



**Oloo v Usafi Services Limited (Cause 1075 of 2016)
[2023] KEELRC 1609 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1609 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1075 OF 2016
SC RUTTO, J
JUNE 30, 2023**

BETWEEN

EVANCE ODHIAMBO OLOO CLAIMANT

AND

USAFI SERVICES LIMITED RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated 19th May, 2016, the claimant avers that he was employed by the respondent as the head of sales and marketing. He avers that he performed his duties well with diligence, enthusiasm, resourcefulness, reliability and honesty for about five months. It is his case that without any lawful excuse or notice, the respondent dismissed him summarily on malicious grounds that he had not performed according to the company's expectations during the probation period which had lapsed on 26th January, 2016. It is on account of the foregoing that the claimant is seeking against the respondent a declaration that his termination was unfair and unlawful, general damages for loss of utility and earnings, three months salary in lieu of notice, salary for the month of February 2016, loss of earnings for 22 years, punitive damages, certificate of service, costs of the suit together with interest.
2. The respondent opposed the claim through its Memorandum of Response dated 25th August, 2016 in which it avers that it engaged the claimant on a probationary period of three months with a further extension of three months which extension was to be used on the evaluation of his performance to the satisfaction of the respondent's management team. It avers that the claimant performed his duties in a dismal manner leading to a consistent decline in sales. The respondent further contends that the claimant occasioned it losses as a result of the fact that it lost some goods during his tenure. Consequently, the respondent counterclaims against the claimant the sum of Kshs 30,390.00 and has asked the Court to dismiss the claim with costs.



3. The claimant filed a Reply to the Memorandum of Response, reiterating his averments in the Memorandum of Claim and denying the respondent's averments. He contends that there was massive improvement in weekly sales while he was the head of sales at the respondent company.
4. The matter proceeded for part hearing on 24th November, 2022 and later on 14th February, 2023, when the defence closed its case. At the trial, both parties called oral evidence.

Claimant's case

5. The claimant started by adopting his witness statement and documents filed together with his Claim to constitute his evidence in chief.
6. It was the claimant's testimony that he was employed by the respondent to serve on a three months' probation which ended on 26th January, 2016. The probation period was not extended after the three months.
7. It was his testimony that he worked diligently and there was improvement on sales supported by the weekly reports that he shared with the directors, senior management and the sales team despite the fact that the directors suspended sales because of inability to get bottles from suppliers which resulted to fluctuating sales. He added that employees were also resigning without replacement.
8. The claimant further stated that prior to the review, there were goods that were lost as reported by the respondent. He was the head of sales and marketing while the department of logistics was headed by a different person who oversaw the dispatch of the lost goods and was responsible for the truck. He was aware of the dispatch of the goods to Mombasa. On 27th January 2016, a day after the goods were delivered, he received an email from the Mombasa Depot clerk notifying him that there was variation on what was issued on material note 57126 and what was received. He handled the matter verbally with the Head of Logistics who assured him that he would investigate the matter. He followed up writing by an email of 30th January 2016 to the Head of Logistics requesting him to produce a comprehensive report on the issue.
9. The claimant further stated that on 6th February 2016, he received an email asking him to take quick action by getting in touch with the transporter of the goods which he did but the transporter and the loader were out of Nairobi when contacted. On 8th February 2016, he received another email from the Managing Director requesting that he updates her on how far he had gone with the matter. He avers that he responded that he was intending to pay a visit on the transport company the following day then update her thereafter.
10. He visited the transport company on 13th February 2016 in the company of the Head of Logistics but did not find the manager, transporter and loader. He called the transport company manager Mr. Michael Maina who informed him that he was out of the office running urgent responsibilities and urged him to book another appointment. He informed the respondent of the progress he had made.
11. The claimant further stated that on 11th February 2016, he received an email from the Human Resource asking him to go for a probation review the following day. He responded to the email and indicated that the time given was too short for him to prepare for the review. His request for more time was declined. Following his letter on the same, the Human Resource pushed the probation review to 16th February, 2016.
12. He further stated that on 12th February 2016 his Logistics Executive was scheduled to go on leave and he was left in charge of the logistics hence he had to schedule all deliveries countrywide and this did



not leave him any time for preparations. On Monday 15th February, 2016, there was no internet access in the office hence accessing data on emails and printing the same was impossible.

13. On 16th February, 2016 the day of the probation review, he put in another request to further push the meeting via a letter dated 16th February, 2016 and the same was declined and the probation review proceeded. All this took place on 16th February, 2016 long after his probation ended on 26th January and there was no extension of the probation period.
14. The scheduled meeting proceeded and it was very acrimonious. It was attended by 5 individuals and did not review performance against any target whatsoever. It was his evidence that in the meeting a strategic plan for the Sales and Marketing department was demanded. This was unrealistic as the respondent did not have a strategic plan document at that particular point in time nor did he have prior information on what its strategic plan was during the period of his employment. Further, there was no set standard of percentage growth expected from him and there are no signed documents to evidence the same. He was however informed in the meeting that as a Head of the Department, he had tactical plans covering areas of his terms of reference.
15. He further averred that the meeting proceeded to other areas that had nothing to do with his performance such as demanding explanations why he had debt liabilities from his previous employment. The meeting ended without the reviewers reviewing his work for the past months. They failed to ask what business he had brought to the firm and on 17th February, 2016, he received a summary dismissal letter dated the same day.
16. The claimant termed his termination as unfair as he was way past his probation period and the assessment was neither done in good faith nor did the respondent review his progress and the dismissal was based on a false evaluation.

Respondent's case

17. The respondent called oral evidence through Mr. Joseph Mwangi who testified as RW1. Similarly, he asked the Court to adopt his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the respondent as exhibits before Court.
18. It was his evidence that the respondent engaged the claimant on 26th October 2015 as the Head of Sales and Marketing and put him on probation for a period of three months with a further extension of three months based on the evaluation of his performance to the satisfaction of its management
19. During the probationary period, the claimant was disrespectful to persons placed in authority over him and according to Section 44 of the *Employment Act*, this warrants summary dismissal.
20. It was RW1's further evidence that during the said period, the claimant occasioned loss of company goods, and proved to lack integrity as he solicited for Kshs.20,000 from a Sales Representative Mr. Simon Sweto handling the Thika Road Region. The other reasons that caused Management to lose faith in the claimant was that during his probationary tenure as the Head of Sales and Marketing, the respondent suffered loss of goods to the tune of Kshs. 30,390/= . This loss was communicated to the claimant and a demand for settlement made to him which amounts he has failed to settle to date.
21. He further averred that despite having targets set for his performance, the claimant performed his duties as the Head of Sales and Marketing in a dismal manner evidenced by the lack of growth in sales during his tenure.
22. RW1 further stated that the claimant obtained funds deceitfully from one of the respondent's clients based in Mombasa and failed to account to the respondent.



23. He added that it was within the claimant's knowledge that the extension of his probationary term and the subsequent confirmation of his appointment was to be based on his performance in terms of the targets set for him and the performance of his duties and as such, he cannot feign surprise at having been dismissed from employment yet his performance was wanting during his probationary term.
24. RW1 further stated that contrary to the claimant's assertions that his dismissal was irregular, the respondent followed the statutorily laid out procedures before terminating his services which were probationary in nature. It also made efforts towards ensuring that the claimant was given an opportunity to rectify his conduct. Despite the respondent's efforts and numerous warnings issued to the claimant, no notable improvements were made. RW1 added that the respondent was well within its right to terminate the claimant's employment during the probationary period by giving him seven days' notice hence the claimant's claim of three months' pay is therefore unlawful.

Submissions

25. The claimant submitted that his employment contract was terminated by the respondent without a good cause and without abiding to due process. As a result, he maintained that the same was in contravention of the principles of natural justice and the provisions of *the Constitution*, the *Fair Administrative Actions Act* and the *Employment Act*. It was the claimant's further submission that during the hearing of his case, the respondent introduced new issues in its witness statements which were not canvassed during the probation review meeting.
26. The respondent did not file any submissions as the same were missing from the Court's physical record and were not traceable on the online portal.

Analysis and determination

27. From the pleadings on record, the evidentiary material before me as well as the claimant's submissions, this Court is being called to resolve the following questions: -
 - a. Was the claimant's termination unfair and unlawful?
 - b. Is the counterclaim justified?
 - c. Is the claimant entitled to the reliefs sought?

Was the claimant's termination unfair and unlawful?

28. For starters, it is noteworthy that the claimant's termination came shortly after the end of his probationary period. Indeed, the review undertaken on 16th February, 2016, was in respect of his performance during his period of probation. I say so because the period surpassed after the end of the claimant's probation was only 17 days.
29. This being the case and in light of the provisions of Section 42(1) of the *Employment Act*, the respondent was not strictly bound by the provisions of Section 41 which provide for procedural fairness. This is further noting that the said provision was still good law in light of the determination in the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University* (2021) eKLR. Therefore, the respondent cannot be deemed to have acted outside the applicable law then.
30. However, the same cannot be said with regards to the requirement for substantive justification under Sections 43 and 45(2) (a) and (b) of the *Employment Act*. In this regard, it should be noted that the *Employment Act* has not ousted the requirement for substantive fairness when it comes to termination



of an employee serving under probation. Put another way, the provisions of Sections 43 and 45 of the Employment Act remain applicable to employees who are on probation.

31. On this score, I find useful guidance in the determination by Radido J. in the case of Mercy Karingithi v Emerald Hotels Resorts & Lodges Ltd [2014] eKLR, where the learned Judge held that:-

- “ 19. I say so because the fairness of termination of employment is not evaluated merely on the basis of the employer complying with procedural fairness but also on the basis of substantive fairness.
20. The question in other words, is whether the provisions of section 45 of the Employment Act are ousted or are not applicable in complaints of termination during probationary period.....
21. It cannot be disputed that although still serving under probation, an employment relationship between parties has commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of the parties arise. These obligations are in terms of duties and rights. Duties of the employer (Respondent) and rights of employee (Claimant) and vice versa.
22. The fundamental rights of employees not to be unfairly terminated and the Claimant in this case, as provided for in Section 45(1) and (2) of the Employment Act cannot be abrogated during the probation period unless clearly expressed so. The only right as far as termination is concerned which has been abrogated during the probationary period is the right to procedural fairness in section 41 of the Act. That is the import of section 42 of the Employment Act.
23. However the security of tenure given to ordinary employees by section 45 of the Employment Act is still applicable. The employees’ right not to be unfairly terminated still binds the employer and is applicable during the probationary period. An employer is obliged to prove the reasons and that the reasons are valid and fair reasons.”

32. And further, in the case of Happiness Nyabonyi Maingo v Shreeji Chemicals Limited [2020] eKLR, the Court determined as follows: -

“Whereas, a probationary contract is a sort of “testing waters” engagement, the rights of the employee are not sacrificed. The employees remain entitled to the protection of the law from arbitrary and whimsical terminations by employers. For example, the law has put in place certain safeguards in favour of employees regardless whether they are employed under a probationary contract... In view of the foregoing, I reiterate that the obligation to justify the reason for terminating contract under section 43,45 and 47 (5) of the Employment Act applies equally to termination of probationary contract. Consequently, an employee has every right to challenge termination for probationary contract for want of substantive fairness.” Underlined for emphasis

33. Therefore, the respondent in this case had not only to prove the reasons for which the claimant was terminated from employment but to also justify that the same were fair, valid and related to his conduct, capacity or compatibility. This is the very essence of Section 45 (2) (a) and (b) of the Employment Act.



34. In this case, the claimant was terminated on grounds of his performance which the respondent termed as dismal. It was further alleged by the respondent that the claimant's conduct was improper.
35. The claimant's letter of summary dismissal reads in part: -

“Reference is made to the 3 months' probation review conducted by your supervisor in the presence of the human resources manager and the company management consultants (herein outdoors Africa) held on 16th February, 2016. The findings were that:

- a. You had performed dismally contrary to expectations based on communicated deliverables on the job description. Some of the areas cited were timeliness of delivery, absence of a departmental plan, lack of growth in sales, dismal performance on collections etc
- b. In addition, cases of improper misconduct that border on integrity, utter disrespect to your supervisor in your manner of speech, careless or improper performance of work, incompatibility with the team, a lack of full disclosure, on key information, that brought the company brand into disrepute just to mention but a few...”

36. From the record, it is apparent that the claimant's probationary review was to be based on his job description. What is not clear is whether he had targets at the start of his appointment and which targets were to be measured at the end of the probationary period. Going by the parties' correspondence in the days leading to the claimant's probationary review, this does not seem to be the case. For instance, the claimant stated in his email of 11th February, 2016, that he had just received the job description. This was five days to his probationary review. In this regard, he addressed the respondent's Human Resource Manager, Mr. George Wasike as follows: -

“Hi George,

I have received the job description it is too wide, I recommend we reduce this to a few KPIs which are measurable and can therefore form part of the Review. I also observe that the 12th Feb being less than 24 hours away will be a time too short to enable me prepare adequately for this review.

I would propose next Friday the 19th February, 2016 at 2:00 pm for this review.”

37. This was followed by the claimant's letter dated 12th February, 2016 in which he addressed the respondent's Human Resource Manager as follows:

Re: Probation Review Meeting Scheduled for 12th February 2016

Thank you for the invitation to review my performance as per the probation terms of my appointment letter dated 22nd October 2015.

I note that the appointment was effective 26th October 2016 therefore the Probation review should have been three months from the date of appointment which falls on the 26th January 2016, I also note that the probation is overdue by 17 days.

In the light of the above I am therefore putting forth the following requests:

- i. That the probation review guidelines be shared by your office to enable my preparation for the same This is so because the Job Description that you have



suggested is not a good tool of performance review as the part of job roles stipulated in it are not measurable.

- ii. The Job Description you have proposed as the main tool of the review has not been discussed between my Line Manager and myself and performance indicators agreed on.
- iii. I have also requested that you accord me one more week to review my performance and put the relevant data together in preparation for this probation review.
- iv. Since your office is Human Resource and being that your office is not my Line Manager I propose that this probation review appraisal be handled by my Line Manager as stipulated in the appointment letter dated 22 October 2015.

Due to the above, I am therefore not able to conduct meaning probation appraisal review with your office as called today the 12th February at 11.00 AM. As per your email invite dated 11th February 2016 at 5.37 p.m. Please assist address the above your assistance in this regard will be highly appreciated.

38. The performance areas identified in the claimant's letter of summary dismissal were timeliness of delivery, absence of a departmental plan, lack of growth in sales and dismal performance on collections. This brings to fore the following questions; Were those the pre-agreed targets? What were the deliverables referred to by the respondent? Why weren't the same exhibited before Court? What were the timelines for delivery? Was the claimant required to have a departmental plan? What was his target in terms of collections? Was the claimant aware that his performance would be measured against the parameters stated in his letter of summary dismissal?
39. Revisiting the claimant's email of 11th February, 2016 and his subsequent letter of 12th February, 2016, it would seem that there was no agreement that the claimant would be evaluated against the parameters on which he was evaluated on. I say so because, if there was such an agreement or understanding, there would be evidence to that extent and the claimant would not have engaged the respondent's Human Resource Manager on the issue as he did in his letter and email.
40. It is noteworthy that the respondent exhibited its sales over different periods of time. However, the same were not against any targets specific to the claimant. Indeed, without set targets, the sales exhibited by the respondent are just figures and not capable of being interpreted and translated for purposes of the claimant's performance. Further, had the sale targets been set from the word go, the question as to whether the claimant had performed or not would not have arisen in the first place as the figures would have been conclusive on the issue. Without any set targets, the measure of the claimant's performance in that regard was not objective and it is no wonder he was insistent that he had performed while the respondent opined otherwise. I further question how the respondent was able to tell that the claimant's performance was dismal without any set targets?
41. With regards to measure of an employee's performance, the Court of Appeal had this to say in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR: -

"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;

- "a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *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 as against poor performance.

- b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.”
42. Based on the above determination which I wholly adopt and reiterate, I arrive at the inescapable conclusion that the respondent has failed to prove that that it had a justified reason to terminate the claimant’s employment on account of his performance as it did not prove that there were targets in the first place and that there was a system of measuring good performance against poor performance.
 43. With regards to the allegation of improper conduct, the same was not substantiated by the respondent. As a matter of fact, the same was too general and was not specific on any issue or any person. For instance, which supervisor was the claimant disrespectful to and in what manner?
 44. In total sum, the respondent failed to meet its evidentiary burden under Sections 43 and 45(2) (a) and (b) of the Employment Act hence the claimant’s termination was not substantively justified.

Counterclaim

45. The respondent has lodged a counterclaim against the claimant in the sum of Kshs 30,390/= being loss of goods it allegedly suffered during his tenure. For starters, it is apparent that the counterclaim was not accompanied by a Verifying Affidavit and none was filed prior to the hearing and Judgment.
46. Order 7 Rule 5 (a) of the Civil Procedure Rules states as follows: -

“ 5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-

.....an affidavit under Order 4 Rule 1(2) where there is a counterclaim.”

While Order 4 Rule (1) (2) of the Civil Procedure Rules provides that: -

“... (2) The plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.

(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit on behalf of the others.

(4) Where the plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

(5) The provisions of sub-rule (3) and (4) shall apply mutatis mudandis to counter-claims.

(6) the court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or



counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule”

47. It is notable that Courts have held that in as much as a counterclaim filed without a Verifying Affidavit is defective, the said defect is not fatal as it is curable. However in this case, the respondent did not file a Verifying Affidavit at all hence the defect was sustained and was not cured.
48. The defect in the counterclaim aside, the respondent did not prove how the loss was attributable to the claimant. Further it did not prove how it arrived at the said figure of Kshs 30,390.00. Despite being a specific claim in nature, the respondent failed to particularize and prove the same as required.
49. In light of the foregoing reasons, the counterclaim cannot be sustained.

Reliefs

50. As the Court has found that the claimant’s termination was unfair for want of proof and justification of reasons, he is awarded 3 month’s salary in lieu of notice as per clause 2 of his letter of appointment. I must point out that in as much as the Employment Act provides for a notice period of 7 days with regards to probationary appointments, the same is the minimum and parties can provide for a longer notice period, which in this case was 3 months. In other words, the Employment Act provides for the floor and not the ceiling. Therefore, the respondent having provided for a notice period of 3 months in the employment contract, it is bound to comply with the same and cannot now revert to the statutory period which is shorter.
51. The claimant is further awarded compensatory damages equivalent to 2 months of his gross salary. This award also takes into consideration the length of the employment relationship which was considerably short as well as the circumstances surrounding the claimant’s termination from employment.
52. The claimant is further awarded salary for days worked in the month of February, 2016 as there is no evidence that the same was paid out to him following his termination from employment.

Orders

53. It is against this background that I enter Judgment in favour of the claimant against the respondent in the following manner: -
 - a. A declaration that the claimant’s termination from employment was unfair.
 - b. The claimant is awarded three (3) months’ salary in lieu of notice being the sum of Kshs 375,000.00.
 - c. The claimant is awarded compensatory damages in the sum of Kshs 250,000.00 being equivalent to two (2) months of his gross salary.
 - d. The claimant is awarded salary for 16 days worked in February, 2016 being the sum of Kshs 66,666.67.
 - e. The total award is Kshs 691,666.67.
 - f. Interest shall apply to the amount in (e) at court rates from the date of Judgment until payment in full.
 - g. The counterclaim is dismissed.
 - h. The claimant shall also have the costs of the suit.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2023.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Nyatta instructed by Mr. Wageni

For the Respondent Ms. Njoroge

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

