



**Lukania v Cotes Du Rhone Ltd & another (Cause 2245 of 2016)
[2023] KEELRC 1798 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1798 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2245 OF 2016
AN MWAURE, J
JULY 7, 2023**

BETWEEN

NICODEMUS LUKANIA CLAIMANT

AND

COTES DU RHONE LTD 1ST RESPONDENT

PETER KIBOGO 2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant filed a memorandum of claim dated September 5, 2016 and amended memorandum of claim dated November 2, 2022 claim for declaration of wrongful and unlawful termination and praying for various remedies.
2. The claimant states he was employed by the respondent on 1st June 2004 and at the termination his gross salary was Kshs 53,700/-.
3. He says he was accused of underperforming and yet there was no report on underperforming.
4. He says he was terminated on 1st April 2016 and he says the reason for termination was to do with some access of Kshs 10,000/- that was paid to a player wrongly but the claimant made sure it was refunded. He says despite that he was suspended and was not given a chance to defend himself.
5. He further says he was given a termination letter citing underperformance as the reason for termination and yet there was no consistent report on underperformance and claimant was not put on performance improvement plan.
6. Claimant says he was not paid his terminal dues and benefits and so prays his termination be declared unlawful and unprocedural and he be paid his dues as per the prayers in his claim.



7. The respondent's response is dated 24th November 2017. The 2nd respondent says he is a stranger to this suit hence wrongly enjoined.
8. The respondents deny the allegations made by the claimant in paragraph 5 of his claim and aver the claimant various acts of negligence amount to gross misconduct. They aver the claimant was dismissed on the provisions of the law and was not unlawfully terminated.
9. They aver they issued claimant with various warning letters and accorded him a hearing before they terminated him.
10. They say they paid all his dues before they terminated him by a cheque dated 28th April 2016 from Diamond Trust bank Kenya Limited. They therefore do not owe claimant Kshs 1,288,800 as claimed and pray the suit be dismissed with costs to the respondent.

Claimant's Evidence

11. He says he worked at the respondent's casino and on 26/3/2016 his junior overpaid a customer with Kshs 10,000 and the (claimant) noted the overpayment and he corrected it and the same was refunded.
12. He says his supervisor heard of the incident and gave him a warning letter. He was suspended for 7 days and even though he was called for a disciplinary meeting he was told to sit outside. He was not given a chance to explain himself.
13. He says he was informed from the Human resource department that he had been dismissed. He says despite appealing he was not given a response. He says he was paid for 15 days worked. He was paid a few days for leave and he was told to go home.
14. Claimant said he was not questioned on performance and even though he had received several warning letters they were not in relation to this termination. Claimant says he was not trained but rose through the ranks.

Respondent's Evidence.

15. The respondent witness is Jackson Bwire and he said claimant was supervising a customer and he paid him in excess of Kshs 10,000/-. He says that was not the first time claimant had made a mistake of that kind.

Submissions

16. The claimant filed his submissions dated 28th February 2023 and the court has carefully considered the said submissions. Equally the court also considered the respondent's submissions dated 9th March 2023.

Analysis and determination

17. The claimant's employment was terminated on grounds of poor performance. The issue of poor performance is one of those cited in section 41(1) of the *Employment Act* as a reason which employer can consider while terminating the employee. Section 41(1) provides as follows:
 - (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.



18. Numerous authorities go further to state that in citing poor performance as a ground for termination there is an elaborate procedure for the employer to follow. Clearly the claimant was terminated on the grounds of poor performance.
19. The termination letter dated April 1, 2016 refers to negligence in paying a customer excess money. The letter further states that claimant had been given opportunity to improve in performing his duties but had not improved. He was said to have been negligent.
20. In the case of *Jane Wairimu Machira vs Mugo Waweru & Associates* (2012) eKLR the court in dealing with poor performance as a ground for termination had this to say:

“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 the Kenya science case court held that 2-3 months is a reasonable period for an employee to improve”
21. In the case of *Maina Mwangi vs Thika Coffee Mills Ltd* (2012) eKLR the court held:

“Where the Employee fails to meet the standards, the first duty of the Employer is to let the Employee know that his performance has fallen below the set standards. The Employer should then propose training, guidance and fresh instructions to the Employee. The Employer is required to allow the Employee time to improve. If no improvement is noted after a reasonable passage of time, the Employer should issue a formal warning to the Employee, and advise the Employee he may be separated from the Employer on account of poor performance. The next phase involves investigations by the Employer and consideration if the Employee could fit better in another role within the organization. At investigation, the Employer should engage the Employee, and if at the end of these steps, dismissal of the Employee is the course that commends itself to the Employer, then Section 41 of the *Employment Act* 2007, must come into play.”
22. It is evident the respondent despite knowing the claimant’s shortcomings and lack of training for this job threw him into it like they were plotting for him to fail. One witness who recorded statement and testified in court by the name Jackson B Bwire on paragraph 6 of his statement said claimant’s promotion was a nightmare as he was unable to handle his job and to make hard decisions. It is clear he was thrown into the deep end of a swimming pool. Even though Mr Bwire the respondent witness testified on behalf of the respondent said he had been trained for the job he however admitted he had no evidence of such training.
23. The respondent therefore did not follow the procedure required. In order to terminate an employee for poor performance the procedure as required by both case laws and section 41 of the *Employment Act* must be adhered.
24. The court was not presented with evidence that the claimant was advised of his poor performance and was called for a hearing to give his side of the story. There are no minutes signed by the claimant to prove he participated in a disciplinary hearing.
25. The court noted claimant received warning letters over a long period dating 2004 to 2016 but the same were not included as the reasons for termination. Indeed the payment of Kshs 10,000/- to a customer on 26th March 2016 seemed to have been the straw that broke the camel’s back and hence the claimant was terminated summarily. The termination letter was dated 1st April 2016 and was to take



effect immediately as per the termination letter where he was ordered to return company property and clear with the relevant departments.

26. The court has considered the pleadings and the evidence adduced by the parties and their respective submissions and the court finds the respondent did not prove he followed the right procedure in terminating the claimant for poor performance. The only fair way is to enter judgment in favour of the claimant and declare that he was unfairly and un procedulary terminated.

Remedies

27. He is awarded the following remedies:
- i. One month salary in lieu of notice Kshs 53,700/-.
 - ii. 5 months' salary for unlawful termination as in accordance to section 49(1)(c) of the Employment Act Kshs 268,500/-
 - iii. Leave allowance is merely pleaded and respondent has attempted to tender evidence pertaining to leave days taken by the claimant and so this prayer is rejected.
 - iv. Costs follow the event and so claimant is awarded costs.
 - v. Total award is Kshs 322,200/-. Interest is awarded at court rates from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7TH DAY OF JULY, 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 March 15, 2020 and subsequent directions of April 21, 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

