



**Samba v Karen Gables Limited (Cause 809 of 2019)
[2023] KEELRC 844 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 844 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 809 OF 2019
L NDOLO, J
APRIL 13, 2023**

BETWEEN

CLEMENCE MGHOI SAMBA CLAIMANT

AND

KAREN GABLES LIMITED RESPONDENT

JUDGMENT

1. By letter dated September 7, 2016, the respondent offered the claimant the position of Manager. The claimant duly accepted the offer and started working for the respondent on October 20, 2016.
2. The claimant worked for the respondent until August 31, 2019 when her employment was terminated. It is this termination that triggered the dispute between the parties.
3. The claimant states her case in a Memorandum of Claim dated November 25, 2019 and filed in court on December 2, 2019.
4. The respondent counters the claimant's claim by a Response dated June 16, 2021, to which the claimant responded on September 16, 2021.
5. The matter proceeded to full trial where the claimant testified on her own behalf. The respondent called its Managing Director, Christian Bernard; Manager, Charles Kuria; and Waiter, Edward Mumbo. The parties further filed written submissions.

The Claimant's Case

6. The claimant states that she was employed by the respondent in the position of Manager from September 7, 2016 until August 31, 2019, when her employment was terminated.



7. The claimant terms the termination of her employment as unlawful for want of due process. She claims that the termination was based on the fact that she had started her own tour company, without informing the respondent.
8. According to the claimant, she was under no obligation to inform the Managing Director about her tour company as there was no conflict of interest with her employment.
9. The claimant sets out her claim as follows:
 - a. Paid leave allowance for 57 days.....Kshs. 292,500
 - b. 12 months' salary in compensation.....2,457,000
 - c. Unpaid salary for the month of August.....204,750
 - d. Salary in lieu of notice.....204,750
 - e. Unpaid service fee.....307,125
 - f. Incurred costs in debt recovery.....50,000
 - g. Monthly deductions (October 2016-December 2017).....176,000
 - h. General damages
 - i. Certificate of service
 - j. Payslips for January to May 2018
 - k. Costs plus interest

The Respondent's Case

10. In its Response dated June 16, 2021, the respondent admits having employed the claimant from October 20, 2016.
11. The respondent however denies the claimant's claim that her employment was unlawfully terminated and states that the claimant wrongfully, unlawfully and in breach of trust and/or contract, set up and started operating her own business from the respondent's premises.
12. In this regard, the respondent accuses the claimant of installing her own PDQ Machine at the respondent's premises, through which payments were made to her, without the respondent's consent or knowledge.
13. The respondent asserts that by setting up and operating her business within its premises, the claimant was in breach of her contract of employment, which required her to devote and dedicate all her time to the respondent's business.
14. The respondent further accuses the claimant of unlawfully and irregularly terminating the contract of a supplier of airport transfer services and taking over the service herself, through a proxy using her motor vehicle and handling all the payments through her own company.
15. The respondent adds that the claimant took advantage of the one-month absence of the Managing Director in August 2019 to terminate the employment of a loyal, hardworking and dedicated employee by the name Mumbo.



16. Further, the claimant is accused of sabotaging the respondent's business, by luring and inciting another employee, Charles Kuria, to stop working for the respondent and instead team up with the claimant in her new business venture.
17. The respondent avers that on August 31, 2019, the Managing Director sought an explanation from the claimant regarding her conduct during his absence but the claimant was rude to the Managing Director.
18. The respondent maintains that it had valid reasons for terminating the claimant's employment, upon discovering that the claimant was disloyal and had not only taken advantage of the absence of the Managing Director to set up and operate her own business from the respondent's premises but was bent on sabotaging the Respondent's business by luring the Assistant Manager to leave employment and team up with her.
19. The respondent states that the claimant's salary for August 2019 was applied towards payment of money owed to the Company by the claimant.
20. The respondent denies that the claimant had any pending leave days and states that in the year 2019 alone, the claimant had taken a cumulative 69 days, when she was away from work as follows:
 - a. January 2019 - 9 days
 - b. February 2019 - 10 days
 - c. March 2019 - 8 days
 - d. April 2019 – 13 days
 - e. May 2019 – 17 days
 - f. June 2019 – 7 days
21. The respondent denies the claimant's entire claim and asks the court to dismiss it with costs.

Findings and Determination

22. There are two (2) issues for determination in this case:
 - a. Whether the termination of the claimant's employment was lawful and fair;
 - b. Whether the claimant is entitled to the remedies sought.

The Termination

23. The claimant was not issued with a termination letter. It is however not in controversy that the termination was on account of conflict of interest, details being that the claimant had opened her own business through which she provided airport transfer services to the respondent's customers.
24. It is also on record that the claimant had not consulted her employer before making the decision to replace an independent contractor engaged by the respondent, with her own company.
25. In the circumstances of this case, I have no hesitation in reaching the conclusion that the claimant abused her position as Manager for personal benefit. In addition, the claimant was accused of making a unilateral decision to terminate the employment of two employees, an accusation she was unable to debunk.



26. In my view, these actions by the claimant constituted a valid reason for termination of employment as required under section 43 of the [Employment Act](#).
27. The next question for determination is whether in effecting the termination, the respondent observed due procedure. The mandatory procedure in this regard is set out in section 41 of the [Employment Act](#) which provides as follows:
41. Notification and hearing before termination on grounds of misconduct
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.
2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
28. In her final submissions, the claimant referred to the decision in [Galgalo Jarso Jillo v Agricultural Finance Corporation](#) [2021] eKLR where it was affirmed that even where there are valid grounds for termination of employment, the law obligates the employer to observe the procedural fairness requirements, including setting out a clear statement of charges and allowing the employee adequate opportunity to respond.
29. In the present case, the respondent did not provide the claimant with prior notice of charges, with lead time to prepare a defence. Instead, the respondent adopted a summary procedure which flew in the face of the mandatory provisions of section 41 of the [Employment Act](#). What is more, the respondent did not bother to issue the claimant with a termination letter.
30. On the whole, I find and hold that the termination of the claimant's employment was unfair for want of due procedure.

Remedies

31. Flowing from the foregoing findings, I award the claimant one (1) month's salary in compensation. In arriving at this award I have considered the claimant's length of service plus her contribution to the termination.
32. I further award the claimant one (1) month's salary in lieu of notice.



- 33. The Respondent claims to have applied the claimant’s salary for August 2019 towards payment of money owed by the claimant to the Company. The respondent did not however provide any documentary evidence to support its position in this regard. There was therefore no justification for withholding of the claimant’s salary and the claim thereon succeeds and is allowed.
- 34. The claims for leave pay, service fee, debt recovery costs and monthly deductions were not proved and are dismissed.
- 35. No basis was laid for the claim for general damages which also fails and is disallowed.
- 36. In the end, I enter judgment in favour of the claimant as follows:
 - a. 1 month’s salary in compensation.....Kshs. 204,750
 - b. 1 month’s salary in lieu of notice.....204,750
 - c. Salary for August 2019.....204,750
 - Total.....614,250
- 37. This amount will attract interest at court rates from the date of judgment until payment in full.
- 38. The claimant is also entitled to a certificate of service plus costs of the case.
- 39. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF APRIL 2023

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JUDGE

Appearance:

Miss Auma for the Claimant

Miss Mati h/b for Mr. Kairaria for the Respondent

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