malicious and unfair. The Respondent Company failed in its legal obligation to ensure that the reasons for termination were valid and that due process of the law was followed for the following reasons:
 - a. The Claimant carried out his lawful duties diligently and faithfully and in line with his duties and responsibilities.
 - b. There was no due process of law as the Claimant was never invited for a disciplinary hearing.
 - c. The Claimant was never put on any performance improvement plan and therefore the allegation of poor performance has no basis in law.
 - d. There were no valid grounds for termination of the Claimant's contract of employment.
 - e. There was no proper procedure followed in terminating the Claimant.



In any event the delay in completing some of the projects was solely caused by the Respondent Company's delay in issuing funds for the same despite the Claimant constantly kept sending reminders on emails and whatsapp.

- f. The demand for the Claimant to pay Kshs. 1.98 million being the amount alleged to be due for the last five years on account of the 2 container offices placed in the yard has no basis. The Claimant was not privy to the contract between the owner of the two containers and the Respondent Company neither did he have any obligation to make any payment.
 - g. The demand to the Claimant to reimburse the Respondent Company Kshs 713,000.00 inclusive of VAT being rent due for the month of May, 2021 by BMK offices is not justified and has no basis. Further the Claimant is being asked to reimburse the Respondent Company Kshs. 325,000.00 inclusive of VAT being rent due for Newham offices. The Claimant has no obligation to make these payments. The delay to have the rent paid by the Respondent's clients was solely caused by delay on part of the Respondent and not the Claimant.
15. He prays as follows;
- a. A declaration that the termination of the Claimant's employment on account of poor performance was unfair, wrongful and unlawful.
 - b. A declaration that the unilateral variation of the Claimant's terms of employment was unfair and unlawful.
 - c. Reinstatement of the Claimant and payment of the salary arrears due to him together with all back salaries from April 2021 to July 2021 which amounts to Kshs. $135,875 \times 4 =$ Kshs. 543,500.00 and all benefits attendant thereto from the date of the illegal and unfair termination.

In the alternative to reinstatement:
 - d. A declaration that the termination of the Claimant's employment on account of poor performance was unfair, wrongful and unlawful.
 - e. A declaration that the unilateral variation of the Claimant's terms of employment was unfair and unlawful.
 - f. Payment of 12 months' gross monthly salary compensation for unlawful and unfair termination of employment; being Kshs. $135,875 \times 12$ months = Kshs. 1,630,000/=
 - g. 3 month's salary pay in lieu of notice = Kshs. $135,875 \times 3$ months = Kshs. 407, 875.00/=
 - h. Damages for breach of the Claimant's rights protected under Articles 41 and 47 of the Constitution;
 - i. Damages for breach of the Claimant's legitimate and reasonable expectations.
 - j. Interest and costs of this suit
 - k. Any other or such further relief as this Honourable Court may deem just and fair to grant.
16. The Respondent's case is a denial of the claim. She however, acknowledges that she undertook a restructuring programme in 2018 that led to the Claimant amongst other employees being declared redundant.



17. It is the Respondent's further case that she did not unilaterally vary the terms of the Claimant's employment. On the contrary, the variation of these terms was necessitated by the prevailing circumstances brought about by the Covid-19 Pandemic so as to caution the Respondent's business and accommodate her employees. The variation notice was not forced onto the Claimant and he is put into strict proof thereof.
18. The Respondent's other case is that they issued a show cause letter to the Claimant and the response failed to elicit a satisfactory answer to the issues raised and therefore his invitation to a disciplinary meeting.
19. The Respondent's further case is as follows; She denies that the Claimant worked with due diligence and faithfully as alleged. The Claimant was unfairly and unlawfully terminated from employment. That the Claimant was not given any performance evaluation, warning letter or even the right to be heard at the disciplinary proceedings. That the Claimant's termination of employment was unjustified, unlawful and unfair or even actuated by malice. The Claimant's termination of employment was procedural and lawful. The termination was in compliance with *Employment Act*
20. In the penultimate and in further response to paragraph 18 of the Memorandum of Claim, the Respondent avers that the Claimant was availed all the necessary avenues to show cause for his poor performance and negligence as;
 - i. A Notice to show cause for unsatisfactory performance was issued to the Claimant.
 - ii. The Respondent fully considered the Claimant's Response to the Notice to Show Cause and found the same to be unsatisfactory.
 - iii. In view of the above, a meeting was availed for the Claimant for further explanation for his poor performance. However, reasons adduced by the Claimant were still unsatisfactory.
21. The issues for determination are;
 1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Claimant is entitled to the reliefs sought.
 3. Who bears the costs of this cause?
22. The first issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in his written submissions reiterates his case for unlawful termination of employment. It is his case that his termination from employment was unlawful for lack of substantive and procedural fairness. There were no valid reasons for termination and neither was proper procedure pursued in his termination of employment.
23. It is the Claimant's case and submission that for poor performance to qualify as a valid ground for termination, the Respondent should have demonstrated that there were measures put in place to measure performance and which measures were used to determine the performance of the Claimant. In the instant case, no performance appraisal were conducted as proof of poor performance or failure to meet expectations. In any event, the Claimant always updated on the progress of tasks given and undertaken and no issue of dissatisfaction was ever recorded.
24. Again, the Claimant in response to the show cause letter explained the expenditure of the Respondent's resources and the reasons the tasks were not completed on due dates. He further explained that inflation costs affected the submitted budgeted amount and that late disbursement of funds delayed



the expected outcomes on completion. He therefore faults the Respondent for non-compliance with Section 43 of the *Employment Act*, 2007 for want of proof of reasons for termination.

25. The Claimant further disagrees with the procedure followed in his termination of employment. It is his case that the employer has to provide the employee with details of accusations levelled against the employee, allow the employee an opportunity to respond to the charges, allow the employee to be accompanied by a shop steward or co-employee of his choice during the disciplinary hearing process and finally provide the employee with the decision either terminating or saving the contract of service.
26. The Claimant in further buttressing his case seeks to rely on authority of *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] eKLR where the court observed as follows;

“In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance standards; that the failure to meet the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore, the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee’s inability to do so and not due to factors that are outside the employee’s control.”

27. Here, the Claimant denies having had several meetings with Respondent as ascribed in paragraph 5 of the Respondent’s witness statement. He denies any performance review meeting with the Respondent and avers that the Respondent does not produce any evidence in support of the said review meeting.
28. The Respondent in her written submissions dated 6th February, 2024 also reiterates her case. It is her case that during the Claimant’s stint of office, his performance had declined.
29. During the course of the employment, the Respondent Company’s management team noted that the Claimant’s performance in the various task given had declined;
 - a. One of the tasks given was that he was that he was required to urgently renovate ‘Block A’ Offices for a client, Newnham Services International Ltd, who had been scheduled to occupy the said offices from 1st May, 2021.
 - b. The Claimant failed to comply with the required timelines for carrying out the works and by a Notice to show Cause Letter dated 13th March 2021 the Company issued the Claimant with a warning letter summoning him to explain his unsatisfactory performance. (Copy of Notice to Show Cause Letter dated 13th March 2021 attached at page 5 of the Respondent’s Supplementary List of Documents)
 - c. As a result of the said delay, the client did not occupy the ‘Block A’ offices as earlier scheduled and the company lost revenue the monthly rent of May.
 - d. The Claimant had also simultaneously been assigned with another task for upgrading the Plumbing works for a workshop client known as BMK which task was not competed within the agreed timelines.
 - e. For both tasks, the Claimant was required to give quotations to the company at the initial stage which would include the expenses for various items which were required and for the labour charges. (Quotations from Suppliers including Balsy Works and Framas Structures and Fitting Enterprises attached at page 6-10 of the Respondent’s Supplementary List of Documents)



- f. However, despite the Claimant being experienced in managing the workshop yard, the expenditure for both tasks exceeded his initial quotations to the company by a large margin. (Summary of Expenses together with the petty cash vouchers attached at page 11-17 of the Respondent's Supplementary List of Documents)
- g. Through a letter dated 26th May 2021, the Claimant attempted to give explanations for the delays and the expenditure. (Copy of the Claimant's Letter Showing Cause dated 26th May 2021 attached at page 18-22 of the Respondent's Supplementary List of Documents)
- h. The explanations given by the Claimant through the said letter were not satisfactory and as a result he was called to a disciplinary hearing on 2nd June 2021 at 9.00 a.m to give a further explanation on why he had spent money allocated to other projects to finish the projects in question without the company's authorization and the reasons he gave were not satisfactory. (Copy of Notice to Show Cause Letter dated 31st May 2021 attached at page 23 of the Respondent's Supplementary List of Documents)
30. It is the Respondent's penultimate case that due to these visible and admitted failures by the Claimant, he was summarily dismissed by a letter dated 1st July, 2020 detailing reasons thereof and calling on him to collect his dues on termination. The Respondent denies failure to observe Sections 41 and 43 of the Employment Act, 2007 and submits that the termination of employment was in tandem with Section 44 of the Employment Act, 2007.
31. The Respondent's case overwhelms that of the Claimant. It is her case that the Claimant was a senior and experienced employee who was responsible and expected to carry out his duties in an excellent manner. He was in charge of projects out of which his judgments was expected in laying down estimates for budgets to be utilized in the implementation of these projects. It was not expected that he would fail or neglect to issue proper estimates thereby causing failure and loss to the Respondent. For this reason, he was summarily dismissed after undergoing appropriate disciplinary process.
32. It was not expected that the Respondent would contend with a failing and non-performing employee. Clear cases of this was the loss arising from rents for BMK and Newham offices which were colossal sums. In the foregoing, I find the dismissal of the Claimant justified and in accordance with Section 44 of the Employment Act, 2007. This therefore becomes a case of lawful termination of employment and I hold as such. And this answers the first issue for determination.
33. The second issue for determination is whether the Claimant is entitled to the reliefs sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the reliefs sought.
34. I am therefore inclined to dismiss the claim with orders that each party bears the costs of the same.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.

D. K. NJAGI MARETE

JUDGE

pppearances:

1. Mr. Ngei instructed by Munyao, Muthama & Kashindi Advocates for the Claimant.
2. Miss Wamuyu instructed by Archer & Wilcock Advocates for the Respondent.

