



REPUBLIC OF KENYA



Njiru v Amref Flying Doctors (Cause E117 of 2021 & Petition 106 of 2021 (Consolidated)) [2024] KEELRC 13498 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13498 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E117 OF 2021 & PETITION 106 OF 2021 (CONSOLIDATED)**

B ONGAYA, J

DECEMBER 19, 2024

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
ARTICLES 28, 31, & 40 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

GEDION NYAGA NJIRU CLAIMANT

AND

AMREF FLYING DOCTORS RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2024)

JUDGMENT

1. In Cause No. E117 of 2021, the claimant filed the statement of claim dated 29.01.2021 through O & M law LLP Advocates. He prayed that judgment be entered for the claimant and against the respondent for unfair termination as follows:
 - i. Damages for unfair termination for the remainder of the term (1,100*8) – USD 8,800.00.
 - ii. Unpaid transport and airtime allowances for the remainder of the term of employment (215*8) – USD 1,720.00.
 - iii. Unpaid house allowance during the term of employment (165*24) – USD 3,960.00.
 - iv. Unpaid Commission – USD 126.90.
 - v. Unpaid notice pay for one month instead of two months as per the employment contract – USD 1,100.00.
 - vi. Damages for unfair termination and breach of Articles 41 and 47 of *the Constitution* of Kenya, 2010 (1,100*12) – USD 13,200.00.



- vii. A certificate of service.
2. The claimant averred that he was employed on 18.02.2019 as a Sales Executive – Corporate (Grade B2) on a two-year fixed-term contract. He was paid a basic salary of USD 115, airtime allowance of USD 100 and was entitled to be a member of an accrued benefits scheme wherein the respondent contributed 14% of his annual basic salary. He was also entitled to a commission on sales as administered by the respondent's commission structure. He pleaded that he was never paid any house allowance throughout the period of his employment with the respondent. He further alleged that he served the respondent diligently and did not have any disciplinary issues levelled against him throughout the period of employment until termination of his employment.
3. The claimant's further case was as follows:
- a. On the evening of 25.02.2020, his line manager abruptly informed him verbally that he had been put on a Performance Improvement Plan (PIP) for two (2) months because of poor performance. His case was that he had never held any discussions with his line manager on the alleged poor performance.
 - b. He was then availed with the PIP on 26.02.2020 and instructed to execute and return the same on 27.02.2020. However, when he returned the executed PIP, he was told to backdate the same to 25.02.2020.
 - c. During the pendency of the PIP, he only had one meeting with the line manager on 06.03.2020 and did not receive any management support from the respondent during the PIP period.
 - d. On 21.04.2020, four (4) days before the official end of the PIP, the line manager informed him that the management had decided to terminate his services due to poor performance. He then sent an email to the line manager on the same day requesting for guidance on his work expectations or hand over for purposes of finalizing his exit from the company. By an email received on 26.04.2020, he was informed that the meeting with the human resources and administrative officer would be held on 27.04.2020.
 - e. The termination of his services was communicated to his colleagues on the said 27.04.2020, during a staff meeting. Prior to the disciplinary process, the respondent's employees started communicating with external clients and intermediaries about his exit from the company. He was treated with indignation and contempt in the workplace despite his efforts for a fair and impartial hearing.
 - f. He thereafter received a show cause letter dated 02.06.2020 to explain why disciplinary action should not be taken against him for poor performance. His response detailed some of the reasons for slump in sales that were not within his control, including the effects of COVID-19 pandemic. On 12.06.2020, he received an invitation to a disciplinary hearing scheduled on 19.06.2020.
 - g. The respondent eventually terminated his employment on 20.07.2020 on account of non-improvement of performance, as per clause 18.4 of the human resource manual. However, the said clause provides that an employee should only be terminated from employment for non-improvement of work after six (6) months.
 - h. He produced cogent reasons to warrant an appeal of the decision of the disciplinary committee but the respondent denied his appeal.



- i. In terminating his employment, the respondent had consequently breached its statutory obligations as follows:
 - i. Failure to inform the claimant of the intention and reasons for placing him on a PIP.
 - ii. Failure to conduct a performance evaluation before putting the claimant on a PIP.
 - iii. Failure to subject the claimant to fair labour practices as per the [Employment Act](#), 2007.
 - iv. Failure to afford the claimant an impartial hearing before termination of employment.
 - v. Failure to follow the proper procedure for termination as per the [Employment Act](#).
 - vi. Failure to pay terminal dues.
4. In Petition No. 106 of 2021, the petitioner filed the petition dated 09.03.2021 through O & M Law LLP. He prayed for:
 - a. A declaration that the actions of the respondent to illegally use the image of the petitioner without his consent has contravened the petitioner's image and personality rights under Articles 28, 31 and 40 of [the Constitution](#) of Kenya, 2010.
 - b. A declaration that the image published by the respondent constitutes an unendorsed marketing advertisement.
 - c. A declaration that the petitioner is entitled to damages for the violation of his image and personality rights.
 - d. Damages for violation of the petitioner's rights;
 - e. Costs of the suit; and
 - f. Such other orders as the Court may deem appropriate.
5. The petitioner's case was as follows:
 - a. On 22.03.2019, the respondent invited its employees to a photo-shoot allegedly for communication purposes. The petitioner duly obliged and attended the company photo-shoot as part of the company processes.
 - b. He was however shocked to later learn that on diverse dates between 01.05.2019 and 30.06.2019, the respondent used his image for external advertisement purposes without his consent. The said images were posted on the respondent's Facebook page that has over 400,000 followers and on its Twitter account with more than 27,000 followers.
 - c. He neither entered any agreement to appropriate his image for commercial advertisement purposes nor was he informed by the respondent of the intention to use his image for advertisement purposes.
 - d. Given the context of the publication, the subject photos were rightly understood by the public to mean that he was endorsing the company as its commercial ambassador, yet he has never used his image to advertise a product or authorised third parties to do the same.
 - e. Consequently, the respondent's actions violated his rights to privacy under Article 31, and to dignity under Article 28 of [the Constitution](#). That Article 40 of [the Constitution](#) provides for the protection of the right to property yet the respondent illegally appropriated his image and liking for commercial purposes without any just compensation for the same.



6. In response to the statement of claim and petition, the respondent filed the amended memorandum of defence dated 06.01.2022 through Kaplan & Stratton Advocates. It denied the allegation of unfair and unprocedural termination of the claimant's employment contract. It further refuted having illegally used the claimant's image as alleged or at all and asserted that he is not entitled to the orders sought on the following grounds:
 - i. The claimant's employment contract was terminated on grounds of poor performance.
 - ii. Despite the respondent's efforts to assist the claimant improve his performance, he failed to improve.
 - iii. The termination of the claimant's employment contract was lawful and justified in the circumstances.
 - iv. The claimant consented to and voluntarily participated in the respondent's photo shoot that took place in March 2019, and his allegations as raised herein are an afterthought.
7. The respondent's case was as follows:
 - a. The claimant failed to attain his sales targets, achieving only 14% of his yearly sales targets against his annual targets in the first year of his employment. The failure to meet targets was despite having set his sales targets very low in the first year of his employment to assist him familiarize himself with the industry and grow his sales pipeline.
 - b. In the week of 10.02.2020, the claimant attended a meeting relating to his poor performance and through an email of the same date, he was informed that he would be placed on a PIP.
 - c. Following the claimant's failure to meet his targets for 13 months, he was placed on a PIP for two (2) months commencing 25.02.2020 to 25.04.2020. The said PIP was implemented by mutual consent and signed by the claimant on 25.02.2020 without him raising any issues or concerns. The areas of concern were specifically explained to him and remedial targets agreed with him.
 - d. It was agreed between the claimant and respondent that during the PIP period, the claimant was to achieve not less than 65% of his monthly sales targets, grow his sales pipeline, identify and on-board at least five (5) intermediaries and retain any business under his portfolio by 100%. It supported and provided the claimant with various resources to assist him improve his performance, to wit, mentoring, management support and sales process guidance. In addition, review meetings were held with the claimant after every ten (10) days to discuss the shortcomings in his performance against the agreed sales targets. Despite the effects of COVID-19, the sales team held virtual meetings daily for two (2) hours. Considering all such support accorded to him, the claimant thus failed to satisfactorily meet his expectations to his own detriment.
 - e. Towards the end of the PIP, the respondent decided to initiate termination proceedings as the claimant had failed to show improvement and did not achieve his sales targets of 65%. Furthermore, it had lost a scheme of Kshs. 1,300,000 million to E-plus because of the claimant's failure to utilize the various resources it provided.
 - f. The respondent held a performance review with the claimant on 27.04.2020, in which meeting he indicated he was well informed of the PIP process, was aware of his responsibilities and confirmed having held review meetings with the respondent. Upon conclusion of the meeting,



the claimant immediately approached the human resource officer and requested the process to be expedited.

- g. The respondent considered the claimant's response to the show cause letter issued to him and found it unsatisfactory. It also considered his representations at the disciplinary hearing and found his reasons inadequate compared to the rest of the sales team. On 20.07.2020, the respondent held a meeting with him, informed him of its decision to terminate his services on grounds of poor performance and issued him a termination letter of same date. On 08.08.2020, the claimant appealed against the decision to terminate his employment. The respondent thereafter wrote to him on 31.08.2020 upholding its decision to terminate his services.
 - h. Prior to termination of the claimant's employment, intervening steps were taken in the interim, to preserve and secure its business. There was no breach of its statutory obligations as alleged and the claimant's termination was both substantively and procedurally justified. In addition, he was paid all his terminal dues as set out in the termination letter.
 - i. With respect to its alleged illegal use of the claimant's image and that the respondent violated his right to privacy, the respondent stated that the claimant attended the said photoshoot in his capacity as Sales Executive – Corporate and was well aware of the purpose for which the images were to be used, to boost sales. Considering he never raised any concerns or objections to the use of his images during the tenure of his employment, his claims at this stage are an afterthought.
 - j. Transport and airtime allowances are provided to working employees to assist them execute their duties in the course of business. The claimant's claims for the said allowances are therefore without any legal basis. Moreover, he was aware that his salary was consolidated to include housing allowance. He was paid two months' notice prior to termination of his employment and there was no breach of *the Constitution* to warrant payment of damages as claimed. He is yet to collect the certificate of service that has been ready for collection.
 - k. The respondent has paid the claimant's commission save for the sum of Kshs. 12,690/= which is therefore due to him and under process for payment.
8. The parties consented and it was ordered that the suit to be determined based on pleadings and documents. The parties filed their respective submissions, which they further highlighted before this Court on 26.11.2024.
 9. The Court has considered the pleadings, documents and submissions and returns as follows:
 - a. The parties were in a contract of service and there is no dispute in that respect. The contract was for two years but the claimant served for only 17 months. The contract was effective 18.02.2019 as a Sales Executive.
 - b. The claimant was terminated because of poor performance. It was submitted for the claimant that on 25.02.2020 his line manager informed him that he had been placed on performance improvement plan (PIP) for 2 months. He did not protest but he signed PIP because the line manager informed him that the management was dissatisfied with his performance. He received the PIP forms on 26.02.2020 and purported to sign them on 28.02.2020 and his line manager asked him to backdate them to 25.02.2022. the claimant alleges that during the PIP he did not receive respondent's support such as on management support, sales training, customer service training but the Court observes that the claimant has not exhibited any protestation or grievance in that respect. Instead, the claimant admits that he held one review meeting with his line manager on 06.03.2020. It therefore appears to the Court that the claimant has alleged



lack of support (an admission of unsatisfactory performance) but without showing that he reported a grievance in that respect.

- c. The claimant alleges that on 21.04.2020 the line manager announced to staff that the management had decided to terminate the claimant's employment. The Court finds that the allegation needed oral testimony tested in a cross-examination but which was not done. On a balance of probability, the announcement as alleged was not proved as required.
- d. The claimant has confirmed by pleadings and per the respondent's exhibits, that he received a letter to show-cause dated 02.06.2020 alleging poor performance. He responded by his letter dated 08.06.2020. by letter of 12.06.2020 he was invited to a disciplinary hearing on 19.06.2020 and was terminated by the letter dated 20.07.2020 on account of non-improvement of performance.
- e. The Court has considered the flow of events. The evidence is that the claimant was accorded due process of a notice and a hearing per section 41 of the *Employment Act*, 2007. Further, the Court has found that the poor performance is not disputed but the claimant has invoked lack of support to improve but without having raised such grievance throughout the material time. The reason for termination is found to have been valid as per section 43 of the Act and was fair as it related to the petitioner's unsatisfactory performance as envisaged in section 45 of the Act.
- f. The Court finds for the respondent's submission that the termination was not unfair in substance or procedure.
- g. Was the claimant's or petitioner's image used for the respondent's commercial advertisement without the claimant's consent? The claimant's own case is that on 22.03.2019 while in the respondent's employment the employees in the marketing department were invited to a photo-shoot allegedly for communication purposes. The claimant attended. His case is that he later learned that between 01.05.2019 and June 30, 2019 and without his consent, his image had been used in external advertisement without his consent or knowledge. The photos were uploaded on the respondent's Facebook page with 400,000 followers and Tweeter account with 27, 000.00 followers. It is his case that use of his image meant he was endorsing the company as its commercial ambassador. He alleges he suffered loss of income for use of his image to promote the respondent's brand. He alleges invasion of his privacy contrary to Article 31 and unfair exploitation of his property without due compensation contrary to Article 40 of *the Constitution*.
- h. The Court has considered the claimant's allegation. He has not stated the date he learned that his images in the photos had been uploaded and used between 01.05.2019 and 30.06.2019. Whatever is clear is that there was no grievance reported in that respect until termination on 20.07.2020 and then the filing of the petition on 16.03.2021. The claimant has confirmed by pleading that he knew that when he attended the photo-shoot, the photos would be used in the respondent's communication. He did not object or protest. As urged and submitted for the respondent, the claim was indeed an afterthought and looking at the flow of the events, the Court returns that in this case, the claimant voluntarily consented to attend the photo-shot and voluntarily consented (had the express knowledge) that the photos with his image would be used for the respondent's communication. They were subsequently so used and only when the claimant was still in the respondent's employment – for which he earned the agreed remuneration by way of the retainer monthly salaries and then the commissions.
- i. Accordingly, the Court finds that there was no unfair invasion of privacy or exploitation of the images in what the petitioner alleged to be use of his property without due compensation. The



alleged violation of the cited provisions of the Bill of Rights is found not established at all. The submissions made for the respondent in that regard are upheld.

10. On the residual remedies the Court returns as follows:

- a. The certificate of service is not disputed and should be delivered by February 1, 2025.
- b. The claims with respect to contractual payment for the unexpired 8 months of the contractual tenure of 24 months and the claimant having actually served 17 months are declined. After the separation, the claimant cannot claim upon the contract that was terminated. Nothing is shown attributable to the respondent that may have barred the claimant from mitigating his circumstances by moving forward in an alternative gainful engagement. The reliefs are declined as unjustified.
- c. There was no grievance about house allowance throughout the service. The agreed payment is found to have been consolidated and as urged for the respondent.
- d. There is no dispute that the parties agreed on two months' pay in lieu of notice. Poor performance and not gross misconduct was alleged. It is in gross misconduct that under section 44 of the employment Act that the respondent would be entitled to dismiss with a lesser notice than was contractual. Accordingly, the claimant is awarded USD 1,100.00 as prayed.
- e. The respondent has shown that the full commissions were paid. The submissions made for the claimant are silent suggesting the claim was abandoned.
- f. The claimant has failed on the petition and partially succeeded on the action. In that consideration the parties will bear own costs of the proceedings.

In conclusion, the petition and cause are hereby determined with orders:

1. The petition is dismissed.
2. The respondent to deliver the certificate of service by February 1, 2025.
3. The respondent to pay outstanding notice payment of USD 1,100.00 by February 1, 2025 failing interest to run thereon at Court rates from the date of filing the cause until full payment.
4. Each party to bear own costs of both the petition and the cause.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

