



**Ogama v Opera Pharma (K) Limited (Cause 1741 of 2017)
[2023] KEELRC 1757 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1757 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1741 OF 2017
SC RUTTO, J
JULY 14, 2023**

BETWEEN

CHARLES OGAMA CLAIMANT

AND

OPERA PHARMA (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that his employment relationship with the respondent commenced on July 21, 2015. He avers that he was confirmed to the position of a Sales Representative with effect from May 2, 2016. He was further promoted to the position of Sales Manager vide a letter dated January 5, 2017. He served in the said position until June, 2017 when his services were terminated. The claimant has termed his termination from employment as unlawful and in breach of his contract of employment. His claim against the respondent is for *inter alia*, compensation for unfair termination, general damages for unfair termination, gratuity for the three years worked and exemplary damages for malicious termination of employment.
2. The respondent opposed the claim through its Memorandum of Defence, in which it has admitted the employment relationship but denied unlawful termination of the claimant's employment. According to the respondent, the claimant started his work well but later slowed down. That he would absent himself from work without leave or even fail to go to work altogether. The respondent further avers that in late 2016 and early 2017, the claimant became careless, negligent and uncaring towards his duties. That this resulted in the respondent losing uncollected money by the claimant. The respondent further states that the claimant was warned about laxity in execution of his duties and was reminded of the importance of being diligent, honest and mindful of the respondent's property which call he did not heed to. The respondent has further termed the claimant's dismissal from employment as fair, justifiable and procedural. That the claimant was dismissed after several warnings which bore no fruit. Consequently, the respondent prays that the claimant's suit be dismissed 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 gave 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. At the trial, the claimant testified in support of his case and at the outset, sought to rely on his witness statement to constitute his evidence in chief. He further produced the documents filed together with his Claim as exhibits before court.
5. It was his evidence that through a letter dated June 10, 2016, his employer noted that his performance was exemplary and even went ahead to offer him a salary increment of Kshs 4,500.00. In January, 2017, the respondent conducted a thorough performance appraisal and commended him for excellent work. He was awarded a score of 80%. Following the successful appraisal, he was quickly promoted to the position of Sales Manager, Nairobi and was to report directly to the Country Manager.
6. The claimant stated in further evidence that he was therefore surprised when he received a termination letter on June 7, 2017 without due process being followed. That at the time, he had been sent on an errand in Mombasa and was called back to collect his letter.
7. It was his further testimony that he was not issued with a show cause letter and was not called for a disciplinary hearing.
8. Closing his testimony in chief, the claimant asked the court to allow his claim and compensate him for accordingly.

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 Response.

Submissions

10. It was submitted on behalf of the claimant that the respondent did not give a reason for terminating his employment. That the same was in contravention of the provisions of the *Employment Act* as it does not contemplate generalized statements issued by employers to employees as reasons for termination.
11. Further, it was submitted on behalf of the claimant that the fact that a generalized statement of the allegation against him was given to him for termination of his employment, goes to show that the respondent was acting unfairly and irregularly in an attempt to find fault against him. To this end, it was argued that no evidence of the said allegation was provided to the claimant by the respondent.
12. It was further submitted that despite the provisions of section 41 being couched in mandatory terms, the claimant was not given an opportunity to make representations in his defence.

Analysis and determination

13. I have considered the pleadings, the evidence on record as well as the claimant's submissions and singled out the following issues for determination: -
 - a. Whether the claimant's termination from employment was unfair and unlawful.
 - b. Is the claimant entitled to the reliefs sought?



Unfair and unlawful termination?

14. Unfair and unlawful termination from employment is prohibited under the *Employment Act*, 2007. In this regard, an employer is required to prove that an employee's termination was not only fair substantively but also procedurally. The legal parameters for determining whether the employer acted fairly and lawfully in terminating the employment of the employee are to be found under sections 41, 43 and 45 of the *Employment Act*.
15. Whereas substantive justification entails proof of the reasons which resulted in an employee's termination, procedural fairness relates to the process applied in effecting an employee's termination from employment. I will start by considering substantive justification.
16. Section 43(1) of the Act, requires an employer to prove the reason or reasons for an employee's termination, and where it fails to do so, such termination shall be deemed to have been unfair within the meaning of Section 45.
17. On its part, section 45 (2) (a) and (b) of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
18. In the instant case, the claimant was terminated through a letter dated June 7, 2017, which reads in part: -

 "Sub: Termination of services with immediate effect

 Dear Mr. Charles,

 Referring to the letter dated April 29, 2017, given by you that you have been frequently not working with the assigned sales reps in their headquarters and forcing them to mention your name while writing their reports, the management has taken the matter very seriously.

 The action by you is false reporting and not working as per plan and forcing the Sales Rep to mention your working with them is not acceptable by the management.

 In light of your accepting the same in writing, the management has decided to terminate your services w.e.f the close of June 10, 2017 from the post of sales manager..."
19. What manifests from the above letter is that the reasons leading to the termination of the claimant's employment was false reporting and not working as per plan. Notably, the respondent did not provide better particulars of the said reasons so as to contextualize the claimant's shortcomings. For instance, in what manner was he not working as per plan? What were the false reports alluded to in the letter of termination? Needless to say, the respondent was required to provide better particulars of the allegations against the claimant so as to substantiate the reason for which it terminated his employment. In this case, it was not clear whether the reasons for the claimant's termination was in respect of his conduct or performance of duty.
20. In terms of sections 43(1) and 45(2) (a) and (b) of the Act, the respondent being the employer, had the heaviest responsibility in terms of proof. What this means is that it had the onus of proving that the reasons leading to the claimant's termination were fair, valid and related to his conduct, capacity or compatibility. Indeed, this is a burden the respondent could only have discharged by way of evidence. As it is, the respondent did not adduce evidence in whatever form or manner, thereby discharging its burden to the requisite standard.



21. It can very well be said that the allegations leveled against the claimant remained largely unsubstantiated.
22. I must say that failure by the respondent to call oral evidence did not help matters either and if anything, impaired its case in a fundamental way.
23. The total sum of the foregoing, is that the respondent did not discharge its evidential burden under sections 43(1) and 45 (2) (a) and (b) of the Act hence the claimant's termination was unfair.
24. Turning to the limb of procedural fairness, an employer is required under section 45(2)(c) of the Act to prove that an employee's termination was undertaken in accordance with fair procedure. Section 41(1) sets out the specific requirements of what constitutes fair procedure. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a union representative of his or her own choice.
25. From the record, the respondent did not comply with the requirements of a fair hearing. For starters, there was no evidence of a notice issued to the claimant detailing the allegations against him and informing him that the respondent was considering terminating the employment contract based on the same. In the same vein, there was no evidence that the claimant was invited to explain his conduct in answer to whatever allegations.
26. In absence of such evidence, I am led to conclude that the respondent did not subject the claimant to the process contemplated under section 41 of the Act, hence his termination from employment was unlawful within the meaning of section 45 (2) (c).
27. The total sum of my consideration is that the claimant's termination was both unfair and unlawful in terms of sections 41, 43 and 45 of the Act.

Appropriate Reliefs

28. Having found that the claimant's termination was unfair and unlawful, the court awards him compensatory damages equivalent to six (6) months of his gross salary. This award takes into consideration the length of the employment relationship between the parties as well as the fact that the respondent neither proved the reasons for the claimant's termination nor the fact that it applied a fair process in so doing.
29. The claim for gratuity is declined as the claimant has not provided basis for the same either contractually or by statute.
30. The claim for general and exemplary damages is declined as the objective of compensation is not to punish the employer but to make good the employee's loss. In arriving at the said finding, I am guided by the determination in the case of *David Mwangi Gioko and 51 others vs Nairobi City Water & Sewerage Company Limited*, [2013] eKLR, thus: -

“This court has in the past held that there is need in resolving employment disputes to pay heed to the principle of a fair go all round. This principle requires the court to balance the interest of the employer and that of the employee.”

Orders

31. In the final analysis, I enter Judgment in favour of the claimant against the respondent and he is awarded:



- a. Compensatory damages in the sum of Kshs 303,600.00, being equivalent to 6 months of his gross salary.
 - b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.
 - c. Costs of the suit.
32. The claimant shall also 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 14th day of July, 2023

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Chepkoyo

For the Respondent No appearance

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

