



**Kimotho v All in One Software EA Limited (Cause 2289 of 2017)
[2023] KEELRC 2081 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2081 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2289 OF 2017
AN MWAURE, J
JUNE 20, 2023**

BETWEEN

ALEX GITIBA KIMOTHO CLAIMANT

AND

ALL IN ONE SOFTWARE EA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of claim dated the 20th September 2017 and filed on the 15/11/2017 claiming unlawful/unfair termination of employment.
2. The claimant says that he was employed as a sales manager vide letter of employment dated the 3rd January 2017. He says the terms of the contract amongst other terms were that the period of contract would be one year. He worked until 7th June 2017 when his services were terminated.
3. The Respondent terminated the contract without following due procedure as captured in the employment contract and labour laws of Kenya. The claimant contends that the Respondent contravened his employment contract when they gave him an appraisal within four months on 25th April 2017 contrary to the appraisal clause on the employment contract. The claimant contends that he was and has been performing to the extent that he netted a potential contract from Java Coffee House Company for 60 branches regionally worth ksh 2.5 million with potential of growing more.
4. The claimant says the Respondent director proceeded to take charge of the negotiations contrary to internal regulations and caused confusion with the clients and the same was squarely and maliciously placed on him by the director. The claimant asserts that he was later informed that the director of the Respondent had now taken charge of the Java Account with the aim of maintaining them by sending them various subsidized quotations way below what the claimant was authorized to do in an effort to net in the clients.



5. The claimant contends that the manner of events leading to his termination were calculated in denying him his dues with regards to 30% commission on sales and therefore terms his termination as irregular and unfair with no justification whatsoever contrary to the employment laws of Kenya and the employment contract.
6. The claimant also contends that at the time of his employment he was earning ksh 80,000 per month with a clause to review salary upwards from time to time. The claimant avers that he was served with a termination notice letter indicating that his services had been terminated. Prior to the said termination notice he had never received any warning letter addressed to him. The reasons advanced in the termination letter were frivolous and did not amount to misconduct that warranted the termination.
7. The claimant avers that it is upon the Respondent's management sensing that they had contravened the labour laws and terminated his services unfairly that they wrote to the claimant indicating willingness to pay his commission as captured in the employment contract.
8. The Respondent contravened the employment contract and the labour laws of Kenya by not advancing reasons and giving him a fair trial to be heard before terminating his contract.
9. The claimant prays for the following as against the Respondent
 - a. A declaration that the termination of the claimant from the employment by the Respondent was unfair
 - b. 9 leave days ksh 24,000/
 - c. One month salary in lieu of notice ksh 80,000
 - d. Letter of service
 - e. Costs and interests of this suit.

Respondent's Case

10. The respondent filed the memorandum of appearance on the 04/12/ 2017 and a defence on the same date.
11. The Respondent says that the claimant was never a bona fide employee of the Respondent by failing to validate his employment by accepting such employment through signing his contract/ letter of appointment. The claimant did receive numerous warning letters which culminated to his summary dismissal.
12. The claimant caused the Respondent to lose a lucrative deal with the Java Coffee by misrepresenting the Respondent and issuing a contradicting quotation to mislead the said client and secretly supply to it substandard goods and services in the claimant's desire to make money through underhand dealings. The claimant had given Java house Company wrong quotations which were way below what the Respondent would charge to offer its services affectively causing the Respondent to lose the said potential client once Java house discovered that there were different quotations emanating from the same company. The respondent therefore says that the claimant can't seek commission for a job the Respondent was not given.
13. The Respondent asserts that it did issue the claimant with numerous warning letters addressing his behaviour such as coming to the office drunk. The Respondent states that section 44 of the [Employment Act](#) allows summary dismissal in instances where the employee is intoxicated during working hours and where the employee wilfully neglects to perform his duties.



14. The Respondent asks that the suit be dismissed with costs.

Claimant's Evidence

15. The claimant, Alex Gitiba Kimotho gave sworn testimony and adopted the witness statement as his evidence in chief. He said that he was the Sales Manager in charge of customer retentions. In the year 2017 June, an issue arose concerning signing in a client and in the process the Director accompanied him to the client. The client was Java house Africa which has presence all over East Africa. He says that they were given quotations. He testified that the director wanted to take charge and quote higher figures. The director at the meeting gave very high figures and shouted at him before the customer. On getting back to the office he was given letter of termination and warning letter.
16. He said that he had a trial project attendance system and a time system. This was a software product. A test is for about 14 days and was approved by the Respondent's bosses but when ready to sign contract a dispute arose. The test was removed from the site after the confrontation. The contract was not signed and he got an email from Manager and said that he should forward to him the list of his prospective clients to would pay him a commission of 50,000/= which was a week after the termination.
17. The witness said that he was entitled to a commission for every client he brought in and it was 30 % of the profit margin and was not sure why he was offered ksh 50,000/=. He maintained that he was not properly terminated. He was not called for a disciplinary hearing or appraisal. He was to be evaluated annually and never underwent any appraisals. He also said that there was no notice to show cause letter as claimed by the Respondents and was only served with the last one. He was never called for a performance review.
18. In cross examination he said that as per the appointment letter of 13/12/2017 one of his duties was to report to his supervisor on his tasks. He was a sales Manager but was to liaise with his supervisor before closing a deal. He consulted his supervisor before he made the contract with Java. He did not receive warning letter prior to his termination and did not report to work late and drunk. In re – examination he said that he was terminated because of the disagreement between Respondent and Java house and he was not accused of being drunk. He also said nowhere in the warning letter was the issue of being drunk raised and he could not have a trial without approval of the Manager as it had to be approved.

Respondent's Evidence

19. Respondent witness Peter Kitheka gave sworn testimony and adopted the documents in the list of documents dated the 30th November 2017 as exhibits in the case and the witness statement dated the 4th December 2017 as his evidence in Chief.
20. He testified that the claimant was employed from January to June 2017 as a Sales Manager. He says in one of the meetings the claimant had with Java was a trial which went through. The trial is not determinative of a sale. After the trial the boss told the claimant he would go for the meeting as he had noted he quoted a less price. The claimant then said he had another meeting with the customer. The Manager went to Java and found the claimant already at Java. The Manager was surprised to find the claimant at Java and told him to go back to the office. The boss thereafter came to the office and asked the claimant why he went for the meeting. The claimant was terminated for disobeying the orders of the Director. The claimant used to go for work whilst drunk. The Java client was lost to them. The claimant was served with a performance review and was dismissed on the 7/6/2017 because of the incident with Java client.



21. In cross examination, the respondent said that the warning letters referred were not prepared after termination. The claimant never signed letters including letters of termination. The claimant was troublesome and they took 6 months to terminate him. The disciplinary process took place on the 6/4/2017 and the claimant was called many times to present his case. He did not have time to respond as he was summarily dismissed.

Claimant Submissions

22. The claimant filed written submissions and argued that the termination of employment must not only be sanct in substance but also in procedure. The claimant relied on the case of *Principal and BOG Machakos Teachers College versus Wambua Munge* 2016 eKLR where it was held that ‘An unfair dismissal is one where there is no substantive justification provided or procedural fairness observed. The elements of a claim for unfair dismissal are explained in *Tolley’s Employment Handbook*, 20th edition at paragraph 53.1 at Page 984 as follows.

“ An employer who dismisses an employee without good reason or without following a fair procedure lays itself open to a claim for unfair dismissal. When such a claim is brought, the employer has to establish the reason for dismissal... if the dismissal is found to be unfair the employer can be ordered to re-engage or to pay compensation to the ex-employees”

23. The claimant contends that the Respondent produced a number of purported warning letters, internal memo and employee policy manual in respect thereof. He said that the purported internal memos are, however, unsigned, the author unknown and their authenticity questionable. The purported warning letters also remain questionable as they fall short of the Disciplinary procedure under clause 9.4 of the Employee Policy Manual of December 2014. It is argued that the Manual under clause 9.4.1 requires the Respondent as a first step to issue verbal warning and the employee to sign a record as an acknowledgment that the warning has been received and understood.
24. No evidence has been tendered to support that the claimant received the purported warning and that he acknowledged the same and/or refused to sign. The question is how the claimant could have continued working with the Respondents if he failed to sign the warning letters delivered to him as this would have been an act of insubordination.
25. The claimant submits that the respondent not only failed to substantively justify the claimant’s termination but also failed on the procedural facet. There were no minutes produced before court as evidence that the Respondent convened a disciplinary hearing where the claimant was given a fair hearing before termination.
26. The claimant relied on the case *Joseph Mwaniki Nganga versus United Millers Limited* 2022 eKLR where it was held that in view of the provisions of section 41 of the *Employment Act*, the employee’s right to be heard whenever an employer is contemplating termination, is a sacrosanct right.
27. There are no submissions in court file from the Respondent.

Issues for Determination

28. There is no dispute that the claimant worked for the respondents from 5th January 2017 to 07 June 2017 when his engagement was terminated. The issues for determination are:
- a. Whether the termination of the engagement on the 07 June 2017 was unfair/unlawful
 - b. Whether the reliefs sought are merited.



29. The termination letter dated the 07/06/2017 states that the reason for termination of the claimant was not being able to deliver the sale of ksh. 500,000 that was agreed upon for the month of May 2017 and giving clients wrong quotations on all the products which led to the disagreement between the Respondent and Java House Company. This, however, does not come out clearly in the evidence given by respondent witness 1 who says that the claimant contrary to the directions given by the Director had gone to meet the client at the time the director had also gone to meet the same client on the discussion of a contract the Respondent was to have with the client. He was told to go back to the office following of which he was terminated.
30. In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken.
31. The Court of Appeal in *Kenya Revenue Authority v Renwel Waitbaka Gitabi & 2 others* [2019] eKLR held that:

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test.”

The Court went further and observed that

“...In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

32. The respondent claimed as testified by their witness that the claimant was a troublesome employee and had received warnings on diverse occasions for gross misconduct including drunkenness and going to work late.
33. The claimant denies receipt of such any warning letters. In any event the claimant was terminated for failure to deliver Kshs 500,000/- sales as agreed upon as per reference No A105/2017/058 and giving clients wrong quotations on their products which led to disagreement between all in one and Java Coffee House Company.
34. The claimant was not therefore given valid reason for termination of his employment as provided in section 45(1) of the *Employment Act*. The said section provides as follows:

No employer shall terminate the employment of an employee unfairly.

In fact there are copies of warning letters and discipline letters purported to have been issued by the respondent to the claimant as early as February 2017 up to the time of termination. He was only employed in early January 2017.



35. The reasons in the warning letters are different from the reason the claimant was terminated for. That can only lead to the conclusion that the respondent was on a fishing expedition as to the reason for termination.
36. Apparently the claimant seemed to have annoyed the respondent when he went to meet Java and the same day he was terminated without a hearing.
37. This was in contravention of the mandatory requirement of section 41 of the Employment Act 2007 which provides:
41. (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.
38. The court therefore finds going by the evidence adduced, the pleadings and the submissions that the respondent did not present a valid reason to terminate the claimant. The claimant was not given a chance to represent himself in a disciplinary hearing in the presence of a witness who would be a fellow colleague or a shop floor union representative.
39. Having failed to present a clear, verifiable reason and having failed to follow the procedures well mandated in section 41 of the Employment Act the court must hold the respondent dismissed the claimant unfairly and unlawfully. The respondent contravened therefore he provisions of sections 41, 43 and 45 of the Employment Act. The respondent therefore must compensate the claimant.
40. Remedies
- a. The claimant will be awarded 2 months equivalent as compensation Kshs 160,000/-
 - b. 9 days leave Kshs 24,000
 - c. One month pay in lieu of notice Kshs 80,000
Claimant total award is Kshs 264,000/-
 - d. Costs are awarded to the claimant and interest at court rates from date of judgment till full payment.
 - e. Claimant to be issued certificate of service within 30 days hereof.

Orders accordingly.

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

