



**Mwangi v Bunson Travel Services Limited (Cause E502 of 2020)
[2023] KEELRC 2383 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2383 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E502 OF 2020
M MBARÚ, J
SEPTEMBER 28, 2023**

BETWEEN

DAVID WACHIRA MWANGI CLAIMANT

AND

BUNSON TRAVEL SERVICES LIMITED RESPONDENT

JUDGMENT

1. The claimant is an adult and the respondent is a limited liability company.
2. On 22 January 2009 the respondent employed the claimant as a financial controller with effect on 1st February 2009 to work in accounts section at the head office in Nairobi. the claimant performed well in his duties and was promoted through letter dated 31st July 2014 and in the letter dated 31st July 2014 the respondent promoted the claimant to the position of finance director.
3. In the period of 2010 to 2019 the respondent registered profits but on 17 February 2020, without any good cause, the respondent directed the claimant to proceed on compulsory leave and to hand over his duties to the external auditor and to surrender his lap top.
4. On 20 March 2020 the claimant was issued with a notice to show cause letter with various allegations and on 2 April 2020 the claimant replied to the notice with details.
5. On 31st March 2020 the respondent wrote to the claimant informing him that his employment terms would be varied reducing his salary by 70% and a contract with variation was issued to the claimant on 24 April 2020 and on 26 April 2020 the claimant declined to accept such contract which had been unilaterally reviewed.
6. On 15 April 2020 the claimant was invited to a disciplinary hearing for 21 April 2020 and he attended and on 23 April 2020 notice issued terminating his employment with effect from 28 April 2020.



7. The claim is that termination of employment was unfair and without any good cause on the grounds that the respondent failed to give any valid reasons for such action, there was no notice issued or payment in lieu thereof and the claimant had no opportunity to defend himself during the disciplinary proceedings which were a sham.
8. The respondent has failed to issue the claimant with a certificate of service and then proceeded to deliberately to withdraw the claimant from the pension contributions from Bunson Travel Pension Scheme.
9. The claimant is seeking the following benefits;
 - a. Ksh. 172,681.50 being 70% of the net salary for the month of April 2020;
 - b. Ksh. 150,000 being allowance not paid for April 2020;
 - c. Ksh. 285,645.6 net salary not paid in May 2020;
 - d. Ksh. 135,483.16 allowances due in May 2020;
 - e. Ksh. 285,645.16 notice pay;
 - f. Ksh. 135,483.87 allowances in lieu of notice;
 - g. Ksh. 439,081.50 accrued leave days of 34.71 days;
 - h. Ksh. 208,260 allowance for accrued leave days of 34.71 days;
 - i. Ksh. 68,100 being vehicle transfer payment not paid for the month of March 2020;
 - j. Ksh. 3,427,741.92 being 12 months' compensation;
 - k. A letter of no objection to Bunson Travel Pension Scheme for the transfer of the claimant's pension contribution to a Pension Scheme of his choice;
 - l. A certificate of service be issued;
 - m. General and punitive damages for malicious, unlawful termination of employment and distress; and
 - n. Costs of the suit.
10. The claimant testified in support of his case that upon employment by the respondent he worked diligently and which led to a turnaround of the business into high returns and profits. He was taken through various appraisals and found to be of satisfactory work performance but all these records are in the custody of the respondent as the employer. Sales improved due to good stewardship of the claimant and the financial statements of the business can demonstrate such improvements over the years until the year 2019 before his employment was terminated
11. The claimant testified that all suppliers had been paid and profits in the statements were kept confidential at the time he was called and directed to hand over his duties to an external auditor in March 2020 and a notice to show cause issued followed by notice for a disciplinary hearing leading to termination of employment which was unfair since his work had been satisfactory over the years.
12. The claimant testified that it is common knowledge that in the year 2020 COVID pandemic affected travel sector and the respondent solely depended on travel in its business. However, the respondent did not have a policy on salary reduction and the unilateral review of his salary by 70% was not justified.



13. The respondent had an arrangement with the employees to provide their vehicles to the issue at a fee and the claims due were not resolved at the end of his employment.
14. In response, the respondent's case is that the claimant was employed and issued with written terms and conditions of his employment. Initially the claimant was productive but he developed performance gaps which were observed during the course of time and he was promoted to the position of Finance Director which he held until his employment was terminated for good cause.
15. Upon his promotion, the claimant adopted a cavalier attitude towards his duties as the financial expert of the respondent leading to ballooning of the outstanding accounts owed to the respondent by customers. He failed and neglected to monitor the company systems or internal financial controls with the respondent that the company's internal financial control system being classified as weak by the auditors. The claimant failed and neglected to reconcile the respondent's online banking and credit cards statement with the result that the true picture of the company's finances was vague at best.
16. The audited accounts as at June 2019 resulted in a management letter that identified grave weaknesses in the company financial systems.
17. The claimant's performance as the finance director left the respondent exposed and the decision to send him on leave was motivated by the fact that at the time, the claimant had amassed many leave days which provided a financial liability to the respondent and contrary to the policy. This had been raised with the claimant and the auditors.
18. While on leave, the claimant was allowed to carry his iPad to allow him to keep in correspondence with the respondent. At the time, the respondent was undergoing an audit and the claimant was aware.
19. The claimant was issued with a show cause notice, he responded but failed to address the issues raised.
20. The decision to reduce salaries was owing to the devastating effect of COVID pandemic on travel both international and national which is the core business of the respondent. The claimant was aware of the precautions position of the respondent and the desire to maintain workforce.
21. A disciplinary hearing was convened to hear the claimant but he was found culpable and a decision taken to terminate his employment for good cause. These related to poor work performance which matters had been addressed with the claimant over time and several warnings issued. The failure to manage finances to ensure the financial controls in place jeopardized the business.
22. The claimant was invited to discuss the payment of his terminal dues but he declined. His dues are ready for collection together with the Certificate of Service and the claims made are without merit and should be dismissed with costs.
23. The respondent called Peter Mwangi as an expert witness, a senior financial advisor with Bellmac Consulting contracted by the respondent to review the general financial well-being of the respondent and compiled a report in support of the findings that the claimant had financial mismanagement leading to termination of his employment.
24. Upon cross-examination, the witness testified that he submitted his report to the respondent with regard to the financial well-being on a date after the claimant's employment had been terminated and hence he had no chance to see the report and findings.
25. The respondent called Julie Dabaly Scott the managing director who testified that she worked closely with the claimant as the finance director but there were performance gaps which were observed during the tenure of employment and captured by auditors over time. These matters were brought



- to the attention of the claimant but he failed to take heed or address leading to termination of his employment.
26. Ms Scott testified that when the claimant joined the respondent, there was eminent threat of insolvency and was required to turnaround the business. Standard Chartered Bank was the main financier but when the claimant was promoted to finance director, he started under-performing. What prompted her in this assessment was the poor performance of the finance department and how operations started going down. Debts were not being paid in time and this meant the business licence would be revoked. During the tenure of the claimant, the debt balances became huge and reduced any possible profits. The Kenya Revenue Authority asked for tax due back to the year 2015 in the year 2020 which meant the claimant had not been addressing this matter. In the year 2019 KRA wrote to the respondent and she sought advice from a tax audit advisor and which matter the claimant ought to have addressed.
27. Ms Scott testified that COVID affected the business and efforts to cut on cost included reduced salaries but the claimant declined the offer made. Association of Travellers met and decided that in order to survive under the pandemic, one measure was to cut costs. The claimant was a member of the Association and hence aware of the resolutions. A memo was sent to all employees but the claimant refused to sign in acceptance of his reduced salary.
28. At the end of his employment, the claimant had pending leave days. The respondent had a policy not to carry forward any leave days. At the end of employment, the claimant had not taken part of his due leave days with a balance of 74 days.
29. The claimant was invited to the disciplinary hearing and allowed a hearing and he admitted to failing to take charge of his departments which justified the sanction taken to terminate his employment since he had fundamentally failed in his role.
30. At the close of the hearing both parties filed written submissions which are put into account and the issues which emerge for determination can be summarized as;
- Whether there was unfair termination of employment;
 - Whether the remedies sought should issue; and
 - Who should pay costs.
31. The respondent, through notice dated 23 April 2020 terminated the claimant in his employment on the grounds that;
- ... the company noted with concern that you literally admitted to not taking charge of your role and the attendant functions thereby leaving the company in a precarious financial position ... therefore, as per the findings of the Disciplinary Hearing, as Finance Director you do not want to accept responsibility for the Finance Department and therefore you have left the Company with no option other than to terminate your reemployment contract effective 28th April 2020.
- Due to the sensitivity of your position, you will be required to serve your notice in order to complete your handover notes and process.
32. The core issue leading to termination of employment was that the claimant had under-performing in his role as finance director.
33. Ms Scott for the respondent gave emphasis to the facts in her evidence in court that upon the promotion of the claimant as the finance director, his work performance became poor leading to a huge



- debt and KRA wrote various letters with regard to unpaid taxes and had to seek external advice which was the duty of the claimant to undertake but he negligently failed to address. Further, that during his tenure, the claimant made the respondent incur losses yet the debt list had huge balances.
34. Indeed, there are certain positions such as that of a finance director of a company which call for a higher threshold in terms of prudence and probity as held in *Violet Kadala v Post Bank Limited* [2020] eKLR. as a finance director, the claimant was employed to take charge of the financial affairs of the respondent and to do so at the highest professional standards.
35. However, where his conducted resulted to alleged under-performance or poor work performance and leading to huge losses to the respondent, such matter ought and should have been addressed through the mandatory provisions of Section 41 of the *Employment Act*, 2007 (the Act).
36. Section 41(1) of the *Act* requires that;
- (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.
37. In view of the provisions of Section 41 of the *Act*, the employee's right to be heard whenever an employer is contemplating termination, is a sacrosanct right. It cannot therefore, be taken away through the invocation of his particular position. In *David Gichana Omuya v Mombasa Maize Millers Limited* [2014] eKLR the Court held that the requirements of Section 41 of the *Act* have a long pedigree in administrative/public law and are referred as the rules of natural justice.
38. In the case of *George Okoth Okello v Africa Blooms Limited & another* [2022] eKLR the court held that for poor performance to qualify as a ground for terminating the services of the employee, it must be demonstrated that there are measures put in place to measure performance by the employer which measures were used to determine the performance of the employee thereof. it is a process. The employer must demonstrate that upon the evaluation and assessment of the claimant in his work performance, on the finding that he was poor, modalities were put in place to support him and given time for improvements but these measures failed.
39. On 17 February 2020 the claimant was directed to take part of his leave days. He was also required to hand over his work tools since an audit was ongoing.
40. On 20 March 2020 the claimant was issued with a notice to show cause on various matters with regard to his work performance. the issues put to him related and included client credit limits, TRAACS bank office incomplete set-up, adding allowances as increments, tax compliance s by the respondent, supplier creation. The claimant responded and then invited to his disciplinary hearing on 21 April 2020.
41. The gist of these analysis is that, where poor performance is alleged by an employer, the threshold of Section 41(1) of the *Act* is for the employer to demonstrate what was done to support such an employee before the decision to terminate employment was taken.
42. The Court of Appeal has identified the parameters of what the employer must address in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR;
- a. Where poor performance is shown to be 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
43. at the point the claimant was sent on leave, he had no chance to see matters put against him. Mr Mwangi the auditor testified that he was called in by the respondent to audit its financial well-being while the claimant was on leave. The claimant had no chance to see his report before the disciplinary hearing or get audit questions over any matter that was required of him to respond.
44. The court finds, there was no process or justice leading to termination of employment. the finding that there was under-performance looked at via-a-vies the law was premature and cannot meet the threshold of Section 41(1) read together with Section 43 and 45 of the Act. there was unfair termination of employment.
45. On the claim for compensation for unfair termination of employment, the claimant worked with the respondent from 1st February 2009 to 23 April 2020 last earning a gross salary of Kshs. 316,250 in terms of his payment statements for February 2020. Compensation is hereby awarded at 3 months' gross wage all at Ksh. 948,750.
46. On the claim of 70% of the net salary for April 2020, a salary reduction must lawfully be effected with the written consent/approval of the employee. The claimant was issued with a reviewed contract but he did not execute in approval. This is in accordance with the mandatory provisions of Section 10(5) of the Act which requires that;
- (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
47. The claim for the 70% of the unpaid salary is due. the fact of the claimant being a member of the Association of Travelers does not negate his employment rights.
48. The sum of Ksh. 172,681.50 is due to the claimant as part of his salary.
49. The claim of Ksh. 150,000 being allowance not paid for April 2020 as part of the benefits due to the claimant under his employment contract is due.
50. On the claim for salary and allowances for May 2020 on the basis that the claimant was never recalled back to work until he handed over in June 2020, the claimant has submitted notice terminating employment dated 23 April 2020 and the matters leading to his unfair termination addressed and redressed. He did



not offer the respondent his labours from such date and the salary allocated is for the full month of April 2020. To claim beyond the award and salary allocated for May 2020 is not justified.

51. The notice of 23 April 2020 indicated that the claimant would be required to attend and give handing over notes up and until 5 May 2020 and his salary for these days is due all at Ksh. 52,709.
52. The respondent admits that the claimant had not taken a huge portion of his leave days. Section 28(2) allow an employee to go back for 18 months in accumulating leave days. On the gross salary of Kshs. 316,250 such amounts to Kshs. 474,375, the claimant had taken part of his leave days under the compulsory leave allocated and his claim for the balance at Ksh 439,081.50 accrued leave days of 34.71 days is justified. The allowance claimed thereof is taken into account.
53. The sum of Ksh. 68,100 being vehicle transfer payment not paid for the month of March 2020 was admitted as due.
54. With regard to pension dues, at the end of employment, an employee is entitled to regulate his pension benefits as required. The respondent shall issue the claimant with the necessary letter to allow him transfer his pension benefits under Bunson Travel Pension Scheme to a Pension Scheme of his choice.
55. The issuance of a Certificate of Service is a right under Section 51 of the Act. upon clearance, an employee should be issued with such certificate.
56. As the claim herein is successful, the claimant is entitled to his costs.

Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;

- a. A declaration that employment terminated unfairly;
- b. Compensation awarded at Ksh. 948,750;
- c. 70% unpaid salary Ksh. 172,681.50;
- d. Ksh. 150,000 salary for April 2020;
- e. Ksh. 52,709 salaries for May 2020;
- f. Ksh. 439,081.50 for leave days not taken;
- g. Ksh. 68,100 being vehicle transfer payment for March 2020
- h. The respondent shall issue the claimant with a letter of no objection to Bunson Travel Pension Scheme for the transfer of the claimant's pension contributions to a Pension Scheme of his choice;
- i. A certificate of service be issued in terms of Section 51 of the Employment Act, 2007; and
- j. Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

