



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Murage v Style Industries Ltd (Cause 345 of 2019)
[2023] KEELRC 14 (KLR) (12 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 14 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 345 OF 2019
AN MWAURE, J
JANUARY 12, 2023**

BETWEEN

MISHECK MAINA MURAGE CLAIMANT

AND

STYLE INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim dated May 24, 2017. The respondent in return filed a response dated June 17, 2019.
2. The Claimant was employed by the Respondent from November 18, 2013 as an IT executive. His gross salary was Kshs 85,000/= per month but rose to kshs 249,883/- per month as at the time of termination. He says he worked hard and his salary was reviewed upwards upto kshs 249,883/-.
3. He says he received his rating for 2017 – 2018 from Amit Saxena his supervisor and awarded him “moderate” evaluation. He says the Claimant was surprised by comment by his supervisor that he was one of the best paid staff and his rating was an opportunity to prove himself. The Claimant says he had already achieved all his goals of that year and especially:-
 - a. Had helped with planning and executing the relocation of IT infrastructure from Lunga Lunga factory to the new Rivaan office. – Goal 1.5
 - b. Had worked tirelessly with the Godrej VoIP team to build Phase II of IP Telephony Infrastructure linking Godrej one with the rest of East Africa Companies in Kenya, Uganda and Tanzania. These companies are SIL, CCL, CIL, SHI, SCD. The project was technically challenging and even my supervisor, Amit admitted that the thought at some point the project would not be successful. I worked tirelessly and ensured it was successful. The success of the project has saved related companies costs of more than 50% as they are able to make intercompany calls free of cost. – Goal 1.5



- c. On March 14, 2018, I helped resolve a highly challenging RDP technical issue related to the HR servers. I was on my annual leave and was requested by my supervisor Amit to come back to work and help resolve the issue which had defeated everyone including the vendor (Eldama Technologies) and Amit himself. – Goal 1.5
 - d. Had upgraded the Trend Micro Antivirus from the Normal Office Scan to the Trend Micro XG Version. I also made sure that all the companies servers, Desktops and Laptops strictly adhered to all security requirements by making sure they were registered on the antivirus server and operated on genuine software. – Goal 1.5
 - e. Had ensured proper user authorization control mechanisms were adhered to by ensuring that proper procedures were followed across East Africa companies (SIL, CIL, CCL, HCZ and SHI) in regard to dynamics AX user access management. – Goal 1.2
 - f. Had ensured that support Incidents and Dynamics AX change requests were resolved in a timely manner in all companies across East Africa. – Goal 1.3 & Goal 1.1
 - g. Had maintained excellent Company-Vendor working relationship to support efficient running of IT operations. I also negotiated prices and contracts on Respondent’s behalf to help them save on costs. – Goal 1.4 & Goal 1.5
4. He says he Protested the performance evaluation through skype message dated June 4, 2018 and requested a meeting with his supervisor to discuss the evaluation.
 5. He said he was ready to resign if the supervisor was not satisfied with his performance. The supervisor rejected his proposal to resign and told him he still needed him in his department.
 6. The Claimant explained to his supervisor what he understood by moderate evaluation but they never seemed to understand each other.
 7. It was the company’s policy that if one fell below rating 2 he should be placed on performance improvement plan (PPI). Claimant says he was never placed on performance improvement plan.
 8. He says on July 3, 2018 he was invited to a meeting attended by HR head Margaret Geno, HR executive Duncan Lumati and Amit. He was asked to explain what issues were bothering him.
 9. He says that he explained that it was about the performance rating of 2017-2018 financial year and he said the rating was unfair and untrue in the spirit of the work he had done. He was told he should not expect his performance to be reviewed as it had already been audited and closed.
 10. He said that he then had a meeting with Amit and they agreed to put their differences aside and work together for the sake of the organization. Claimant was asked to write an email to confirm the same and he did write as dictated by Amit.
 11. He says that on July 8, 2018 he was called by Amit and Mr Lumati and was handed a document which he was asked to sign and he signed. He says on July 9, 2018 he was handed the second page of that document and he realised it was a performance improvement plan (PIP) and he refused to sign it as it was against what they had discussed with Amit previously.
 12. Claimant says he continued with his work and continued to update his boss Amit who was now on leave. He was however on February 18, 2019 told he needed to update his PIP. The PIP indicated there was a review on September 2, 2018 and there was nothing like that.



13. On February 19, 2019 he was called to review his PIP plan and Amit was in the meeting and also Mr Lumati and Mr Riju Dulta and they told him what he had done was enough to give organization reasons to take action against him. Apparently that had to do with failure to sign for the review document.
14. The Claimant says that on February 21 he was called to a meeting and asked why he failed to sign the previous PIP. He says the previous PIP was not correct and that is why he refused to sign it. He says on March 1, 2019 he was given a termination letter and was asked to hand over company's properties.
15. He says during the time of his employment he was forced to support five other companies without commensurate pay. When he raised that issue he says he was threatened with termination. He said he worked and supported Charm industries, Cannon Chemicals Ltd, Jigma Hair Industries Ltd, Hair Credentials Zambia SCD (U) limited and Uganda – Darling.
16. Claimant further says he was not paid house allowance and was not offered accommodation between May 2013 to April 2016. The Claimant says his employment was unlawfully terminated and he now prays for the following:-
 - a. A declaration that the Respondent unfairly and unlawfully terminated his employment contract.
 - b. Compensation in accordance with Section 49 of the *Employment Act*, 2007 in the sum of kshs 2,997,996/= being the Claimant's 12 months' salary for the unfair and unlawful termination.
 - c. Payment of unpaid house allowance in accordance with Section 31 of the *Employment Act*, 2007 in the sum of Kshs 486,150/= for a period of 30 months at the standard rate of 15% of basic pay.
 - d. Payment of Kshs 39,577,310.00/= being the unpaid salary in respect of the five other companies that the Claimant worked for and supported.
 - e. Issuance of a certificate of service that complies with section 51 of the *Employment Act*.
 - f. Costs of the suit.
 - g. Interest on the above at court's rates.

Respondent's Case

17. The Respondents admit they had employed the Claimant in their organization and that his ratings were outstanding and superior previously but that in 2017 his rating was moderate. He says on several occasions Claimant had meetings with representative of the Respondent and specifically on July 5 and 2018, and February 18, 2019 and discussed delays associated with active integration and governance, risk and compliance and lack of proper coordination and supervision.
18. Respondent says Claimant was made aware of work performance concerns. They explained that the Respondent has a global performance management system in which goals are sent on system the beginning of company year on April 1 date of the year.
19. The Respondent says it is performance driven and any employee on below rating would be put on 3 months' performance improvement plan (PIP).
20. He says the respondent's PIP plan is an elaborate plan. According to the respondent the PIP plan was issued to the Claimant for the year 2017-2018 and he was invited for a meeting with his line manager and representative from human resource department to ensure fairness and objectivity.



21. He says the line manager identified areas for improvement and they agreed on how to go about it. He says the line manager kept Claimant informed of progress and the claimant would always receive feedback and support.
22. The Respondent says that he expected Claimant to respond positively but it was unfortunate his performance remained below standard. The Respondent says that due to the dismal performance the Respondent terminated the Claimant's employment after final review with the Claimant at the close of PIP on February 19, 2019.
23. The Respondent says the Claimant was never forced to offer support to other countries as Respondent has sister companies with their respective employees in charge of their IT with servers. Some of the servers are resident in Kenya.
24. Concerning the claim for unpaid house allowance the respondent states that there was initially a system error that did not indicate Claimant's house allowance. He says that however the payslips effective May 2016 the house allowance was reflected as 15% of his salary.
25. Further the respondent said that the Claimant was paid terminal dues being one month salary in lieu of notice, leave days earned but unutilized and 15 days' pay for each completed year. He therefore received kshs 261,802 as full and final settlement and he confirmed he had no other claim from Respondent including claim for compensation as a result of termination of service.
26. He says Respondent is therefore estopped from claims for further compensation.
27. In conclusion the respondent avers that the Claimant has no reasonable or justifiable cause of action and prays that his claim be dismissed with costs to the Respondent.

Claimants Evidence

28. The Claimant gave his evidence in chief on March 14, 2022 and in his evidence in chief he basically retaliated mostly what he had written in the memorandum of claim.
29. The only clarification he made is that the error the Respondent claims was in his payslip is not correct as what is added is his increments. He also retaliated he used to give support to five other companies related to the Respondent and was not compensated for the same.
30. He says he was not compensated for working for those other companies as he was informed he was a shared resource. He also says he was given about kshs 200,000/= terminal dues but are not itemized. He tried to ask for itemized statement but did not get any response.
31. He says that he supported some companies but was never compensated for the same. He repeats that the terminal letter dated March 1, 2019 provided he would be entitled to terminal dues but was not informed what they covered.

Respondent's Evidence

32. The respondent's witness Mr Lumati as well testified in tandem with the contents in the response and said the Claimant's performance had gone down and he was put on PIP plan but he was not cooperative and so he did not improve and was terminated. He was also paid his terminal dues and he acknowledged the same.
33. The witness says during cross examination the Claimant was placed on PIP plan and his line manager gave him support but he was not cooperative and so did not improve his services.



Claimant's submissions

34. The Claimant's brief submissions are reliant on case of *Donald Odeke Vs Fidelity Security Ltd* (2012) eKLR where court held

“it does not matter what offence the employee is accused of, if the employee is not heard termination is ipsa factor unfair.”

35. The Claimant also submits he should never have been put on PIP as no issue whatever had been raised in his performance. Nevertheless he continued working diligently even when he was put on PIP and he says he produced evidence of having achieved all his goals for the year 2017-2018.

36. He also says he was forced to support other companies even though he was not compensated and he says as well he was not paid house allowance until May 2016. He says he is owed Kshs 486,150 as house allowance made up as follows:

- a. 15% of Kshs 85,000 Dec 2013 to 2015 Kshs 204,000
- b. 15% 117000/- from April 2015-2016 Kshs 122,850/-
- c. Kshs 177,000 from November 2016 to April 2016 Kshs 159,300/-

Respondent's submissions

37. The respondent in his submission says that the claimant was made aware of performance concerns and in particular key user link support, slow technology upgrade, non-compliance in IT and server management. He was also indicted with lack of team coordination.

38. The respondent relied on the case of *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR where it was held”

In the event a decision is made to terminate an employee on the reasons for poor performance the employee must be called again in the presence of an employee of his choice, the reasons for termination shared with the employee”.

39. The respondent says the claimant was informed of the decision to terminate his employment in a meeting held on February 19, 2019 in the presence of his line manager, Human resource business partner, H. R. Head East Africa where he chose not to come with his witness. The decision was communicated in a letter dated March 1, 2019.

40. The respondent states that he informed the claimant of his poor performance and gave him an opportunity to improve and yet he did not improve. In that regard the respondent avers they complied with the tenets of the law.

41. As to the claim that the claimant was forced to work for five other sister companies of the respondent, the respondent states that their operation is integrated and linked to the sister companies through the servers and various information technology. He says that the claimant signed the PIP on July 8, 2018 with key performance areas which required ensuring and maintaining the integration including obtaining licensing and hardware matrix as well as server backup and up gradation.



Determination

42. The Claimant had worked for the Respondent in the IT department from November 12, 2013 till he was terminated on March 1, 2019. He says he had received excellent ratings until 2017-2018 when he received moderate ratings.
43. He was then placed on (PIP) even though he claims he was not informed he had been placed on the said PIP. He said he continued to work diligently and kept his line manager informed of every progress until February 2019.
44. The documents in court show in 2016 claimant received outstanding ratings and in May 2017 he was promoted to Executive IT executive due to his consistent performance. Then in May 2018 he was evaluated moderate. It is not clear what changed so suddenly to cause such a drop in his performance.
45. He says on February 8, 2019 he was called for a meeting and was informed that his performance plan review were not going on well. He was called for a meeting on February 19, 2019 and was informed the purpose of the meeting was to close his PIP review. He says that there was no consensus in that meeting and he was told to leave the meeting. He says on February 20, 2019 he was told to sign his reviews and since they were not correct he did not sign them.
46. He says that he was told his PIP was not successful and that was on March 1, 2019 and the same day he received a termination letter. He says that was in spite of having had achieved his set goals and was rated excellent except in 2017/2018 when he was related “moderate”. He avers he was placed on PIP from July 2018 to February 2019 and was not given any letter extending his PIP and the only extension provided in their policy is 30 days after expiry of the 90 days as provided in the company policy.
47. The Respondent did indicate areas of poor performance as is required in good practice where the employee should be informed of the areas of poor performance and specifically targeted areas for the required performance improvement. This is per the document dated July 6, 2018. The employer is then expected to give feedback to the employee on the progress.
48. The respondent however failed from there as he did not inform claimant he was to attend a disciplinary meeting due to his poor performance. It is noted by the court that in the respondent’s letter dated July 9, 2018 they indicated that if claimant did not improve it could lead to disciplinary hearing. It is also not however followed by a formal invite to a disciplinary hearing in compliance to section 41 of the [employment act](#).
49. Section 41 (1) of [Employment Act](#) provides as follows:

“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”
50. In section 45(1) of the [Employment Act](#) the law provides: “No employer shall terminate the employment of an employee unfairly.”
51. In the case of [Jane Wairimu Machir vs Mugo Waweru & Associates](#) (2012) eKLR the court held that the proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give employee an opportunity to improve over a reasonable length of time like 2-3 months would be reasonable” The court further held that “appraisal of performance must of necessity



involve active participation of the employee and that credible performance appraisal process must be evidently participatory.”

52. The Case of Jane Samba Mukala vs Ol Tukul Lodge Limited Cause No 823 of 2011 the Court observed:

“where poor performance is shown to be the reason for termination the employer is placed at a high level of proof as outlined in section 8 of 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 against poor performance.”

53. It is imperative for the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they had taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to say that one has been terminated on poor performance as the effort leading to this decision must be established.

54. The Claimant had “excellent” and “superior” ratings prior to 2017. In the rating of 2017/2018 he was rated moderately and he averred he achieved all his goals and he had numerous discussions with his superiors. He contends he was told he would not be placed on performance improvement plan but his rating would not be reviewed as auditing had already been done and closed. In July 2018 he was put on a performance improvement plan. There was a list shared indicating areas required for improvement. The court was not presented with evidence on measurement tools of expected improvement and feedback on progress or lack of it. Indeed it is claimant’s averment that he was not even informed he was to be on performance improvement plan. The company policy is to put an employee on a PIP for 90 days with an additional 30 days’ extension.

55. Apparently he was on PIP from July 2018 to February 2019 so for about 8 months. It was in February 2019 that he was questioned on his reviews and was informed they were not satisfactory. The charge against him was delay in active directory integration and delayed governance and risk and compliance status. The Claimant avers he did all this work and he justified the same to his superiors but they rejected his explanation.

56. The court is not given any concrete evidence on the sudden poor performance for the Claimant to fall from “excellent” to “moderate”. He was also charged with lack of proper team coordination and supervision. It abhors the court what changed so abruptly in the claimant’s performance and yet the claimant had worked for the respondent from November 2013 to 2017 when he had always received outstanding evaluation.

57. The authorities that provide on how an employer should deal with poor performance place a high burden on the employer to provide the evaluation tools that show poor performance and the process to help the employee to improve on his performance.

58. The employee should if he does not improve be given other roles in the organization. It is only if all this fails and dismissal of the employee is the only cause that commends itself to the employee then section 41 of the Employment act must come into play as held in the case of Maina Mwangi vs Thika Coffee Mills Ltd 2012 eKLR.

59. The facts in this cause and the pleadings clearly point to the fact that after the Claimant was put on performance improvement plan without his involvement. The Respondent decided to terminate him without informing him that he needed to attend disciplinary hearing in the presence of a fellow worker



or a shop floor union representative of his choice present during his explanation as well provided in section 41 (1) of the *Employment Act* 2007.

60. On March 1, 2019 he was called by the human resource head in a meeting with other superiors. She informed him that the PIP was unsuccessful and the email he had written under instructions of AMIT his supervisor was too informal and at that point he was handed the termination letter and was asked to hand over the company's properties. The claimant did not sign the minutes of first March 2019. He was however according to the minutes which the court is not clear were shared with the claimant informed that he could appeal the decision to the CEO within seven days.
61. The flow of this is that the Respondent made generalized allegations against the Claimant's pertaining to his performance in the years 2017 and 2018. This is after he had served the same organization for about six years with consistently high evaluation. Furthermore, the Respondent did not adhere to fair disciplinary procedural and even the way the termination was communicated was rather harsh and unfair contrary to the elaborate procedural protections afforded to employees by the employment laws.
62. The court also noted that the claimant signed a discharge voucher dated April 18, 2019. It is titled as "clearance certificate". The same read in part "I have no claims whatsoever against Style Industries Limited".
63. The respondent submits that the claimant should not make this claim since he signed the discharge voucher. The court is seized of the fact that discharge voucher is considered on the merits of each case because mostly the employees sign the discharge voucher as they are desperate to be paid their dues. At times the employee may sign the voucher to acknowledge receipt of their dues and not to absolve the employer from liabilities.
64. The court would not regard the executing of discharge voucher as a license per se to absolve an employer from adhering to statutory obligations. The court is supported by the decision of *De La Rue V David Opondo* (2013) eKLR where the court held that discharge voucher does not absolve an employer from the statutory obligations or the court from investigating into alleged unfair termination. The circumstances and the wording of the clearance certificate which was signed one and a half months after the termination of claimant for employment is not indicative of a person who signed it voluntarily or with intention to forgo his dues.
65. The court would wish to distinguish this case with the court of appeal case *Coastal Bottlers Limited V Kimathi Mithika* (2018) e KLR where the said court of appeal held that a discharge voucher is a binding contract and it constituted a full discharge and the court should not entertain the suit filed after execution of the discharge.
66. The present case and considering the circumstances under which the claimant signed the discharge voucher almost two months after termination of his employment and considering the document was titled clearance certificate he was not signing a discharge voucher but a certificate to enable him receive his dues.
67. Furthermore the respondent promised to pay the claimant 15 days' worth of his salary for every year worked. The claimant only received Kshs 261,802/= and he says he was not given the breakdown of the same despite asking the respondent for the breakdown severally. Under those circumstances clearly the claimant was not signing a discharge voucher to absolve the respondent from all liabilities. That kind of a write up cannot absolve the respondent from complying with his obligations as an employer.
68. In conclusion the court has found the respondent in terminating the claimant did not comply with the law relating to employment laws and as for the discharge voucher herein referred as clearance certificate does not allow an employer to subject an employee to unfair labour practices.



69. The court finds the Claimant has made a case for unfair and unlawful and unprocedural termination.

70. Remedies

1. The claimant is awarded 5 months equivalent of salary being therefore Kshs 1,249,165/=only.
2. The claim for house allowance is not supported by any documentation as court was not presented with a contract indicating that claimant was entitled to house allowance apart from the gross salary.
3. The salary claimed for other companies that claimant purportedly worked for and supported is far fetched and cannot be justified and so is declined.
4. Costs are awarded to the claimant as well as interest at court rates from date of judgment until final payment.
5. The certificate of service should be issued to the claimant within 14 days from today's date.

Orders Accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF JANUARY 2023.

ANNA NGIBUINI MWAURE

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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.

ANNA NGIBUINI MWAURE

JUDGE*

