



**Ngure v Sendy Limited (Cause 497 of 2018)
[2023] KEELRC 2341 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2341 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 497 OF 2018
M MBARÚ, J
SEPTEMBER 28, 2023**

BETWEEN

ANDREW NGURE CLAIMANT

AND

SENDY LIMITED RESPONDENT

JUDGMENT

1. On February 1, 2017 the respondent employed the claimant as head of sales. In October 2017 the claimant applied for leave days citing work burn out but this was declined.
2. On October 21, 2017 the claimant was sent on one month compulsory leave and would report back on November 30, 2017 which was informal.
3. On the morning the claimant was supposed to report back to work, the respondent called him for a breakfast meeting with his supervisor at 7am at Java coffee house, Junction on Ngong Road away from the office. At the meeting, the claimant was informed that he had been relieved off his duties and was to hand over immediately and that a meeting with the board had been held and a decision taken to terminate his employment.
4. The claimant asked for reasons of such action but was informed that this related to work performance, leadership, personal situation flowing from emails from third parties about his personal life and the board had no faith in his work.
5. The claimant was not paid in December 2017. No notice had issued on any matter that required him to respond to or applied to terminate his employment or payment of damages and terminal dues and this resulted in unfair termination of employment and he is claiming the following dues;
 - a. Notice pay Ksh 390,000;
 - b. 12 months' compensation Ksh 4,680,000;



- c. Overtime of 4 hours daily Ksh 281,665,80;
 - d. Gratuity Ksh 300,000; and
 - e. Costs.
6. The claimant testified that upon employment by the respondent, he was placed on probation for 3 months which he completed and was confirmed in his role. He worked diligently and under his contract he was required to work for 40 hours per week but he worked overtime without compensation and is seeking payment for all such work.
 7. The claimant testified that in September 2017 he encountered some personal problems and asked for some time off but this was declined. On October 31, 2017 the respondent sent him on compulsory leave to resume on November 30, 2017 but before this could complete he was summoned and informed that the board had decided to relieve him of his duties without prior notice, hearing or payment of his terminal dues.
 8. In January 2018 the respondent paid the claimant some dues without specifications.
 9. He had been on a one-year contract subject to renewal based on good performance. He had been away from August 2017 and his contract was due to end in January 2018.
 10. In response, the respondent's case is that the claimant was employed on February 1, 2017 as head of sales and his employment was terminated on December 5, 2017 following a meeting on December 1, 2017 where he was informed of such matter.
 11. The claimant's work performance was poor for the reasons that he could not achieve his targets and having admitted to his poor performance, the respondent approved a one month paid leave to enable the claimant time off and to re-organize himself. The compulsory leave was a mutual agreement between the parties.
 12. A meeting was held with the claimant on December 1, 2017 to discuss his performance and ability to resume work and he was allowed to make his representations on his ability to resume work. The respondent deliberated on the matter and reviewed claimant's targets based on his admission that his performance was poor and had been affected by external and internal factors which the claimant personally disclosed related to family.
 13. The claimant under-performed in his duties as revealed by monthly performance evaluations which showed that he failed to achieve key monthly sales targets. The respondent offered suggestions on how the claimant could improve his performance but he failed to improve. In an email dated October 31, 2017 the claimant admitted that internal and external factors were affecting his performance and would take time to reflect and sort out after his low output compared to his colleagues were brought to his attention and in particular, the claimant was found negligent in the performance of his duties when he failed to deliver, physical delivery notes that were required for payment of monies and failed to inform the respondent on this non-delivery causing the respondent to incur a loss of Ksh1,237,785 on unpaid invoices.
 14. Other grounds leading to termination of employment were that the claimant's social conduct disrupted the respondent's business as the mother of his children came to the respondent's offices causing disruptions during office hours by claiming child support and further sent email messages to the respondent's directors requesting for intervention and assistance.



15. Employment terminated on the grounds of poor performance and failure to meet key monthly sales KPIs and the alleged salary withheld for December 2017 has since been paid in lieu of notice. There was no redundancy to justify any claim under Section 40 of the [Employment Act](#) but due to poor work performance under Section 44(4) (c) and (e) of the Act. Notice was paid.
16. The respondent has since paid the claimant in lieu of notice through his Equity Bank account in January 2018. Termination of employment was lawful and procedural and no damages are due. There is no evidence of overtime work and gratuity is not due since the claimant is a registered member of NHIF and NSSF and the claims made should be dismissed with costs.
17. In evidence, the respondent called Rose Kariuki the legal counsel who testified that the claimant was employed as head of sales but his work performance was poor leading to Termination of his employment on December 5, 2017. He failed to meet his key targets and KPIs and responsibilities and despite these matters being brought to his attention to improve, there was no progress. A meeting was held between the claimant and top management on December 1, 2017 with regard to his work performance and the reasons the respondent was considering termination of his employment and when employment terminated he was well aware of the reasons.
18. Ms Kariuki also testified that the claimant had internal and external problems affecting his work performance and causing disruptions at work when the mother of his children caused office disruption and affected overall work performance. The claimant was given compulsory leave to resolve but there was no improvement to his work productivity.
19. At the close of hearing both parties filed written submissions which are analysed and the issues which emerge for determination can be summarised as follows;
 - Whether there was unfair Termination of employment;
 - Whether the remedies sought should issue; and
 - Who should pay costs.
20. The respondent has given emphasis in the pleadings, evidence and in the written submissions filed on 12 April 2023 that the claimant's employment was terminated on the grounds of poor work performance and which was below the agreed standard between the parties. The respondent has also relied on the case of [National Bank of Kenya v Samuel Nguru Mutonya](#) [2019] eKLR where the Court of Appeal held that where an employer claims that the employee is of poor performance, such employer is placed at a high level of proof and in this case, the respondent asserted that the claimant was invited to a meeting on December 1, 2017 with regard to his poor performance and throughout his employment he was under KPIs and evaluations but he failed to improve.
21. The legal threshold under which an employee's work performance must be addressed is Section 41 of the [Employment Act](#), 2007 (the Act) 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.
22. Where such matter of alleged poor work performance in employment is identified by the employer, the employee is entitled to the due process of the law. The elements of such due process in addressing



such alleged misconduct is defined in the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR and follows;

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

23. The claimant applied for leave in October 2017 due to what he noted was burn out. This was declined.
24. On October 31, 2017 the respondent sent the claimant on compulsory leave and to resume on November 30, 2017.
25. On December 1, 2017 a meeting was held with the claimant outside the office before he could resume duty and from the evidence, various matters about what was affecting his work performance were discussed. Such matters were identified as internal and external.
26. The respondent has not clarified if the claimant was ever allowed back at the office after such meeting but through notice dated December 5, 2017 his employment was terminated and directed to hand over his duties.
27. As outlined above, the duty to prove poor work performance is upon the employer. It is a process. It is not sufficient to state that the employee was of poor work performance.
28. After the claimant was sent on compulsory leave, this was to allow him to rest in terms of his employment rights under Section 28 of the Act. His performance could not be reviewed within such period outside work to enjoy his right for leave. Taking leave was with the approval and directions of the employer. Before the claimant could resume duty from his compulsory leave, he was summoned and within 5 days, his employment was terminated without notice and hearing as contemplated under Section 41 of the Act. Such was procedurally and substantively unfair. The respondent failed to meet the threshold and principles outlined by the Court of Appeal in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR cited above.
29. The claim for compensation for unfair termination of employment is justified on the finding that there was unfair termination of employment. The claimant was earning Ksh 390,000 per month, he worked under a year and his contract was due to lapse in January 2018. He was denied a fair chance to complete his contract and an award of one month is hereby found appropriate award at Ksh 390,000.
30. In the letter dated December 5, 2017 the respondent offered to pay the claimant in lieu of notice and salary for December 2017. This was paid in January 2018. The claimant had worked for 5 days in December 2017 which is different from the notice pay due to him upon the finding that his employment terminated unfairly and for the 5 days, the claimant is entitled to Ksh 65,000.



31. On the claim for overtime pay for 65 days, the claimant was not on a minimum wage. the alleged overtime worked is not approved by the employer nor the work done under such time particularised to justify such a claim.
32. The claim for gratuity pay is not a term of the employment contract in the terms and conditions thereof. the payment statement confirm the respondent was in compliance with the provisions of Section 35(5) and (6) of the Act to justify a claim of service pay.
33. This being an employment claim, the court finds each party ought to meet own costs.
34. Accordingly, judgment is hereby entered for the claimant against the respondent with an order that employment terminated unfairly; compensation awarded at Ksh 390,000, pay for 5 days in December 2017 at Ksh 65,000; and each party to bear own costs.
35. The file shall be returned to ELRC Nairobi Registry.

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

M. MBARŪ

JUDGE

