



**Kinyanjui v One Software (EA) Ltd (Cause 2288 of 2017)
[2023] KEELRC 934 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 934 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2288 OF 2017
AN MWAURE, J
APRIL 20, 2023**

BETWEEN

JAMES MWENDA KINYANJUI CLAIMANT

AND

ONE SOFTWARE (EA) LTD RESPONDENT

JUDGMENT

Introduction

1. The claimant filed a memorandum of claim dated 20th September 2017.

Claimant's Case

2. The claimant was employed and given a one year contract dated 13th January 2017 as a software developer. He worked until 3rd April 2017 when he was unlawfully terminated.
3. He says the reasons given for the termination were frivolous and did not amount to misconduct.
4. He says on 4th April 2017 he was called by one Peter Kitheka who informed him his termination had been rescinded and should resume work. He says he resumed work until 8/4/2017 when he was informed his termination had been terminated.
5. He says that the respondent tried to rectify their mistakes in breaching their labour laws and they sent him an email dated 24th April 2017 and attached the termination letter. The termination letter was backdated to 24th April 2017.
6. He says the termination by the respondent was unlawful and wrongful and he was not given a chance to defend himself. He says as a result of the said termination his reputation and image was tarnished severely and prays for damages for Kshs 1,016,666/-.



Respondent's Case

7. The respondent in his response dated 30th November 2017 denies they unlawfully terminated the claimant. He says the claimant received numerous warnings in writing concerning performance and absconding work and lateness which led to the issuance of the termination notice.
8. He says the claimant used to write his academic writing assignments during the working hours and further the claimant never received a call from Peter Kitheka asking him to resume work.
9. He further says the claimant had performance issues and had received several warning letters and had also been taken through disciplinary hearing.
10. The respondent further says the claimant did not perform his duties as expected and so does not even deserve any commission. He says the claimant's dismissal was justifiable and fair and within ambit of labour laws. The respondent prays the claimant's suit be dismissed with costs.

Claimant's submissions

11. The claimant in his submissions avers he was employed vide employment letter dated 12th January 2017 for a period of one year. He says he was served with a termination notice without any warning being given to him or a termination letter. He says he was dismissed without a valid reason.
12. He says the warning letters the respondent purported to send the claimant were not compliant to the procedure provided in their human resource disciplinary manual.
13. As for emails allegedly extracted from claimant's laptop they lack legitimacy and there is no evidence that they were extracted from his email. He says there was no certificate to support the electronic documents to wit the emails.
14. Claimant further says there was no valid reason given on the termination of employment and the mandated procedure was not followed since the respondent never produced minutes of the disciplinary meeting.
15. Claimant submits that there are myriads of authorities to the effect that the procedure mandated in section 41 of *Employment Act* should be adhered to (see the case of *David Gichana Omuya v Mombasa Maize Millers Limited* (2014) eKLR).
16. The claimant prays that the court finds the respondent terminated him unfairly and grants him the reliefs prayed.

Respondent's submissions.

17. The respondent's submission are that the claimant was terminated fairly as per provision of her contract and sections 41(2) and 44 of the *Employment Act*. They aver that the claimant had performance issues and was issued with internal memos on 14th February 2017 and 1st March 2017 and 25th March 2017. He says he was also issued with verbal and written warnings. They say that the claimant's summary termination was substantially and procedurally fair.
18. He also says the dismissal was based on reasons related to the employee's conduct and satisfied the burden of proof as in section 47(5) of the *Employment Act*. They are relying on the case of *Kenya Revenue Authority v Maginga Salima Morgani* (2010) eKLR where court held "the fairness of hearing is not determined solely by its oral nature. It may be conducted through exchange of letters to buttress



its position that the claimant was given several warnings to remedy his conduct and the last warning being in writing the claimant cannot allege that he was not accorded an opportunity to be heard.

19. The respondent depones that since the claimant was summarily dismissed and the procedure was fair and the reason were valid he is not entitled to the one month in lieu of notice or the accrued leave days. They also submit that the claimant is not entitled to costs and that indeed the claimant should be condemned to pay costs.

Analysis and Determination

20. The claimant worked for the respondent from 13/1/2017 and on 3/4/2017 when he received the termination notice. Prior to the receipt of termination notice he had received four warning letters on 25/3/2017, 16/4/2017 on 9/3/2017 and on 7/3/2017. Apparently he had also received several verbal warnings. The allegations against him was poor performance and doing his personal work during the office hours. He was accused of slugginess and delaying work. He was accused of not changing his attitude despite several warnings in writing and verbal warnings.
21. It is unfortunate the claimant is alleging he was never issued with any warning letters in his statement of claim and yet there are several warning letters produced in court. The court has no reason to believe the said warning letters were fake.
22. The termination letter of 3rd April 2017 also clearly indicated the reason for termination was due to poor performance. Then he was issued another termination notice dated 19/4/2017 with immediate effect and was accused he was doing his personal work during the office hours.
23. Going by the provisions of section 45(1) of the [Employment Act](#) 2007 an employer should only terminate the employment of an employee with a valid reason.

Section 45(1) of [Employment Act](#) provides verbatim as follows:

“No employer shall terminate the employment of an employee unfairly.”

The court finds the respondent had a valid reason to consider terminating the claimant from their employment and the same had been communicated to the claimant severally through written warnings and verbatim as per the evidence on record. The respondent avers the claimant had not improved and had not changed his attitude.

24. Section 43(2) of the [Employment Act](#) provides as follows

“The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”

25. The reason for termination of the respondent was poor performance and poor attitude towards work among others. The court finds the respondent had valid reason to terminate the claimant and he communicated the reasons to the claimant properly both in writing and verbally.
26. However despite having good reasons to terminate the claimant from his employment the respondent was impatient and failed to follow the disciplinary procedure provided in their human resource manual. The respondent’s Human resource manual provide that the respondent must give the warnings of misconduct and conduct disciplinary hearing within three weeks.



27. The court was not presented with evidence of disciplinary hearing and after the warnings the claimant was issued with a termination letter dated 3rd April 2017 and a summary dismissal letter dated 19th April 2017.
28. He was not taken through a hearing in the presence of a fellow worker of his choice to be present during his hearing or a shop floor union representative of his choice. There were no minutes to demonstrate such a hearing was conducted.

Section 41 (1) of the [Employment Act](#) 2007 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.

29. The said section is mandatory and must be followed. The often cited case of [Walter Ogal Onuro v Teachers Service Commission](#) cause No 955 of 2011 provides as follows:

“For termination to pass the fairness test, it ought to be shown that there was not only substantive justification for termination but also procedural fairness.

30. As well the case of [Kenfreight EA Limited v Benson K Nguti](#) (2016) eKLR which provided:

“Apart from issuing proper notice according to the contract of employment as provided the employer was duty bound to explain to the employee in the presence of another employee or a union official in a language the employee understands the reason or reasons which employer is considering termination of the employee. An employee is also entitled to be heard and his representation if any considered by the employer before termination.”

31. In conclusion the court finds that even though the respondent may have had a valid reason to terminate the claimant from his employment summarily he failed in following the mandatory disciplinary process provided in section 41(1) of the [Employment Act](#). The law provides that the employer must pass the substantive test and procedural test otherwise the termination will be declared unfair and wrongful. In this case the respondent failed to follow the right procedure and so the court declares the termination was un procedural and wrongful.

32. The court proceeds to award the claimant the following remedies.

1. One month salary in lieu of notice Kshs 100,000/-
2. 5 days accrued leave Kshs 16,666/-.
3. One month compensation for general damages Kshs 100,000/-
4. The Court found the respondent had a reason to terminate the claimant but the procedure followed was flawed and so the court orders each party to meet their costs.
5. Interest will be awarded from the date of judgment until the date of full payment. The impact of the total award is Kshs 216,666.
6. The court will not award the remaining period of the contract as the respondent had valid reason to terminate the claimant from employment due to unacceptable performance.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF APRIL, 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

