



**Ogol v Opera Pharma (K) Limited (Cause 1742 of 2017)  
[2023] KEELRC 1884 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1884 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1742 OF 2017  
SC RUTTO, J  
JULY 31, 2023**

**BETWEEN**

**JOHNSON AKELLO OGOL ..... CLAIMANT**

**AND**

**OPERA PHARMA (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant avers that he was employed by the Respondent with effect from February 1, 2016 as a Sales Representative and was confirmed to the said position with effect from July 1, 2016. The Claimant further avers that in January, 2017, he was subjected to a performance appraisal and review by the Respondent and he scored an impressive 72%. According to the Claimant, he was promoted to the position of Sales Manager in January, 2017 owing to his good performance. The Claimant further states that with effect from May 30, 2017, the Chief Executive Officer of the Respondent terminated his services. He has termed the said termination as unlawful and in breach of his contract of employment. The Claimant's claim against the Respondent is for a declaration that his termination from employment was unlawful and unfair, compensatory damages for unfair termination, service pay, general damages and exemplary damages as well as an order for issuance of a Certificate of Service.
2. Opposing the Claim, the Respondent avers that following the Claimant's employment, he started on very well but later slowed down in his work. That he would absent himself from work without leave or even fail to go to work altogether without notice to the Respondent. That in late 2016 and early 2017, the Claimant became careless, negligent and uncaring towards his duties resulting in the Respondent losing money uncollected by the Claimant. The Respondent further avers that the Claimant was terminated from employment after it gave him several warnings and held several meetings with him which bore no fruit. The Respondent thus termed the termination of the Claimant as fair, justifiable and procedural. Consequently, the Respondent has asked the Court to dismiss the Claimant's suit with costs.



3. The matter proceeded for hearing on February 28, 2023 in absence of the Respondent who failed to make any appearance after the Court had given time allocation. It is worth pointing out that the Respondent was represented at the time the matter was called out and time allocation given by Court.

### **Claimant's Case**

4. The Claimant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on his behalf as exhibits before Court.
5. It was the Claimant's evidence that following his successful review and promotion to the position of Sales Manager, he was not given a substantive contract of employment for the said position. He was surprised to receive the letter of termination on May 30, 2017 without due process being followed. He stated that he was not accorded the right and opportunity to be heard. He further denied receiving a warning from the Respondent.
6. According to the Claimant, the termination was done in total disregard of the contract of employment, the *Employment Act*, as well as his rights as an employee. That he was rendered jobless as a result of the unlawful termination by the Respondent.
7. The Claimant further told Court that he was not paid any dues following his termination.
8. Closing his testimony in chief, the Claimant asked the Court to allow his Claim as prayed.

### **Respondent's case**

9. As stated herein, the Respondent did not participate in the hearing hence failed to call oral evidence. Therefore, its case remained as per its Memorandum of Defence.

### **Submissions**

10. It was submitted on behalf of the Claimant that contrary to the actions of the Respondent, the *Employment Act* provides that valid reasons should be given and elaborated to an employee prior to termination of an employment contract. That in this case, the fact that a vague reason was given, goes to show that the Respondent was acting unfairly and irregularly in an attempt to find fault against the Claimant.
11. It was further submitted that the Respondent's action to move and terminate the Claimant's employment in total disregard of the procedure enunciated in Section 41 of the *Employment Act*, amounted to unfair termination under the *Employment Act*. In support of the Claimant's position, the Court was invited to consider the determination in *Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited* [2014] eKLR, *Alphonse Maghanga Mwachanya vs Operation 680 Limited* [2013] eKLR and *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* [2014] eKLR.
12. The Respondent on the other hand submitted that the termination of the Claimant was within the statutory provisions of Section 35(1) (c) of the *Employment Act*. It was further submitted that the Claimant was notified of the Respondent's intention to terminate his employment.
13. It was the Respondent's further submission that as the employer in this dispute, it had fulfilled the statutory burden by showing that the Claimant was careless, absconded duties without leave and exhibited dishonesty. That on the other hand, the Claimant being the employee, has not discharged his duty by showing that his termination was unfair.



## Analysis and determination

14. Flowing from the pleadings on record, the evidentiary material placed before me as well as the opposing submissions, it is apparent that the Court is being called to resolve the following questions: -
- i. Whether the termination of the Claimant's employment was unfair and unlawful;
  - ii. Is the Claimant entitled to the reliefs sought?

## Unfair and unlawful termination?

15. The first point of entry in determining the fairness or unfairness of an employee's termination is Sections 43 and 45(2) of the *Employment Act*, 2007 (Act). The import of the aforesaid provisions is that an employer must prove that the reasons leading to the termination of an employee were fair, valid and related to the employee's conduct, capacity or compatibility; or based on its operational requirements. That is not all. The employer is further required to prove that in terminating the employee's services, it complied with the requirements of a fair process which entail notification and hearing.
16. Succinctly put, for termination to meet the legal threshold, an employer must justify that there was reason to terminate the services of an employee and that such termination was in line with fair procedure.
17. It is also instructive to note that the burden of proof, lies with the employer. Such was the determination by the Court of Appeal in the case of *Kenfreight (E.A.) Limited v Benson K. Nguti* [2016] eKLR thus; "the burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer."
18. Turning to the instant case, the reason for the Claimant's termination was that his services were no longer required by the company. In this regard, the Respondent invoked Clause 4 of the Claimant's letter of appointment. It is however notable that Clause 4 of the said letter appointment provides for "leave".
19. The said letter of termination is couched in part: -
- "Sub: Termination of services from the post of Sales Manager
- Dear Mr. Johnson
- We are sorry that as per clause 4 of appointment letter, your services are no longer required by the company. So, the organisation is giving you one month notice on 2<sup>nd</sup> June, 2017 per appointment letter clause to terminate your services..."
20. What is discernible from the Claimant's letter of termination is that the Respondent did not assign any particular reason for terminating his employment.
21. Applying the provisions of Sections 43(1) and 45(2) (a) and (b) of the Act, to the case herein, the Respondent was not only required to provide the reasons for the Claimant's termination but prove the same. In this case, no reasons were proffered hence there was nothing to justify and or apply the test under Section 45(2) (a) and (b) of the Act. For instance, was the Respondent terminating the Claimant based on his conduct or capacity? or was it based its operational requirements? Either way, the Respondent was bound to assign reasons for the Claimant's termination and prove that the same were fair and valid.



22. Based on the foregoing, it is evident that the Respondent failed the test of substantive fairness and indeed, it can very well be said that the Claimant was totally at sea with regards to the real reasons behind his termination from the Respondent's employment.
23. Notably, it is only in its Defence that the Respondent gave a number of reasons for the Claimant's termination. Hence the question, why didn't the Respondent state as much in the Claimant's letter of termination?
24. I must add that the days when an employer would terminate an employee without proffering any reasons are long gone. The *Employment Act*, 2007, heralded a new way of managing termination of employment contracts hence any termination from employment must be accompanied by reasons which are fair, valid and related to the employee's conduct, capacity or compatibility. As rightly stated by the Court of Appeal in the case of *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR: -

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

25. Having found that the Respondent did not prove the reasons for the Claimant's termination as required under Sections 43 and 45(2) (a) and (b) of the Act, I arrive at the inevitable conclusion that it failed to discharge its evidential burden hence the resultant termination was not substantively fair.
26. Turning to the question of procedural fairness, it is apparent from the record that the Respondent did not prove that it subjected the Claimant to a fair process. From the record, the Claimant was only given one month notice but was not issued with a notification that the Respondent was contemplating terminating his employment on whatever grounds. In addition, there is no evidence that the Claimant was invited to render his explanation against whatever allegations. This leaves no doubt that the Claimant's termination was not in line with the provisions of Section 41 of the *Act*.
27. In considering the import of Section 41 of the Act, the Court of Appeal had this to say in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR: -

“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.....Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”



28. I wholly reiterate and apply the above determination to the case herein and hold that the provisions of Section 41 are mandatory and there is therefore no room for maneuver when it comes to applying fair procedure in effecting an employee's termination from employment. Anything short of the standard established under Section 41 invalidates a termination as in the instant case.
29. To augment this position, I wish to reiterate the determination by the Court of Appeal in the case of *Kenfreight (E.A.) Limited vs Benson K.Nguti (supra)*, where it was held that:-
- “ Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken”.
30. What this means is that beyond issuing the Claimant with a notice of termination, the Respondent was required to go a step further and explain to him the reasons for which it was considering terminating his employment in the presence of another employee or a union official in a language that he understands.
31. As the Respondent failed to meet the threshold stipulated under Section 41 of the Act, the Claimant's eventual termination from employment was procedurally unfair within the meaning of Sections 45(2) (c) of the Act.
32. In the end, the Court is satisfied that the Claimant's termination from employment was devoid of substantive justification and procedural fairness within the meaning of Sections 41, 43, and 45 of the Act.
33. In total sum, the Claimant's termination was unfair and unlawful.

#### Reliefs?

34. As the Court has found that the Claimant's termination was both unfair and unlawful, he is awarded compensatory damages equivalent to six (6) months of his gross salary. This award takes into consideration the length of the employment relationship as well as the circumstances attendant to the Claimant's termination.
35. There being no evidence that the Claimant falls within the exclusions under Section 35(6) of the Act, the Court awards him service pay for two years.
36. The claim for general and exemplary damages is declined as the Court has awarded the Claimant compensatory damages for unfair termination. That should suffice.

#### Orders

37. Against this background, I enter Judgment in favour of the Claimant against the Respondent and he is awarded: -
- a. Compensatory damages in the sum of Kshs 303,000.00 being equivalent to six (6) months of his gross salary.
  - b. Service pay for two years being Kshs 50,500.00.
  - c. The total award is Kshs 353,500.00.



- d. Interest on the amount in (c) at court rates from the date of Judgment until payment in full.
  - e. The Claimant shall also have the costs of the suit.
38. As the employment relationship was not disputed, the Claimant shall be entitled to a Certificate of Service in line with Section 51(1) of the Employment Act. This shall issue within 30 days from the date of this Judgment.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> day of July, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Chepkoyo instructed by Mr. Ndalila

For the Respondent Mr. Khalwale

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

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