



**Wanjala v Doctor Pharm Kenya Limited (Cause 1771 of 2015)  
[2023] KEELRC 1336 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1336 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1771 OF 2015**

**L NDOLO, J  
MAY 25, 2023**

**BETWEEN**

**SARAH NALIAKA WANJALA ..... CLAIMANT**

**AND**

**DOCTOR PHARM KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The issues in dispute as listed by the Claimant in her Memorandum of Claim dated September 23, 2015 and filed in court on October 2, 2015 are:
  - a. Unlawful and unfair termination of employment;
  - b. Non-payment of terminal dues; and
  - c. Sexual harassment at the workplace.
2. The Respondent filed a Memorandum of Response on November 20, 2015. At the trial, the Claimant testified on her own behalf but the Respondent did not call any witness. Further, the Respondent did not file final submissions in spite of adequate opportunity to do so.
3. This judgment is therefore based on the parties' pleadings, the Claimant's testimony and her final submissions.

**The Claimant's Case**

4. By a letter dated August 26, 2014, the Claimant was employed by the Respondent as a Medical Representative, effective August 18, 2014. The Claimant was to serve a probation period of six (6) months.



5. On December 20, 2014, the Respondent terminated the Claimant's employment on allegations of unsatisfactory performance.
6. The Claimant terms the termination as unlawful and unfair for the following reasons:
  - a. The Claimant was not served with a notice to show cause to answer to charges of poor performance;
  - b. No hearing ever took place before the decision to terminate the Claimant's employment was made;
  - c. Due process was not followed in executing the termination.
7. The Claimant states that the termination was against the terms of her employment contract, which stipulated that termination on the basis of performance was to follow a final warning. She avers that she was not served with any warning letter on poor performance.
8. The Claimant denies ever being subjected to a performance appraisal. She claims that monthly data compiled by the Respondent showed that she performed better than her colleagues in the Department.
9. The Claimant states that the real reason for termination had to do with her immediate supervisor's sheer dislike and personal vendetta against her.
10. The Claimant alleges that she was a victim of sexual harassment perpetrated by her immediate supervisor, Mr. Naveen Survana. She deems the termination of her employment as the consequence of her declining to give in to sexual advances by Survana.
11. The Claimant states that the Respondent did not have a sexual harassment policy in place and there was no mechanism for reporting or resolving sexual harassment complaints. The Claimant claims to have lodged her complaint against Survana to the Human Resources Department.
12. The Claimant seeks the following remedies:
  - a. A declaration that the termination of her employment was unlawful and unfair;
  - b. General damages for unlawful and unfair termination as provided under Section 49 of the [Employment Act](#);
  - c. A declaration that the Claimant was sexually harassed by the Respondent in the course of her employment;
  - d. General damages for sexual harassment;
  - e. Kshs. 12,417.30 being unpaid leave days for 4 months;
  - f. Kshs. 106,434 being 2 months' salary for unserved probationary period;
  - g. Certificate of service;
  - h. Costs plus interest.

### **The Respondent's Case**

13. In its Memorandum of Response dated November 18, 2015 and filed in court on November 20, 2015, the Respondent denies the Claimant's claim that her employment was terminated unlawfully and unfairly. The Respondent states that it acted professionally in terminating the Claimant's employment.



14. According to the Respondent, the Claimant's employment was terminated within her the terms of her employment contract, which stipulated the circumstances under which the Claimant was liable for summary dismissal.
15. The Respondent avers that the Claimant's performance during the probation period was found to be unsatisfactory. The Respondent denies the Claimant's allegation that she was not subjected to performance appraisal.
16. The Respondent further avers that the Claimant was issued with verbal warnings by her supervisor, which she did not heed to.
17. The Respondent denies the Claimant's claim of sexual harassment by her supervisor, Mr. Naveen Survana, which the Respondent deems as aimed at tarnishing the supervisor's image and reputation.
18. The Respondent asserts that it has a sexual harassment policy in place which provides for lodging of sexual harassment complaints and adds that the Claimant has never reported any such complaint.
19. The Respondent states that upon her dismissal, the Claimant was paid her terminal dues in the sum of Kshs. 42,859. According to the Respondent, the Claimant was not entitled to any leave pay as she had not worked for a continuous period of 12 months.

### **Findings and Determination**

20. There are two (2) issues for determination in this case:
  - a. Whether the Claimant has made out a case of unlawful termination of employment;
  - b. Whether the Claimant is entitled to the remedies sought.

### **The Termination**

21. The Claimant's employment was terminated by letter dated December 20, 2014, stating as follows:

“Dear Sarah,

Re: Termination Of Service

The above subject refers.

According to the nature of our agreement; the nature of your work was supposed to be performance related.

The management in executing its duty has been continuously appraising the nature of your performance and has found it unsatisfactory.

It is unfortunate to note that, despite the patience extended by the company to allow you deliver on your performance; the same has not been forthcoming; rendering the situation untenable.

It is with the above reasoning that the company has arrived at the decision of relieving you off (sic) your duties; the same takes effect immediately. You are required to return all company material in your possession after which all your dues shall be calculated up to your last working day.

We wish you best of luck in all your future endeavors.

For & On Behalf of;



Doctor Pharma (K) Ltd;  
(signed)  
H. Kotecha  
Director”

22. According to this letter, the Claimant’s employment was terminated on the ground of poor performance. It is not in contest that at the time of the termination, the Claimant was serving probation. It has however been settled by a three judge Bench of this Court in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR that employees serving probation are entitled to the procedural fairness requirements established by the *Employment Act*.
23. The proper procedure for handling cases of poor performance was restated by this Court in its decision in *Jane Wairimu Machira v Mugo Waweru & Associates* [2012] eKLR to the effect that an employee whose performance has been put into question is entitled to specific notice of the areas of concern with reasonable time to improve. Further, once the employer begins to consider termination of employment on account of poor performance, the employee is entitled to a performance appraisal and a capability hearing within the beacons of Section 41 of the *Employment Act*.
24. In the present case, the Respondent did not adduce any evidence to show compliance with the foregoing procedure.
25. For this reason, I find and hold that the termination of the Claimant’s employment was substantively and procedurally unfair and she is entitled to compensation.

### Remedies

26. I therefore award the Claimant three (3) months’ salary in compensation. In making this award, I have considered the Claimant’s service period plus the Respondent’s unlawful conduct in terminating the employment.
27. In the absence of leave records to the contrary, I allow the claim for prorata leave for 4 months of service.
28. The Claimant made allegations of sexual harassment against her Supervisor, Naveen Survana. She however did not adduce any evidence to support these allegations. She claimed to have reported the alleged sexual harassment to two officers within the Respondent’s Human Resource; Roselyn Kagiri and Dorcas Ngaruiya. Again, this averment was not backed by any evidence.
29. On the whole, I find and hold that the Claimant did not prove her claim of sexual harassment, which therefore fails and is dismissed.
30. There is no legal basis for the claim for 2 months’ salary for unserved probationary period and the claim is therefore disallowed.
31. Finally, I enter judgment in favour of the Claimant as follows:
  - a. 3 months’ salary in compensation.....Kshs. 159,651
  - b. Prorata leave for 4 months (53,217/301.754).....12,417
  - Total.....172,068
32. This amount will attract interest at court rates from the date of judgment until payment in full.



33. The Claimant is also entitled to a certificate of service plus costs of the case.

34. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY 2023**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Mr. Magua for the Claimant**

**Mr. Olaha for the Respondent**

