



REPUBLIC OF KENYA



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**Matundura v Ashut Engineers Limited (Cause 291 of 2020)
[2023] KEELRC 2218 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2218 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 291 OF 2020
L NDOLO, J
SEPTEMBER 28, 2023**

BETWEEN

ANGELA KERUBO MATUNDURA CLAIMANT

AND

ASHUT ENGINEERS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The issue in dispute as stated by the Claimant in her Memorandum of Claim dated 7th July 2020 is ‘constructive, wrongful, unfair and unlawful termination of the Claimant’s employment coupled with discrimination and harassment by the Respondent and failure to pay terminal dues.’
2. The Respondent filed a Memorandum of Response dated 16th September 2020 in response to which the Claimant filed a Reply dated 7th October 2020.
3. The matter went to full trial where the Claimant testified on her own behalf and thereafter called Hellen Kioko. The Respondent called its Group Human Resource Business Partner, Manase Otieno. Both parties then filed written submissions.

The Claimant’s Case

4. The Claimant was employed by the Respondent in the position of Supply Chain Manager, effective 18th June 2018. She served probation until 13th November 2018, when she was confirmed in her position.
5. The Claimant accuses the Respondent of frustrating her efforts to prepare departmental Key Performance Indicators (KPIs) for the year 2019. She claims to have adopted KPIs prepared by the Respondent’s Consultant, Deepark Varanasi of Accretive Africa.



6. The Claimant states that on 12th April 2018, the then Chief Executive Officer, Baiju Mohan, in the presence of the Operations Manager, Hetal Bhandari, informed the Claimant that a new Supply Chain Manager would be joining the Respondent Company, to handle the Claimant's docket.
7. The Claimant further states that on 15th April 2019, the Respondent introduced the new Supply Chain Manager, Omondi Edward Okelo. The Claimant claims that Okelo earned a monthly salary of Kshs. 450,000 while she earned Kshs. 340,000.
8. On 8th July 2019, the Claimant reported back to work from sick leave and presented a sick sheet to the Human Resource Director, Hellen Kioko.
9. Claimant claims to have been pressurised to resign from employment but she declined.
10. On 31st October 2019, the Claimant was issued with a Performance Improvement Plan (PIP). The Claimant raised concerns on the PIP and a meeting was convened for 1st November 2019. The meeting was attended by the Operations Manager, the new Supply Chain Manager, the Human Resources Partner and the Claimant. The Claimant declined to sign the PIP on the ground that her input was not taken into account.
11. The Claimant states that another meeting was held on 2nd November 2019 at which she was pressurised to sign the PIP. She reiterated her concerns regarding the PIP which she signed with reservations.
12. The Claimant avers that she was not subjected to end year performance reviews.
13. On 30th December 2019, the Claimant had her first PIP review and on 27th January 2020 she was issued with a letter requiring her to show cause within 24 hours, why disciplinary action should not be taken against her for alleged gross misconduct; particulars being, appraising her team on the basis of different KPIs from those set at the beginning of the year.
14. The Claimant responded to the show cause letter on the same day, 27th January 2020 and on 28th January 2020 she was invited to a disciplinary hearing scheduled for 29th January 2020.
15. The Claimant was dismissed by letter dated 31st January 2020. She states that her dismissal was unlawful and unfair. Specifically, she accuses the Respondent of treating her differently from her immediate supervisor, who had allegedly also used the erroneous KPIs.
16. The Claimant appealed the dismissal and was invited to an appeal hearing on 25th February 2020. By letter dated 19th March 2020, the Claimant's appeal was dismissed. The Claimant contends that the grounds of her appeal were not considered by the Respondent.
17. The Claimant claims to have been coerced to sign a discharge voucher so as to receive her terminal dues.
18. The Claimant sets out the following particulars of her harassment by the Respondent:
 - a. Being asked to move her workstation from the main office to the warehouse;
 - b. Being asked not to attend meetings held by Heads of Departments;
 - c. Being threatened with dismissal;
 - d. Being asked to attend work despite being unwell;
 - e. Being denied minutes of meetings she had attended;
 - f. Being placed on a PIP after declining to resign;



- g. Being asked to respond to a notice to show cause within 24 hours;
 - h. Being denied salary for the month of January 2020;
 - i. Frustration in the clearing process;
 - j. Being asked to sign a discharge voucher prior to payment of her terminal dues;
 - k. Delay in releasing the terminal dues.
19. The Claimant further cites the following particulars of her discrimination by the Respondent:
- a. Remunerating the Claimant at a lower salary than the Supply Chain Manager engaged on 15th April 2019;
 - b. Conducting a performance review on the Claimant in isolation to the other employees of the Respondent, after the mid-year reviews and before the end-year reviews;
 - c. Asking the Claimant to resign on account of the Respondent having two Supply Chain Managers;
 - d. Placing the Claimant on a PIP for failure to resign;
 - e. Placing the Claimant on a PIP after she had gone through a mid-year review that did not disclose any performance issues on her part;
 - f. Taking a different disciplinary action against the Claimant's supervisor despite the admission that he had contributed to the reason for the Claimant's dismissal;
 - g. Failing to pay the Claimant her annual variable pay benefits;
 - h. Failing to subject the Claimant to end-year reviews;
 - i. Stopping the Claimant's salary for the month of January 2020 while the disciplinary process was ongoing;
 - j. Removing the Claimant from the payroll for January 2020 while she was still undergoing the disciplinary process.
20. The Claimant tabulates her claim as follows:
- a. 12 months' salary in compensation.....Kshs. 4,080,000
 - b. 2 months' salary in lieu of notice of.....680,000
 - c. General damages for discrimination and harassment.....5,000,000
 - d. 2 years variable pay.....240,000
 - e. Costs plus interest

The Respondent's Case

- 21. In its Memorandum of Response dated 16th September 2020, the Respondent admits having employed the Claimant in the position of Supply Chain Manager, effective 18th June 2018.
- 22. The Respondent denies the Claimant's averment that the departmental KPIs in issue were developed by Deepark Varanasi of Accretive Africa. The Respondent states that it is in fact the Claimant and her



- team who formulated the KPIs which were to be utilised to gauge performance during the mid-year and end-year reviews.
23. According to the Respondent Varanasi's role was purely consultative. The Respondent states that the Claimant submitted the KPIs for each of the employees working under her to the Human Resource Manager for record keeping and they were never amended.
 24. Regarding the relationship between the Claimant and Omondi Edward Okelo, the Respondent states that Okelo was engaged as the Head of Supply Chain and Production Planning, while the Claimant held the position of Supply Chain Manager, with each having their own distinct roles and responsibilities. The Respondent denies that Okelo was hired to replace the Claimant.
 25. The Respondent clarifies that the distinction in pay package as between Okelo and the Claimant arose from the fact that Okelo was in a significantly higher role with a wider scope of responsibilities.
 26. The Respondent states that in the month of July 2019, the Claimant disappeared for one month, without notification or authorisation, and upon resurfacing, availed a sick sheet. The Respondent adds that despite the Claimant's unauthorised absenteeism, she was not taken through a disciplinary process nor did the Respondent contemplate terminating her employment.
 27. The Respondent concedes that the Claimant was placed on a PIP effective 13th November 2019, in view of the fact that her performance had deteriorated. According to the Respondent, the PIP meetings were documented by minutes, with action plans indicated and signed off by the parties.
 28. The Respondent states that the Claimant was initially reluctant to participate in the PIP and adds that the Claimant was afforded all the required support to improve on her performance.
 29. The Respondent maintains that Okelo was never the Claimant's supervisor and states that the Claimant was supervised by the Operations Manager, Hetal Bhandari.
 30. The Respondent states that the Claimant was availed the minutes of the meeting held on 1st and 2nd November 2019, which she voluntarily signed on 3rd November 2019. According to the Respondent, there was no meeting on 29th October 2019.
 31. The Respondent's case is that the PIP was a voluntary, consultative, structured and well documented exercise, and the Claimant was fully aware of its initiation as her performance had begun to deteriorate a few months after the mid-year review.
 32. The Respondent states that in view of the fact that the Claimant had been placed on a PIP, the end of year review could not be conducted when the PIP was still running.
 33. The Respondent avers that the Claimant was issued with a show cause letter dated 27th January 2020, which specifically set out her negligence of duty and the Claimant was required to give reasons why disciplinary action should not be taken against her.
 34. The Claimant responded to the show cause notice vide her letter dated 27th January 2020, upon which she was invited to attend a disciplinary hearing, by letter dated 28th January 2020. The Respondent states that the Claimant did not ask for extension of time to either respond to the show cause notice or to prepare for the disciplinary hearing.
 35. The Respondent denies delaying payment of the Claimant's salary for the month of January 2020.
 36. The Respondent further denies all the particulars of harassment set out by the Claimant and maintains that the termination of employment was lawful and fair.



Findings and Determination

37. There are two (2) issues for determination in this case:
- a. Whether the Claimant's dismissal was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

38. The Claimant was dismissed by letter dated 31st January 2020 stating as follows:

“Dear Angela,

Re: Summary Dismissal

Reference is made to our show cause letter issued to you on 28th January 2020, the response received from you on the same day and the hearing meeting held on 29th March 2020.

In the show cause letter issued to you, management expected a feedback as to why disciplinary action should not be taken against you for;

- i. Evaluating during Mid-Year reviews, different Key Performance Indicators (KPIs) compared to those you set and agreed with employees under you at the beginning of the year;
- ii. Provided for end year reviews of your team, different KPIs from to (sic) those you set and agreed with them at the beginning of the year and what you reviewed at the mid of the year.

In your show cause response, you did confess that the happenings were not intentional and that the same was erroneous. You further mentioned that as per the current structure, Edward your colleague is currently the head of department and that he should also take the blame for not cross checking the KPIs.

Management is well aligned with you that your immediate supervisor Mr. Edward ought to have checked the correctness of the KPIs as well. This would however only be applicable in the end year reviews since the mid-year reviews he was only attending the KPI review sessions which you conducted with your team to enable him understand the review process. A parallel disciplinary process has also been initiated against Mr. Edward for not cross-checking end year review KPIs against those set at the beginning of the year in order to detect your mistake.

During the hearing meeting held with you on 30th January 2020, you were asked whether your failure to refer to the KPIs you set at the beginning of the year while conducting Mid-year reviews amounted to negligence of duty and you stated that this was only an error that occurred. In the same meeting, you were further asked to explain how the same error could reoccur at the end of the year when you submitted for review again different KPIs from both what you set at the beginning of the year and what was reviewed at the middle of the year and you stated that you had nothing to say on that.

As a senior manager in supply chain department, management entrusted you with a crucial responsibility of managing your team's performance hence the reason you sat down with each of them at the start of the year 2019 agreed on set performance targets and signed off on the same.



It is however sad that upon setting and agreeing on the Key Performance Indicators, you improperly conducted the reviews without regard to the targets you personally set with your team. Management would not have had this case with you if you were keen enough in undertaking your responsibility as regards review of employees' performance.

Please note that as a result of your negligence, management is unable to get the true performance results for employees under you across the year hence a challenge in even deciding who among them deserves to be rewarded.

While these mistakes were noted from your end, it is sad to note that you also had serious performance related concerns that were highlighted to you at the beginning of November 2019 and as a result you have been on performance improvement plan which was set for final review at the end of this month.

While management has always pardoned you for various mistakes that would equally amount to negligence of duty, the same cannot be accepted any longer for reasons there (sic) effects are now becoming detrimental to the company as well.

In view of the above and in line with section 44 (4)(c) of the Employment Act, you are hereby summarily dismissed with effect from 31st January 2020. Upon full and final clearance, your final dues shall be paid as follows;

- i. Salary up to and including 31st January 2020,
- ii. Leave days earned but not taken as at 31st January 2020,
- iii. Less statutory deduction and any amount owing to the company

Please note that you are allowed to appeal this decision within fourteen (14) days from the date and time of your receipt hereof.

A certificate of service shall thereafter be issued and you will also be required to sign a formal discharge letter upon settlement of your final dues.

Yours Faithfully

For: Ashut Engineers Limited

(signed)

Manase Otieno

HR Business Partner”

39. The dismissal letter gives the reason for the Claimant's dismissal as use of the wrong KPIs for evaluation of staff in her department. This accusation was also stated in the notice to show cause issued to the Claimant on 27th January 2020. In her response of even date, the Claimant admitted having used the wrong KPIs to evaluate staff working under her.
40. The Claimant however went further to shift blame to Edward, who she referred to as 'the overall boss'. According to her, Edward ought to have cross checked the KPIs against a version she claims to have shared with him on 6th May 2019, way ahead of the impugned performance reviews.
41. Although the Claimant sought to pass off the issue as a genuine error, the Court did not see any remorse in her response to the show cause letter. Further, both in her Memorandum of Claim and testimony before the Court, the Claimant convoluted the issues by focussing on her PIP rather than the specific incident of negligence regarding the use of wrong KPIs.



42. In determining whether a termination of employment passes the fairness test, the Court is required to answer two questions; first, whether there was a valid reason for the termination and second, whether in executing the termination, the employer observed due process.
43. In the final submissions filed on behalf of the Respondent, reference was made to the decision in *Bamburi Cement Limited v Farid About Mohammed* [2016] eKLR where the Court of Appeal stated as follows:
- “Where a party makes a claim for unfair termination, the court must be satisfied of two things; the procedure employed in terminating the party’s service and the reason or reasons assigned to the termination.”
44. Regarding the reason for termination, Section 43 of the *Employment Act* provides as follows:
43. Proof of reason for termination
1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
45. This provision codifies what is commonly known as the ‘reasonable responses test’ which was well captured by Lord Denning in *British Leyland UK v Swift* [1981] IRLR 91 as follows:
- “Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”
46. As held by the Court of Appeal in *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* [2015] eKLR and *Kenya Revenue Authority v Renwel Waitbaka Gitahi & 2 others* [2019] eKLR in a claim of unfair termination of employment, it is not open for the Court to substitute its own ‘reasonable grounds’ for those of the employer.
47. In its decision in *Sbariffu Mike Omondi v Ranfer Teas (Kenya) Limited* [2021] eKLR this Court held as follows:
- “...the fact that the Claimant’s supervisor may also have been negligent, does not diminish the Claimant’s culpability. The Claimant occupied a position of responsibility in his own right and he owed his employer a direct duty of care.”
48. I hold the same in this case. The Claimant held a senior position within the Respondent’s establishment and she owed her employer a direct duty of care. The fact that her supervisor may have missed the correct KPIs did not absolve the Claimant from culpability. It was not lost on the Court that at the time the error occurred, the Claimant was on a running PIP. The purpose of a PIP is to allow



the employee a guided opportunity to improve on their performance. Such an employee is expected to cooperate and to put their best foot forward.

49. Even assuming that the error was inadvertent, the Claimant ought to have owned it and taken mitigative measures. Instead, she set out to blame her supervisor for not picking up her mistake. The role of supervisors is not to pick up the errors of staff working under them.
50. Taking all factors into consideration, I find and hold that the Respondent had a valid reason for dismissing the Claimant as required by Section 43 of the *Employment Act*.
51. The procedure for handling disciplinary cases leading to termination of employment is contained in Section 41 of the Act which provides that:
 41. Notification and hearing before termination on grounds of misconduct
 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 shop floor union representative of his choice present during the explanation.
 2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
52. From the evidence on record, the Claimant was issued with a show cause notice to which she duly responded. She was also invited to a disciplinary hearing at which she fully participated. The Court did not see any formal objection by the Claimant to any part of the disciplinary proceedings. I am therefore satisfied that the procedural fairness requirements of Section 41 of the *Employment Act* were satisfied.
53. In the result, I find and hold that the claims for compensation, notice pay and general damages are without basis.
54. The claim for variable pay was not proved and is disallowed.
55. Finally, the entire claim by the Claimant is dismissed.
56. Each party will bear their own costs.
57. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2023

LINNET NDOLO

JUDGE

Appearance:

Ms. Ayisi for the Claimant

Ms. Akong'a for the Respondent

