



**Mutyota v Horeca Kenya Limited (Cause 2477 of 2016)
[2023] KEELRC 379 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 379 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2477 OF 2016
SC RUTTO, J
FEBRUARY 10, 2023**

BETWEEN

SHADRACK KIKOMA MUTYOTA CLAIMANT

AND

HORECA KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent as a Business Manager vide a letter of offer dated 20th April, 2016. That he was entitled to a monthly salary of kshs 400,000.00 exclusive of house allowance and incentives. The claimant states that he accepted the letter of offer on 26th May, 2016 and was to commence work on 1st July, 2016. That however, he was called and asked to commence work on 15th June, 2016 which was 15 days earlier than the previously agreed date.
2. That on 30th September, 2016, after working for three and a half months, he received information from Malek Inja that his employment had been terminated with immediate effect. He avers that this was done without any justifiable reason and without following due process. Accordingly, the claimant seeks against the respondent several reliefs including a declaration that his dismissal was unlawful, notice pay, unlawful salary deduction, compensatory damages, leave pay, house allowance, interests and costs of the suit.
3. Upon being served with the Statement of Claim, the respondent filed a Statement of Response in which it has denied the claimant's averments and put him to strict proof. It specifically denies the assertion that the claimant was invited to commence his official duties earlier than the date indicated in the letter of offer. It further avers that the claimant was retained as a consultant for the period running from 15th June, 2016 to 30th June, 2016 during which he conducted market research for the company and was paid a sum of kshs 200,000.00 for consultation. That the claimant's performance was highly unsatisfactory hence in a meeting held on 23rd August, 2016, between the respondent and the claimant, it was mutually agreed that he did not fit the role for which he had been hired.



4. That since the respondent did not wish to terminate the claimant, he was offered a new role as an Operations Manager for the Mombasa Area and was invited to take up this new role with effect from 1st September, 2016. That the claimant took up this new role and was based in Nairobi as the Mombasa office was being set up. That further, since the role consisted a smaller scope of work, the salary was to be kshs 200,000.00.
5. That by 30th September, 2016, the claimant's performance had not improved and the respondent was highly dissatisfied hence at the end of the probationary period, the claimant's employment was terminated. The respondent further denies any failure to follow due process and breach of the Employment Act. Consequently, it avers that the claimant is not entitled to any of the reliefs sought hence has asked the Court to dismiss the claim with costs.
6. The matter was scheduled for hearing on 11th October, 2022. During the trial, the respondent was absent despite the date having been taken by consent in Court. Subsequently, the Court gave time allocation and instructed the claimant's Advocate to contact the respondent's Advocate. At 11:00 am, the claimant's Advocate informed the Court that he had called a Ms. Margaret from the firm on record for the respondent and they had promised to join the Court virtually. However, there was no appearance from the respondent side hence the matter proceeded notwithstanding their absence.

Claimant's Case

7. The claimant testified in support of his case and at the commencement of the hearing, sought to adopt his witness statement, to constitute his evidence in chief. He proceeded to produce the bundle of documents filed together with his claim as his exhibits before Court.
8. It was his testimony that he was to start work on 1st July, 2017 but commenced 15 days earlier upon request by the respondent's representative in Kenya. That in that month, he was paid kshs 200,000.00 which was half of the salary payable to him. That he executed his duties faithfully, responsibly, diligently and was never taken through any disciplinary proceedings.
9. That the respondent was a new business entity and he was the first Business Manager with overall responsibilities over all facets and departments of the respondent's business. That further, he was responsible for starting the business from the scratch and was commended for his efforts.
10. That on or about 30th September, 2016, after he had worked for only three and a half months, and while he was performing his contractual obligations, he received information that he had been terminated with immediate effect, with reasons being poor performance. That he was not on any Performance Improvement Plan (PIP) and he was not given any Key Performance Indicators.
11. It was his further testimony that all through his employment, he had kept complaining about his appointment letter and properly defined job descriptions to no avail. That therefore, his termination was done without any justification and without following due procedures.
12. That during the month of September, 2016, he did not receive his full salary despite working for the entire month. That instead, he was paid half of his salary which he vehemently complained about. That he was not given any explanation for being paid less salary.
13. He further told the court that his contract did not provide for the probation period hence at the time of termination, he was not on any probation. That following his termination, he was paid half of his monthly salary in lieu of notice.
14. According to the claimant, his termination was unfair as he had left another job to take up his new assignment with the respondent. Closing his testimony, he asked the Court allow his claim.



Respondent's case

15. As stated herein, the respondent did not call oral evidence hence its case remained as per the its Response to the Statement of Claim.

Submissions

16. It was submitted on behalf of the claimant that his evidence that he was not placed on a PIP or taken through any appraisals was uncontroverted. That an employer is required by law to demonstrate any allegations of poor performance and it is not enough to just state poor performance. In support of this argument, the claimant placed reliance on the authorities of *Gladys Chelimo Bii vs Kenya Power and Lighting Company Limited* (2021) eKLR and *David Araka vs Uchumi Supermarkets Limited* (2021) eKLR. It was further submitted that the respondent has failed to discharge its burden or show that it was justified in dismissing him on account of poor performance. That further, there is no proof that the claimant was on probation hence no substantive justification was necessary. For emphasis, the claimant sought to rely on the cases of Francis Aboge Aduk vs Hasbah Kenya Limited and Christine Juma Were vs Kenafric Industries Ltd.
17. The claimant stated in further submission that the respondent did not follow due process when terminating his employment in that he was terminated with immediate effect and was not accorded a hearing. To support this argument, the claimant cited several authorities including *Dennis Asenji vs the Standard Group Limited* (2022) eKLR, *Bernard Ogari vs Freight in Time Limited* (2021) eKLR, *Agakhan Hospital Kisumu vs Erick Wanjohi* (2020) eKLR, *Elton Barasa vs One Acre Fund* (2018) eKLR and *Seth O. Onchari vs Shah Lalji Nangpar Academy* (2020) eKLR.

Analysis and determination

18. 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. Was the claimant under probation at the time of his termination?
 - ii. Was there a justifiable reason to terminate the employment of the claimant?
 - iii. Was the claimant afforded procedural fairness prior to termination?
 - iv. Is the claimant entitled to the reliefs sought?

Was the claimant under probation at the time of his termination?

19. The claimant avers that his contract did not provide for probation hence he was not on probation at the time of his termination. This is not entirely true. I say so because his contract of employment dated 20th April, 2016 which he exhibited before Court, provides for a probationary period of three months under clause 7.
20. It is apparent that the claimant was terminated on 30th September, 2016. As per the certificate of service issued to him by the respondent, he commenced employment on 15th June, 2016. This is also confirmed by his pay slip for the month of June, 2016 which indicates that he was paid a monthly salary of kshs 200,000.00, hence it can be inferred that he worked for half the period in that month. Therefore, it can very well be said that the claimant worked for three and a half months being the period commencing 15th June, 2016 upto 30th September, 2016.



21. It is therefore evident that at the time of his termination, the claimant had served past his three months probationary period as there is no evidence that his probation was extended for a further period. In absence of such an extension and without a word from the respondent, the claimant's contract of service is deemed to have been confirmed upon expiry of the probation period. My thinking on this issue accords with that of the Court in the case of *Narry Philemons Onaya-Odek v Technical University of Kenya [Formerly, the Kenya Polytechnic University College]* [2017] eKLR where it was held that:
- “ 33. Noting the above, the probationary terms of the claimant's contract of service lapsed after 6 months. By operation of the law and in accordance with section 42 of the *Employment Act*, the claimant successfully completed his probation period and thus his employment confirmed. After the lapse of 6 months, the respondent as the employer had no right to review such contract of service retrospectively. Effectively, under the terms of service, once the claimant proceeded to offer his labours to the respondent upon the lapse of 6 months, he could only be terminated from such employment in accordance with section 35, 40, 44 of the *Employment Act*, 2007 or by mutual agreement of the parties.”
22. The total sum of the foregoing is that at the time the claimant was terminated on 30th September, 2016, he was not on probation and was deemed by law as confirmed. He was therefore entitled to the safeguards under the *Employment Act*, which would ordinarily apply to an employee who is not on probation. A case in point is the notice period in respect of termination.
23. Before I pen off on this issue, I find it worth mentioning that the respondent annexed to its Response, a contract dated 15th June, 2016, which provides for a probation period of six months. Notably, the same is not signed by either the claimant or the respondent hence it is not owned. Besides the same was not admitted in evidence hence it was of no evidential value to the respondent.
24. That said, was the claimant's termination unfair and unlawful?

Justifiable reason for termination?

25. Section 43(1) of the *Employment Act* (Act) requires an employer to prove reasons for termination 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: -
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
26. The significance of the foregoing provisions is that an employer bears the burden of proving the reasons for termination of employment and moreso, that the said reasons are fair and valid. What constitutes fair and valid varies from case to case and largely depends on the facts and evidence before the Court.
27. In the instant case, the reasons leading to the claimant's termination as can be discerned from his letter of termination was in respect of his performance. His letter reads in part: -

“ RE: Termination of Services

I regret to inform you that your employment with Horeca Kenya Ltd is terminated as of 30th September, 2016. The reason for termination is due to poor performance, we have had



several discussions with you previously where you agreed to improve, but you have not shown any improvement. Based on the company strategies and current needs, it has become necessary to discontinue your employment...we regret to have to terminate your services but a decision had to be made.”

28. For starters, the respondent did not lead any evidence to prove that the claimant’s performance was wanting. Why do I say so? There were no performance targets or performance indicators against which the claimant’s performance was to be evaluated. What’s more, there were no reports or such other evidence demonstrating that the claimant’s performance when measured, was below par.
29. Indeed, one wonders how the respondent arrived at the conclusion that the claimant’s performance was poor yet there are no targets or reports indicating as much? How was his performance assessed and against what?
30. All in all, it is essential to note that where an employee is accused of poor performance, an employer ought to demonstrate that they have in place a mechanism of assessing performance. Such assessment is ordinarily undertaken against measurable targets agreed to prior.
31. As was held by the Court in the case *Agnes Yabuma Digo vs PJ Petroleum Equipment Limited* (2013) eKLR:

“Staff performance management is crucial for organizational success. In this case there was no evidence that there was any performance management system in place. Indeed the Respondent’s witness, Peter Mugambi admitted that the Claimant had not been given any targets. Even worse, the Claimant had no written job description...There was no evidence of any appraisal of the Claimant’s performance at any stage. An employer who fails to manage the performance of their staff lacks the moral authority to tell staff that they have underperformed. On this basis, I have rejected the Respondent’s claim that the Claimant’s performance was poor.”

32. Without evidence of the claimant’s performance assessment, I cannot help but conclude that the respondent has not proved that it had fair and valid reasons to terminate the claimant’s employment on grounds of poor performance.
33. The total sum of the foregoing is that the respondent has failed to discharge its evidential burden as required under sections 43(1) and 45(2) (a) and (b) of the Act hence the claimant’s termination was not substantively fair.

Fair process?

34. Pursuant to Section 45 (2) (c) of the Act, an employer is required to comply with the provisions of fair process and prove that it accorded an employee a fair hearing prior to terminating his or her employment. The specific requirements of a fair hearing are provided for under section 41 of the Act in the following manner: -

“(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. Underlined for emphasis



35. It is the claimant's case that the respondent did not apply due process in terminating his employment. As stated herein, the respondent did not tender evidence during the trial, hence this position was not controverted.
36. Over and above, this is a case where facts speak for themselves as the wording of the claimant's letter indicates that his termination was to take effect the same day. It thus follows that the claimant was not given any notice prior to his termination.
37. Section 41(1) of the Act requires that an employee be notified beforehand of the reasons the employer is considering terminating his or her employment. The employee is then given an opportunity to render an explanation in answer to the allegations against him. More importantly, it is noteworthy that the employee is entitled to have a fellow employee or a union representative present during such an explanation.
38. In this case, there is no evidence that the respondent fulfilled the requirements of section 41 of the Act hence is at fault. If his letter is anything to go by, then it is apparent that the claimant's termination was abrupt and he did not have an opportunity to defend himself. It is quite clear from the facts and evidence herein that none of the procedures outlined under section 41(1) of the Act were undertaken by the respondent before terminating the claimant's employment. Therefore, the claimant's termination fell below the legal parameters established under sections 45 (2) (c) and 41 of the Act.
39. On this score, I wish to echo the determination by the Court of Appeal in the case of *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR held where it was held as follows: -
- “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;
- “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.” Underlined for emphasis
40. Similarly, in the case of *Naumy Jemutai Kirui vs Unilever Tea Kenya Limited* [2020] eKLR the Court stated as follows: -
- “Before the employer can be found to reply on the provisions of section 43(2) with regard to solely relying on having genuine reasons existing to justify termination of employment, the due process of the law dictates that the employee must be notified of her poor performance as an issue forming the basis of reasons for which the employer is considering termination of employment and thus allow the employee to give her defences in the presence of another employee of choice.”
41. Based on the above determinations which I wholly adopt and reiterate, I arrive at the inescapable conclusion that the respondent has failed to prove that the claimant was subjected to a fair process prior to termination of his employment.



42. In the circumstances, it is the finding of the Court that the claimant's termination was procedurally unfair within the meaning of Section 45 (2) (c) and 41 of the Act.

Reliefs?

43. As the Court has found that the claimant's termination was substantively and procedurally unfair, he is awarded compensatory damages equivalent to three (3) months of his gross salary. This award takes into account among other factors, the length of the employment relationship.

44. With regards to the claim for notice pay, it is apparent that the claimant was paid kshs 200,000.00 being salary in lieu of notice. This is half of what was due to him as monthly salary. He is therefore entitled to the balance of Kshs 200,000.00.

45. The claimant is also entitled to the salary withheld by the respondent in the month of September, 2016. The claimant's pay slip indicates that he was paid Kshs 200,000.00 instead of Kshs 400,000.00. As the respondent did not provide any justification for failure to pay the claimant's full salary for that month, I return that he is entitled to the balance being Kshs 200,000.00.

46. The claim for house allowance is denied as it is clear that the claimant's gross monthly salary was Kshs 400,000.00 constituting basic salary and allowances. The Black's law dictionary, 10th Edition defines "gross income" to mean the "Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings."

47. It is therefore presumed that the allowances encompassed house allowance. I am further fortified by the determination in the case of *Joseph Sani Orina vs Hiprora Business Solution (EA) Limited* [2017] eKLR, where the Court reckoned as follows: -

"The claimant's payslip showed that his gross salary was Kshs 60,000/=. Gross salary as opposed to basic salary usually includes house allowance and other allowances paid by an employer and include basic pay."

48. With regards to leave pay, the claimant has sought compensation in the sum of kshs 400,000.00. It is apparent that as part of his terminal dues, he was paid kshs 40,000.00 being leave earned but not taken. Furthermore, the claimant did not tell the Court to what extent he was claiming the unpaid leave noting that he only worked for three and a half months as opposed to a full year.

Orders

49. It is against this background, that I enter Judgment in favour of the claimant against the respondent and he is awarded: -

- a. Compensatory damages in the sum of Kshs 1,200,000.00 being equivalent to three (3) months of his gross salary.
- b. Half a month's salary in lieu of notice being Kshs 200,000.00.
- c. Withheld salary for September, 2016 being kshs 200,000.00.
- d. The total award is Kshs 1,600,000.00
- e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
- f. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.



STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. George Gilbert

For the Respondent No appearance

Court Assistant Abdimalik Hussein

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 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.

STELLA RUTTO

JUDGE

