



REPUBLIC OF KENYA



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**Mbui v Jilag Limited & another (Cause 122 of 2019)
[2023] KEELRC 2142 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2142 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 122 OF 2019
NJ ABUODHA, J
SEPTEMBER 22, 2023**

BETWEEN

KAGWIRIA ESTHER MBUI CLAIMANT

AND

THE JILAG LIMITED 1ST RESPONDENT

ROSELYN NDAVU 2ND RESPONDENT

JUDGMENT

1. In her statement of claim filed on 26th February, 2019, the claimant pleaded that:
 - a. The claimant was first employed by the 1st Respondent to work as an Operations Manager in charge of Cleaning Department on 1st September, 2016 with a monthly salary of Kshs.60,000/= a position which she held till 3rd May, 2017 when her contract was unlawfully terminated.
 - b. It was agreed that her starting salary of Kshs 60,000/= per month would be reviewed depending on her performance.
 - c. The Claimant was a diligent employee and in the month of November 2017 her salary was reviewed to Kshs 85,000 a clear indication that her performance was outstanding.
 - d. On the 1st day of September 2017, the 1st Respondent through the assistance of the Claimant managed to secure cleaning services at Jubilee Insurance House.
 - e. Since Jubilee Insurance House was a new client the 1st Respondent had to hire new staff to do the cleaning services at the premise. It was agreed that a total of 15 staff members would be required to do the cleaning.
 - f. The Managing Director however indicated that the wage bill for the firm had gone high and therefore requested the 2nd Respondent in her capacity as the Human Resource Manager with



the assistance of the Claimant to hire only 10 new staff members and get the other 5 from the already existing staff members.

- g. The 10 new employees were recruited as agreed though on one month probation basis with a monthly salary of Kshs 8,000/- but it was agreed that from the month of October 2017 they will be confirmed as employees and their salary will be harmonized to those of their counter parts and they would also start earning Kshs 12,600/-.
- h. At the end of October 2017, the 10 new employees were never confirmed and their salary was never increased as agreed. As such 8 of them opted to quit.
- i. The Claimant immediately informed the 1st Respondent's Managing Director of her predicament in shortage of staff members but was informed to replace only 7 employees due to the huge wage bill.
- j. Due to the shortage of cleaners and lack of moral on the part of the new cleaners who felt discriminated on as they were being paid Kshs 8,000/- while their counter parts were being paid Kshs 12,600/-, the quality of cleaning service being offered to the new client deteriorated and they started raising complaints.
- k. On 21st December 2017 the 1st Respondent's Managing director visited Jubilee Insurance House to ascertain what the problem was and the Claimant repeated her earlier sentiments that they needed more staff and also that the salary for all the cleaners ought to be harmonized.
- l. On 22nd December 2017 the Claimant was summoned to the firm's head office where she was issued with a show cause letter by the 2nd Respondent and she was required to respond to it within 48 hours.
- m. The Claimant responded to the show cause letter within the stipulated period and she was then informed to attend a Disciplinary hearing on the 3 day of January 2018 which she did and at the end she was informed that they would get back to her.
- n. The Claimant avers that the Disciplinary Committee as constituted and how the hearing was conducted flouted the provisions of The [Employment Act](#), The [Human Resource Management Professionals Act](#), the provisions of his employment contract and the principles of natural justice in that:-
 - i. The 2nd Respondent being the alleged Human Resource Manager did not have a valid Practicing Certificate when the cause of action arose hence was estopped from practicing as such by the law;
 - ii. The Disciplinary Committee as constituted did not meet the legal threshold as the Human Resource Manager was not present during the proceedings;
 - iii. The Claimant was not informed in advance of the complaint levied against her to enable her prepare her response;
 - iv. The Claimant was not allowed to adduce evidence in support of her side of the story;
- o. On 9th January 2018 the Claimant was summoned to the firm's head office where she was informed by the 2nd Respondent that a decision had been arrived at and without any notice, warning or valid reason, the Respondents wrongfully and unfairly terminated the employment of the Claimant, and issued her with a summary dismissal letter.



- p. The Claimant declined to accept the same insisting that she needed to be given copies of the minutes of the Disciplinary meeting held on 22nd December 2017 plus a tabulation of all the dues owed to her but was told by the 2nd Respondent to come for them the following day.
- q. On 10th January 2018 the Claimant went back to the firm's head office and this time she was issued with a termination letter by the 2nd Respondent which she received and when she inquired about her dues she was informed that the same would be deposited in her bank account with the next 14 days which has not happened to date.
2. The respondents filed a response in which they averred that:
- a. The Respondents deny all the allegations contained in paragraphs 4, 5 & 6 of the Claim and put the Claimant to strict proof thereof and state as follows:-
- i. The Claimant was first employed by the 1st Respondent on 1st September 2016, as Operations Manager in charge of the cleaning department, with a monthly salary of Kshs. 60,000/— a position which she held until the 9th January 2018 and not 3rd May 2017 as alleged.
- ii. The Claimant was a poor performer and after working with the 1st Respondent for a period of one (1) year three (3) months, she did not meet the key performance expectation per her job description. The Claimant's salary was raised to KES 85,000/= due to her constant pleas of not being able to meet her monthly obligations and asking for financial assistance from 1st Respondent's Managing Director, who financially assisted her on certain occasions based on humanitarian grounds.
- b. In reply to paragraph 7 of the Claim, the 1st Respondent states that Jubilee Insurance Company Limited contract was secured solely by the efforts of the Managing Director of the 1st respondent and the claimant is put to strict proof thereof.
- c. In reply to paragraph 10 of the claim, since the claimant already had a list of casuals and permanent staff working with her and at her disposal, she was fully in charge of staff placements as indicated in her job description.
- d. All allegations in paragraph 11 of the Claim are denied. The Claimant had a database of both casuals and permanent staff to work with, hence, it was at her full discretion to decide which type of staff to place at any given site at any given time. The Claimant was fully mandated to handle staff transfers from various sites and replacements according to performance of these staff, all at her discretion as this was directly linked to her performance. The Claimant is put to strict proof.
- e. The Respondents deny all the allegations contained in paragraphs 15 and 16, put the Claimant on strict proof thereof and state the following:-In terms of provision 2 on the Claimant's job description, the Claimant was fully tasked with the responsibility of ensuring that there was correct staff numbers at every site. However, if this was not achieved at Jubilee Insurance offices, it was not brought to the attention of the 1st Respondent and in any case, the task fell under the Claimant's full responsibility as per her job description. The shortage of staff at Jubilee Insurance offices was solely as a result of the Claimant not ensuring correct staff numbers at the site even though she had a data base of previously trained staff and other staff at her disposal, and thus had to take full responsibility of the substandard work witnessed. The Casual staff of the 1st Respondent would certainly earn a different package from the permanent staff a fact well known to the Claimant. There were several complaints by Jubilee Insurance regarding the



Complainant's operational processes and poor performance. The clients complained of lack of proper handover and supervision, which were tasks to be handled by the Claimant. There was no discussion with the Claimant regarding staff salaries on the alleged date as the Managing Director had visited the client in response to the several complaints raised by the client after efforts to sort the same issues with the Claimant bore no fruit. The 1st Respondent will put the Claimant to strict proof thereof.

- f. The 1st Respondent admits paragraphs 17 and 18 of the Claim but denies all the allegations contained in paragraphs 19 (i), (ii) and (iv), 20, 21 (i), (ii), (iii), (iv), (v) and (vi) 22 of the Claim and state the following: -The 2nd Respondent was not a Human Resource Manager but an Administrative Assistant who used a template in typing the letter of 9th January 2018 she sent to the Claimant on behalf of the 1st Respondent. The organization did not have a Human Resource Manager at the material time and the disciplinary committee, comprised of the Managing Director and the Executive Director was properly constituted. The 2nd Respondent did not attend the disciplinary proceedings since she was an Administrative Assistant and not a Human Resource Manager. The Claimant was also notified in advance of the complaints levied against her and enough time was given to her to prepare for her defence before the hearing date. There was no room to issue a warning letter as the actions committed by the Claimant amounted to gross misconduct which caused the contract with Jubilee at the risk of termination due to the escalated complaints, from the client directly levelled at the Claimant's inability to perform her operational duties effectively/efficiently.
3. At the hearing the claimant testified that she was a professional housekeeper and was dealing with commercial cleaning. She recorded a witness on 18th February, 2019 which she relied on as her evidence in chief. She also relied on the documents filed with the claim. It was her testimony that she was employed by the respondent as Operations Manager at a monthly salary of Kshs. 60,000/- which was raised to Kshs. 85,000/- when she got terminated. She stated that on 1st September, 2017, through her efforts she got a cleaning contract with Jubilee Insurance and advised the respondents to add fifteen cleaners. The respondent employed ten and took five others from regular staff. It was agreed that the starting wage be Kshs. 8,000/- and after confirmation to be Kshs. 12,000/-. The work was however not managed well due to shortage of staff and low salary. Most of the staff left due to pay disparities. Some were paid Kshs. 8,000/- while others were paid Kshs. 12,000/-. Those paid Kshs. 8,000/- felt discriminated and left due to low morale.
4. On 21st December, 2017 she was summoned to the office and issued with a show cause letter to which she responded in 24 hours. She attended a disciplinary hearing thereafter with a witness of her choice, Florence Kamau. After the disciplinary hearing she was asked to await a decision. She was later called and issued with a termination letter. She signed for it but no terminal dues were paid immediately. She made a demand and was paid Kshs. 120,000/-. No explanation was given over the payment. It was further her evidence that when she became sick and was hospitalised, she noted that the respondent never remitted NHIF and NSSF deductions.
5. The claimant's second witness Florence Wairimu Kamau stated that he was a professional housekeeper and that she specializes in commercial cleaning services. She recorded a witness statement on 18th February, 2019 which she adopted as her evidence in chief. It was further her evidence that she attended the claimant's disciplinary hearing. At the hearing the claimant asked about the whereabouts of the Human Resource Manager since she was the one who issued the show cause letter but was told that it was the business of the Human Resource. According to her, she was a consultant for the respondent and was the one who referred the claimant to the respondent and that the respondent never complained about the claimant.



6. In cross-examination she stated that she worked for the respondent as a consultant for about a year and worked with the claimant at the same time. She referred casuals to the respondent and they were never paid. According to her, she never witnessed any complaints against the claimant and that the claimant introduced clients to the respondent through demonstrations. In re-examination she stated that if she made a referral and there was an issue, the respondent would revert to her.
7. The claimant's 3rd witness Josephine Egesa Mwavali stated that she worked as a cleaner at Sarit Centre and that she recorded a statement on 18th February, 2019 which she adopted as her evidence in chief. According to her, she worked for the respondent as a supervisor and that she reported to the claimant. It was her evidence that there were challenges in work performance due to understaffing. They kept borrowing staff from Hazina Towers to assist at Jubilee House. According to her Jubilee was supposed to have its own staff but some workers failed to report to work over pay dispute. Some were paid Kshs. 8,000/- per month while others were paid 10,000/- for the same work.
8. It was further her evidence that she was not aware the claimant had left employment however challenges increased when the claimant left. The person who replaced the claimant (Betty) was not familiar with the work. Suppliers were not paid on time and were complaining. The machines for work broke down and were never repaired. In cross examination she stated that she worked for about two and a half years and that she was issued with a contract of employment. The claimant was a general supervisor but was based at Hazina Towers. She was not aware if the claimant was later assigned to Jubilee House. She further was not aware if the claimant had power to employ. Further, the claimant was at a construction site at Jubilee House and that the clients complained about the quality of the work at Jubilee. According to the witness, those with contracts at Hazina were paid Kshs. 12,000/- and those at Jubilee were paid Kshs. 8,000/-.
9. Regarding supplies she stated that she had no evidence that suppliers were not paid. She further stated that she did not know Betty's role and that she was brought by Rona. She further stated that she had no evidence to show some workers were not paid but that she was a supervisor and whenever she called them they would not come to work because they had not been paid.
10. The claimant's 4th witness, Joyce Wanjiku Nduta stated that she worked as a cosmetician and that she recorded her witness statement on 18th February, 2019 which she adopted as her evidence in chief. According to her, she used work for the respondent and that she worked for over a year. Her supervisor was Josephine and later when she was moved to Jubilee, her supervisor was James. Esther was patrol manager. Her work at Jubilee was cleaning and that she was issued with a contract. Her monthly salary was Kshs. 12,000/-. Later she was told that because she did not have a contract, her salary would be reduced to Kshs. 8,000/-. Ms Nduta further stated that there were challenges at Jubilee House due to construction. There were issues in maintaining cleanliness because there was shortage of cleaners. IT Department complained about cleanliness of the office. The work was supposed to be done by two people per office but was done by one person per office. She informed the claimant about it and the claimant borrowed staff from Hazina. It was her testimony that the number of workers dropped due to frustration by Lorna. Salaries delayed and that Lorna only used to come if complaints increased.
11. In Cross-examination she stated that she could not remember when she was at the respondent but that she left after the claimant. The Human Resource Manager was Mercy. Regarding salary, she stated that she was told her salary would be Kshs. 12,600 by the claimant. She was not told what was required before she could be paid Kshs. 12,600. She denied knowledge of any difference in salary between casuals and permanent staff. It was her evidence that she had no evidence of the threats from Lorna and that the threats were direct.



12. The respondent's witness Lorna Nandi stated that she was the respondent's Managing Director of the respondent. She recorded a statement on 10th April, 2019 which she relied on as her evidence in chief. She also relied on the documents filed with the response. It was her evidence that she knew the claimant and that she was respondent's employee. She was employed in August, 2016 as the Operations Manager. She would work at respondent's sites before the correct supervisor is identified. The claimant would also recommend cleaners for hiring. According to her, the claimant underwent disciplinary hearing. She received several complaints from Jubilee Insurance over non-performance by the claimant. She visited the client to ascertain the complaints and found they were true. She consequently addressed the claimant to remedy them however there was no change. It her evidence that she thereafter issued the claimant with a show cause letter. The claimant complained about shortage of staff yet she was the one responsible for who was suitable to be hired as a casual and was not. She had power to hire more staff. It was further her evidence that casuals and permanent staff were paid differently. Permanent staff would be paid Kshs. 12,600 while casuals were paid Kshs. 8,000/-. The claimant's work was to update the respondent about employees status as casuals and permanent. According to Lorna, her work was to secure business for the respondent.
13. regarding the disciplinary hearing, it was her evidence that the claimant was called for disciplinary hearing and was advised to come with witnesses of her choice. She came with Florence as her witness. No minutes were taken and that they were not aware minutes would be taken. About HR, she stated that Mercy, the respondent's HR had just resigned and that Roselyn was her Administrative Assistant and Personal Assistant and did not know why she had been joined as a defendant in the suit. She further stated that they deliberated and found that the claimant failed to protect the integrity of the project and a decision was therefore made to summarily dismiss the claimant but this was reduced to normal termination hence the claimant was issued with a termination letter. Upon termination, the claimant was paid all her terminal dues on 22nd March, 2018. The amount was Kshs. 122,105/- and the evidence was before the Court. The payment was through a swift transfer.
14. Regarding relationship with the claimant, it was Lorna's evidence that this was close, the claimant being their first Operations Manager. The claimant occasionally asked for support over personal matters and at times these was never deducted from her salary. Regarding NSSF and NHIF, she stated that she went on maternity leave at the material time and that the respondent hired a new external auditor who did not remit the statutory deductions despite taking money for that purpose. Concerning Jubilee as a client, she denied the claimant secured Jubilee as a client. That was her responsibility and that she produced evidence to vouch for that.
15. In cross-examination she stated that the claimant's initial salary was Kshs. 60,000/- and later raised to Kshs. 80,000/-. She further stated that the respondent used to have administrative and governance meetings and that they never had an appraisal system but the respondent being new, had an internal mechanism for addressing that. The claimant was never warned about her performance. The inquiry was about the claimant was at the customer's site. There were complaints about lateness in cleaning and improper cleaning where items were never returned to their proper place after cleaning. Further that the claimant was supposed to supervise new projects until they were on-boarded. Jubilee was a new project. Regarding staff placement, it was her evidence that the claimant used to report to Human Resource about that and the HR would report to her. The claimant never called her about any staff challenges at Jubilee. She denied the respondent had any challenges with suppliers and that the claimant never bought any supplies and got refunded.
16. Regarding show cause letter and disciplinary hearing, it was her evidence that the letter was addressed to the claimant by her and that no minutes were recorded and shared. Concerning Jubilee she stated



that it had a substantive supervisor and his name was James. And further that from the claimant's job description, she could hire and fire staff under her. She could determine how long casuals could work.

17. Section 43 of the [Employment Act](#) regarding proof of reason for termination provides that:

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- (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.

Further section 47(5) of the Act places the burden of proving that an unfair termination has taken place on employee while the burden of proving reasons for termination is on the employer. As provided under subsection 2 of section 43 above, the reasons for termination of a contract are 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.

18. The respondent terminated the claimant's service on account of non-performance and insubordination. To rely on poor performance as a cause for termination, the same must conform to Section 45(2)(5) of the [Employment Act](#) in that there must be a fair reason and the burden of proof that poor performance was fair reason rests on the employer. Prior to issuing notice of intention to terminate on account of poor performance, the employer must demonstrate that they informed the employee of their job description, expected outcomes, parameters of measuring performance, conducted appraisals, issued warnings, and that the employer did everything possible to equip the employee with skills necessary for the job and assist them achieve the expected outcomes. In the case of [Jane Samba Mukala v Ol Tukai Lodge Limited](#) [2013] eKLR the court observed as follows;

“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...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...”

19. The respondent alleged that the claimant did not handle competently the Jubilee Insurance customer site. According to the claimant, the below standard handling of the Jubilee Insurance customer site was as a result of low staff levels. She acknowledged she had the mandate to hire more staff which she did but could not retain the same due to pay delays and the fact that the respondent was paying staff performing same work, differently. There was therefore high staff turnover. The respondent did not sufficiently counter this allegation by the claimant. Whereas the respondent claimed the claimant had power to hire and fire staff, their remuneration was obviously a responsibility of the respondent. The claimant's performance as a supervisor was a function of being facilitated with adequate staff. The respondent never provided sufficient evidence to show it addressed the challenge of high staff turnover raised by the claimant. To this extent the respondent as required did not sufficiently demonstrate that they facilitated the claimant yet she failed to deliver on her job description and expected outcomes.



20. Concerning allegations of insubordination, the respondent apart from merely alleging the same in the show cause letter, did not provide details of the nature of the insubordination and to who it was directed. The allegation seemed to have been tied to the accusation of non-performance over which the court has already made a finding. This accusation is therefore not proved. In conclusion the respondent has failed to prove the reasons for terminating the claimants service as required under section 43 as read together with section 47(5) of the *Employment Act*. The Court to that extent finds and holds that the termination of the claimant’s employment was unfair within the meaning of section 45 of the *Employment Act*.
21. The claimant was hired on 1st September, 2016 and worked until 9th January, 2018 when her service was unfairly terminated. The contract had a termination clause of one month’s notice or pay in lieu thereof by either party. The claimant if not terminated had the right to terminate the same for any reason provided she invoked properly, the termination clause. By the time the claimant was terminated, she had worked for the respondent for approximately one year three months. If a redundancy was to occur, the claimant could have been the first to be considered for redundancy under the principle of last in-first out. In the circumstances an award of six months’ salary would adequately compensate the claimant for unfair termination of service. The claim for gratuity will be disallowed since the claimant was registered with NSSF. The Court will however order the respondent to remit the arrears of NSSF dues on account of the claimant deducted but not remitted to NSSF. The same applies to PAYE and penalties if any, that was deducted but not remitted to KRA.
22. In conclusion the court orders as follows.
- a. The respondent shall pay the claimant Kshs.510,000/- on account of compensation for unfair termination of service.
 - b. The respondent shall remit, including penalties where applicable, all statutory deductions made from the claimant’s salary but not remitted.
 - c. The claimant shall have costs of the suit
 - d. Prayer (a) shall be subject to statutory deductions but shall attract interest at Court rates from the date of this judgment until payment in full.

23 It is so ordered

DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023

ABUODHA J.N

JUDGE

Delivered virtually this 22nd day of September, 2023

