



REPUBLIC OF KENYA



**KENYA LAW**  
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**Masese v Kimondo Gachoka & Co Advocates & another (Cause E023 of 2022)  
[2023] KEELRC 2223 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2223 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E023 OF 2022  
S RADIDO, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**MERCY KERUBO MASESE ..... CLAIMANT**

**AND**

**KIMONDO GACHOKA & CO ADVOCATES ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTLINE ASSURANCE COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Mercy Kerubo Masese (the Claimant) sued Kimondo Gachoka & Co Advocates (1<sup>st</sup> Respondent) and Directline Assurance Co Ltd (2<sup>nd</sup> Respondent) on 28 April 2022 alleging unlawful/wrongful termination of employment.
2. The 1<sup>st</sup> Respondent filed a Response on 21 July 2022, and the 2<sup>nd</sup> Respondent on 8 July 2022. The Claimant filed a Reply to the 1<sup>st</sup> Respondent's Response on 14 February 2023
3. On 30 January 2023, the firm of Mukite Musangi & Co Advocates applied to be allowed to cease acting for the 2<sup>nd</sup> Respondent but the application was abandoned.
4. The Cause was heard on 21 March 2023 and 22 June 2023. The Claimant, a Legal Head with the 1<sup>st</sup> Respondent, and the Human Resource Manager with the 2<sup>nd</sup> Respondent testified.
5. The Claimant filed her submissions on 27 July 2023, the 1<sup>st</sup> Respondent on 6 September 2023, and the 2<sup>nd</sup> Respondent on 29 August 2023.
6. The Court has considered the pleadings, evidence, and submissions.



## **Probation**

7. Before delving into the merits of the fairness and validity of the Claimant's dismissal, the Court wants to consider a defense raised by the 1<sup>st</sup> Respondent that since the Claimant's employment was terminated during probation, then the protections assured by sections 35(1), 41, 43 and 45 of the *Employment Act* did not arise (the contract also had a probationary clause).
8. In *Monica Munira Kibuchi & 6 Ors v Mount Kenya University; Attorney General (Interested Party)* (2021) eKLR, a three-judge bench of this Court held that section 42(1) of the *Employment Act, 2007* which excludes employees serving probation from the protections assured them under section 41 of the Act run counter to the rights guaranteed by Articles 24, 41 and 47 of *the Constitution*.
9. Considering the declaration of constitutionality which has not been stayed or set aside by the Court of Appeal, this Court will defer to the holding in the aforesaid determination and hold that the Claimant was entitled to the rights in sections 41, 43, and 45 of the *Employment Act*.

## **Unfair termination of employment**

### **Procedural fairness**

10. Section 35(1)(c) of the *Employment Act, 2007* envisages written notice of termination of employment while section 41 of the Act requires the employer to afford the employee an opportunity to be heard before taking the decision to terminate the contract on the grounds of misconduct, performance or physical incapacity.

### **Neglect of duties**

11. The 1<sup>st</sup> Respondent issued a show-cause notice dated 2 October 2020 to the Claimant, an advocate in its employ at the material time. The allegation was a failure to discharge duties (failure to attend Court, failure to file submissions, failure to review, submit and process judgment on time, and filing misleading court attendance reports).
12. The show-cause requested the Claimant to submit a written explanation within 3 days ahead of a disciplinary hearing on 9 October 2020.
13. Upon receipt of the show-cause the Claimant responded to the allegations through email on 5 October 2020 and also requested that the disciplinary hearing be conducted through Zoom because she was constrained financially due to a pay cut precipitated by the COVID-19 health pandemic, lack of sufficient leave days and because she was taking care of young children.
14. The 1<sup>st</sup> Respondent replied to the Claimant on 6 October 2020, indicating that a physical disciplinary hearing was necessary. The Claimant was advised to make arrangements to attend the hearing.
15. On 7 October 2020, the Claimant sent an email to the 1<sup>st</sup> Respondent stating that due to a medical condition, she would not be able to attend the disciplinary hearing physically. The Claimant sent a copy of a sick-sheet later to the 1<sup>st</sup> Respondent.

### **Failure to attend disciplinary hearing**

16. The Claimant, therefore, did not attend the hearing and on 30 October 2020, the 1<sup>st</sup> Respondent issued a termination letter.



17. The question that begs, in the circumstances, is whether the 1<sup>st</sup> Respondent afforded the Claimant a reasonable opportunity to be heard.
18. The 1<sup>st</sup> Respondent alerted the Claimant of the allegations to confront and requested her to make a written response which she did.
19. Thereafter, she was invited TO a physical hearing but she did not attend. The Claimant sought a postponement of the physical hearing and gave the reasons for seeking the postponement.
20. The 1<sup>st</sup> Respondent declined the request but gave no reasons. While the Court cannot speculate or condemn the 1<sup>st</sup> Respondent for not assigning any reasons, it can address its mind as to whether the reasons given by the Claimant for seeking a postponement were fair and reasonable.
21. At the material time, the world of work had undergone and was still undergoing fundamental changes necessitated by the COVID-19 health pandemic. The government had placed the country in a lockdown with minimal travel allowed.
22. The world of work had changed overnight and many employers including the judiciary adopted a virtual workspace. Many employees were working from home, utilising virtual work platforms.
23. The request for a Zoom hearing was therefore, reasonable and fair.
24. The Claimant also furnished the 1<sup>st</sup> Respondent with a sick-sheet from the Jaramogi Referral & Teaching Hospital indicating that she was attended to at the hospital on 7 October 2020, and recommending against long distance travel.
25. Nothing was placed before the Court to dispute the genuineness of the medical note. If it was a fit for purpose sick-sheet, the Court cannot speculate.
26. The 1<sup>st</sup> Respondent did not suggest that conceding to the request of the Claimant would have prejudiced it or that there was urgency in the disciplinary hearing.
27. The opportunity to be heard in disciplinary cases is not just a form or process. The employee should be afforded sufficient and adequate facilities and opportunity to make representations in the presence of a colleague, or trade union representative if applicable.
28. The 1<sup>st</sup> Respondent did not afford the Claimant a sufficient opportunity to put her case across rendering the process procedurally unfair.

### **Substantive fairness**

29. Pursuant to sections 43 and 45 of the *Employment Act*, the 1<sup>st</sup> Respondent had the burden of proving the validity and fairness of the reasons for dismissing the Claimant.

### **Failure to attend disciplinary hearing**

30. The immediate cause for the summary dismissal of the Claimant was failure or refusal to attend a disciplinary hearing.
31. The Court has already adverted to the procedural fairness of the Claimant's dismissal. The reasons therein are closely intertwined with the substantive fairness of the dismissal.
32. The Claimant did not in substance decline to attend the disciplinary hearing. She sought to be indulged for a virtual hearing (reasonable accommodation).



33. The reasons the Claimant gave for seeking an indulgence were leave days' deduction during COVID-19, financial constraints due to a 30% pay cut, attending to two young children, and advice from a doctor against long-distance travel.
34. The Respondent as an employer did not demonstrate that these were unreasonable requests or that there was an urgency in having the disciplinary hearing on the scheduled date which outweighed the need to accommodate the Claimant's requests.

#### **Neglect of duties**

35. The Claimant's troubles started when one of the Respondent's client's properties were attached. The Claimant had failed to attend Court.
36. The judgment of the Magistrates Court speaks for itself.
37. The Claimant failed to attend the defence hearing. She did not file submissions. The explanations about not being able to trace the files and the failures of the Clerk are not convincing.
38. The neglect to attend dutifully to the Court case in question was a valid and fair reason for disciplinary action.
39. The 1<sup>st</sup> Respondent, in the circumstances, had valid and fair reasons to dismiss the Claimant.
40. Nevertheless, the Court, therefore finds that the summary dismissal of the Claimant was procedurally unfair and also not in accord with justice and equity as contemplated by section 45(4)(b) of the [Employment Act](#).

#### **Compensation and pay in lieu of notice**

41. The Claimant prayed to be awarded maximum compensation and the equivalent of a 1-month salary in lieu of notice.
42. The Claimant had served the 1<sup>st</sup> Respondent for about 4 months and in consideration of this factor, the Court is of the equivalent of 1-month salary as compensation and 7 days' salary in lieu of notice in terms of clause 2. C of the contract would be appropriate (gross salary was Kshs 143,000/- and the formula of Kshs 143,000 divided by 22 has been used to compute daily salary for purposes of notice pay).

#### **Breach of contract**

#### **Pension scheme contributions/benefits**

43. The Claimant sought an order directed at the 2<sup>nd</sup> Respondent to produce an account of monies remitted on her behalf to the Pension Scheme and further that such monies be paid back to her.
44. The 2<sup>nd</sup> Respondent asserted that the Court had no jurisdiction over this limb of the claim in light of the holding in *Albert Chaurembo Mumba & 7 Ors v Maurice Munyao & 146 Ors* (2016) eKLR and sections 46, 47 and 48 of the Retirements Benefits Act.
45. The 2<sup>nd</sup> Respondent also produced records to show that the pension scheme was run or administered by Zamara and that the Claimant was expected to apply for the dues but she did not. The Scheme Manager/administrator was not made part of the proceedings.
46. The Court, therefore, declines to make any adverse orders against the pension scheme.



## **Conclusion and Orders**

47. Flowing from the above, the Court finds and declares that the summary dismissal of the Claimant was procedurally unfair and she is awarded:
- i. Compensation Kshs 143,000/-
  - ii. Pay in lieu of notice Kshs 38,500/-
- Total Kshs 181,500/-
48. The head of claim in relation to the pension scheme is dismissed.
49. The Claimant has partially succeeded and she is awarded costs on  $\frac{3}{4}$  scale.

**DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 27TH DAY OF SEPTEMBER 2023.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

### **Appearances**

**For Claimant Behan & Okero Advocates**

**For 1<sup>st</sup> Respondent Kimondo Gachoka & Co. Advocates**

**For 2<sup>nd</sup> Respondent Mukite Musangi & Co. Advocates**

**Court Assistant Chrispo Aura**

