



Kaume v Madison Insurance Company (K) Ltd & another (Cause 363 of 2018) [2023] KEELRC 1491 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1491 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 363 OF 2018
AN MWAURE, J
JUNE 16, 2023**

BETWEEN

PATRICK GITONGA KAUME CLAIMANT

AND

MADISON INSURANCE COMPANY (K) LTD 1ST RESPONDENT

JOSHUA NJIRU 2ND RESPONDENT

JUDGMENT

1. The claimant states that he was employed by the 1st Respondent and worked diligently until the 19th October, 2017 when he was wrongfully and unlawful terminated by the Respondents for no justifiable cause. The Respondent avers that at the time of termination he held the position of Marketing Services Manager with the 1st Respondent where he was earning a gross salary of ksh 377,143/-.

Claimant's Case

2. The claimant in his statement of claim dated 19th March 2018 avers he received a termination letter on the 19th October, 2017 which was dated the 17th October, 2017 from the Respondents alleging poor performance and misconduct. The claimant says his termination from employment was unfair since none of the alleged reasons for his termination were raised during the disciplinary hearing.
3. The termination letter is not clear on the specific allegations and the cause for the claimant being summoned by the Respondent to the disciplinary hearing. The alleged disciplinary issues to be addressed were not made known to the claimant to enable him to adequately prepare his defence.
4. Claimant says the termination letter did not provide for an appeal of the Respondent's decision as required by the law. The illegal and unethical actions of the Respondents have caused immense damage to the claimant and the claimant's family who are dependent on him as their main bread earner.



5. The claimant further says that his termination from service was unfair, un-procedural, and was not based on any valid reason hence his claim for damages for unlawful and wrongful termination of service. The claimant states that the Respondents are in breach of the contract of employment and as a result the claimant has suffered loss and damage.
6. The claimant prays for judgment as against the Respondent as follows;
 - a. 12 months' salary compensation for loss of employment, ksh 9,525,716.
 - b. Costs of the suit.
 - c. Interest on (a) and (b) above at court rates from the date of filing suit till payment.
 - d. Any other and or further relief that this court may deem fit and just to grant in the circumstances.

Respondent's Case

7. The Respondent filed the statement of response on the 16/5/2018 and says that there was no discrimination against the claimant during his employment with the 1st Respondent and that the claimant was terminated from employment purely on poor performance as his aggregate score for the year 2017 was below average and noting that his probation period had been extended due to underperformance.
8. The 2nd Respondent states that he ought not be sued in his personal capacity as he is merely an agent of the 1st Respondent and was never at any time the claimant's employer.
9. The Respondent asserts that the article published in the Nairobi news.com was a direct result of the claimant's neglect of duty as it was the claimant's responsibility as the Marketing Services Manager to coordinate the 1st Respondent's correspondences with the media as well as manage the corporate image. The Respondent further states that memos in the 1st Respondent's Company are normally responded to within a day, which the claimant did not do, nor did he request for an extension of time to respond to the memo.
10. The Respondent further says that the Notice to Show Cause letter dated 8th September 2017 clearly indicated the areas of concern and the claimant was fully aware of the agenda of the meeting at the time of being invited for the disciplinary hearing on the 4th October 2017. The Respondent denied that items 5 and 6 were part of the disciplinary hearing agenda.
11. The Respondent says that termination of the claimant was done procedurally, in accordance with the law and was based on the poor performance of the claimant which he was made aware of on numerous occasions prior to the termination.

Claimant's Evidence

12. The claimant gave sworn testimony and said that he currently works in Kisumu at the Aga Khan. He adopted the witness statement dated 19/3/2018 as evidence in chief. He adopted the documents in the list of documents dated the 19/3/2018 and filed on the 20/03/2018 as his exhibits nos. 1-37.
13. In cross examination he said that he was employed by the Respondent on 2/11/2015 and was on probation for 3 months and it was then extended for 3 months but was then confirmed. Claimant said he was given letter which said that his skills were good but needed to do better and there was a recommendation that the probation be extended by 3 months. He said that as the Marketing Services



- Manager Communication was key to his job. He said he did not have a problem with his employer or communication.
14. The claimant testified that there was a bill board which was offensive to Madison principles as it painted women in the wrong light. He says he was not the final approver but billboard affected employer because of bad publicity. He said the employer gave him a warning letter on the 13/4/2017. He says he was given a warning letter for delayed branding of the office and on September 2017 he got a show cause letter from 2nd Respondent whose contents he understood but there was no basis. He said that he responded to the letter but his explanation was not accepted. He defended himself in the disciplinary hearing. He says he got the letter on the 2/11/2017 and proceeded with the hearing on 4th November 2017. He was told he had the right to bring his witness but had very little time to arrange for one. A decision was made after deliberations and he signed the minutes on 10/10/2017. The witness said that he was never given an explanation why he was called for the disciplinary hearing and thereafter he was not informed of the outcome of the meeting. He claims he was not aware that Madison had a human resource manual.
 15. The claimant further says he was accused of misrepresentation on the billboard. The PR Company was engaged by the 2nd Respondent but the 1st Respondent paid for it. He admitted that the billboard caused the 1st Respondent to be painted in bad light. He also said he got a request from Nation journalist to write a statement to correct the billboard on the 10/4/2017 and he responded and shared with the 2nd Respondent to give approval to the statement and he did that. He prepared the statement and also shared with the advertising agency and forwarded the draft to the 2nd Respondent on the 11th /4/2017. Publication was done on the 12/4/2017 and they published on their own online platform. The Response was ready but the MD never approved the same. The response was forwarded on the 13/4/2017 only after publication. The 2nd Respondent approved the response after the story had been released and so claimant did his part in the matter. He states that the warning letter of 13/4/2017 was not justified as he was not carrying the blame for that article.
 16. The claimant said that the 2nd warning letter in August 2017 about branding the office was not justified as on the 28/8/2017 MD was asked for two additional quotations and they took time to respond. The last quotation was picked and it saved the company kshs 200,000/-. He affirms and it was not his fault for the delay. The building was being partitioned and it took time and he was not the one to blame for the delay. He was given a show cause letter which he responded to and was then called for a disciplinary session. The 2nd Respondent did not attend the disciplinary meeting and his witnesses feared to speak at the disciplinary hearing and hence did not get a colleague to accompany him.

Respondent's Evidence

17. Respondent witness Sarafina Janet Wairimu gave sworn testimony and said that she is the group Human Resource Manager of the Respondent. She adopted the witness statements filed on the 16/5/2018 and dated 9/5/2018 as her evidence in chief. She also adopted the documents as contained in the Respondent's list of documents marked as exhibits 1-13.
18. The respondent witness said that the claimant was employed on the 16 /11/2015 and was confirmed after he was taken through probationary review and was found fit to be confirmed. She says that however his salary was not reviewed in 2017 because of poor performance. She also admitted that the claimant was not put on a performance improvement programme and furthermore he was issued with a number of warning letters.
19. According to the respondent's evidence the Claimant was issued with 1st warning letter as publication of the bill board went out and one neurosurgeon said that it was creating wrong message to



female neurosurgeons. The claimant was supposed to bring the billboard down and apologise to neurosurgeons' association. The respondent witness admitted that the claimant drafted the response about the billboard before the publication went out. The 2nd warning letter related to screening and branding of the office and was dated 30/8/2017. The claimant was to do the branding of office and he was warned because the branding took 3 months but it was to take shorter period. She admitted that she did not know when the work was to be completed. The respondent says that the third warning letter was to do with delayed membership renewals of FKE and Chamber of Commerce and requirement for renewal of membership was to get notification and pay membership fees. The claimant says he prepared the invoices for the renewal of membership to the respective associations and payment delayed. The claimant was invited to a disciplinary session through a letter dated 29/9/2017 which was received the same day for a meeting scheduled for 4/10/2017. She admits that the claimant admitted the notice given was short but nevertheless he attended the same and the same went on.

Claimant's submissions

20. The claimant relied on the Court of Appeal decision in *National Bank of Kenya v Samuel Nguru Mutonya* 2019 eKLR where the court relied on the decision in *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010 LLR 255 (ICK) (September, 2013) where it was held that:
 - a. Where poor performance is shown to be the 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.
 - c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
 - d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee?
21. The claimant submitted the Respondents have not proved that there was a valid and fair reason to terminate the claimants as required under section 45 of the *Employment Act*. He submits that on the contrary the claimant had demonstrated excellent performance by carrying out a number of outstanding tasks for the company. The claimant was not a poor performer and the allegations set out in the termination letter accusing the claimant of poor performance and misconduct was just a cover up to give the Respondent an excuse to terminate the claimant.
22. The claimant relied on the case of *Daniel Kiplagat Kipkeibut v Smep Deposit Taking Microfinance Limited* 2016 eKLR which cited *Nicholas Muasya Kyula v Farmchem Limited* Industrial Cause Number 1992 of 2011 LLR 235 (ICK) where the honourable court held that 'It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required



to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of misconduct before a decision to terminate is arrived at. The claimant avers he was therefore unfairly terminated by the respondent.

23. There are no submissions in the file for the Respondent.

Determination

a. Whether there were valid grounds to terminate the claimant

b. The remedies, if any, the claimant is entitled to.

24. Section 45 (1) and (2) of the [Employment Act](#) makes the following provisions regarding unfair termination of employment—

1. No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove—

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason—

i. related to the employee’s conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. That the employment was terminated in accordance with fair procedure.

25. The Respondent cites poor performance for terminating the Claimant’s employment. This a valid ground for termination as per Section 41 of the [Employment Act](#), 2007. In [Jane Wairimu Machira v Mugo Waweru & Associates](#) (2012) eKLR, the court held that:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

26. The Court of Appeal in [Jane Samba Mukala v Ol Tukai Lodge Limited](#) Industrial Cause No. 823 of (2010) LLR 255 (ICK) observed as follows:

‘The employer must show that in arriving at the decision of noting 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...It will not suffice to say that one has been terminated for poor performance as the effort leading to this decision must be established.

27. The Respondent’s manual at per page 15 paragraph 6 titled “performance management” is categorical on the issue of performance management. It provides that to ensure individual employee performance is aligned with the overall company objectives, the performance management process will be as follows:

i. Every employee will have performance targets agreed with him/her at the beginning of every year. These will be recorded in a standard template.

ii. Every performance will be reviewed on half yearly basis

iii. The annual employee performance review will be done at the end of each year.

28. The manual goes on to provide that all the issues arising from the performance reviews must be documented and appropriate action initiated. The performance management system shall be guided



by openness, fairness and honesty, joint ownership between management and employees. Performance evaluation shall be based on achievement of goals against objectives and corrective action taken for underperformance.

29. The Respondent's manual was to guide in all the human resources management practices. The evidence provided by the Respondent employer as regards the alleged poor performance by the claimant seems to fall short of the provisions of their Human Resource Manual. Whilst there is on record evidence of dissatisfaction from the Respondent with how the claimant was performing his work as can be seen from the extension of the probation contract and letter from the Respondent Managing Director dated 29th May, 2017, there is, however, no record of compliance with manual as relates to performance agreed targets which are used as the basis to measure performance. This was supposed to be documented at the commencement of each year.
30. This is crucial as the manual is part of the employment contract of the employee and must be complied with where it is not contradicted by the employment contract. There is also no record of performance improvement plan put in place by the Respondent to address the complaint of poor performance.
31. The claimant says his woes with the respondent began on February 2017 when he confronted the 2nd respondent for insulting him before his colleagues by telling him "you think like a wheelbarrow".
32. He says the 2nd respondent refused to execute or remark on his 2017 performance appraisal resulting in his failure to get a salary increment. He then received a low rating on his performance. The 2016 appraisal had been executed and so there was no problem.
33. In April 2017 he received a warning letter for refusal to respond to a letter from "Nairobi news.com" regarding an offending billboard and he wrote a response and forwarded to the 1st respondent's legal manager and the 2nd respondent failed to issue a response. The article was published and 2nd respondent failed to take responsibility for that.
34. He says he received another warning letter dated 30th August 2017 about branding the office which had delayed. He says the quotation from the service providers came late and he wrote an explanation and so avers the warning letter was unwarranted.
35. He received a third warning letter dated 7th September 2017 about delay in renewing membership with FKE and KNCCI. He says he responded and was then accused of using abusive language. He says he was asked to resign and was served with a notice to show cause letter dated 8th September 2017. He says he responded to the show cause letter on 11th September 2017 and then proceeded on leave till 26th September 2017.
36. He says he was invited for a disciplinary hearing on 4th October 2017 though he received the letter inviting him to the disciplinary hearing on 2nd October 2017 and so did not have sufficient time to prepare and to get a fellow colleague to accompany him to the hearing. He nevertheless attended the disciplinary hearing which contained the following agenda.
 1. Article in Nairobi news
 2. Branding of ground floor
 3. Membership of KNCCI & FKE
 4. Impolite language
 5. Performance appraisal and salary review



6. Foul language to MD
37. He says agenda 5 to 6 were not mentioned in the minutes dated 10th October 2017 and he executed them under protest.
38. He says on 19th October 2017 he received a termination letter alleging poor performance and misconduct.
39. The termination letter referred to four issues and so clearly poor performance appraisal was not specifically handled according to the minutes yet the termination letter refers to poor performance. The issues raised in the minutes were dealt with at varying times and were responded to by the claimant and in all fairness the claimant seemed to have responded satisfactorily as pertains to the billboard advert, the branding of the office and the renewal of membership of FKE and KNCCI. As for impolite language allegation in the court's opinion the claimant pointed out to the numerous warning letters and invoked God for help. That does not seem to point out to impolite language but seem to have been a desperate response to the numerous warning letters.
40. Even though the respondent complied with section 41 of the *employment act* and invited the claimant to a disciplinary hearing in the presence of his witness however the procedure provided in the respondent's manual as earlier pointed out was not adhered to neither is the provision provided in various authorities relating to disciplinary process for underperformance. The court is guided by various authorities already referred hereto *inter alia Jane Wairimu Machira v Mugo Waweru & Associates* 2012 eKLR and *Jane Samba Mukala v Ol Total Lodge Limited* Industrial Cause No 2010 LLR 255 (ICK).
41. The court has considered the pleadings filed, the evidence adduced and the submissions and is convinced the 1st respondent unfairly and wrongfully terminated the claimant from his employment and the claimant is entitled to compensation. The court will not enter judgment against the 2nd respondent who was an agent/employee of the 1st respondent. The claimant is awarded 3 months' pay as compensation equivalent of his salary according to section 49(1)(c) of *Employment Act* at Kshs 377,143.23 = 1,131,429/-.
42. Finding no proof of discrimination by the respondent that prayer fails.
43. Costs follow the event and claimant is therefore awarded costs. He is also awarded interest at court rates from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH 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 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.

ANNA NGIBUINI MWAURE

JUDGE

