



**Molonket v East African Portland Cement Company (Cause 198 of 2019)
[2023] KEELRC 2137 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2137 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 198 OF 2019
NZIOKI WA MAKAU, J
SEPTEMBER 20, 2023**

BETWEEN

LUCY RIMANTO MOLONKET CLAIMANT

AND

THE EAST AFRICAN PORTLAND CEMENT COMPANY RESPONDENT

JUDGMENT

1. In her Statement of Claim dated 22nd March 2019, the Claimant instituted this suit against the Respondent claiming unlawful termination of her employment. She prayed for judgment against the Respondent for:
 - a. Reinstatement to her previous position/job without any loss of benefits.
 - b. Salary arrears for the entire period the Claimant has been out of employment.
 - c. In the alternative, an order for payment of the Claimant's lawful terminal dues (as tabulated in paragraph 10 of the claim).
 - d. Maximum compensation of twelve months salary.
 - e. Damages for sexual harassment and discrimination respectively.
 - f. Exemplary Damages.
 - g. Costs of this suit with interest.
2. The Claimant averred that she was in the employment of the Respondent company since 2009 as a Regional Sales Manager on permanent and pensionable terms. That she was later promoted to Head of Sales in June 2014 through a letter of appointment dated 23rd June 2014 and held the said position until 1st November 2014 when she was terminated from employment without any reasonable notice and/or justification. She recounted how the Respondent's Managing Director paid her a visit on 31st



August 2016 at around 12.30pm at her office and made inappropriate advances towards her, which she unequivocally rejected. That after the said incident, the MD created a hostile and inimical work environment as he openly embarked on a systematic war of words, negatively discussed her in meetings and contorted all sorts of malicious and libellous allegations against her. The Claimant averred that she reported the sexual harassment by the MD to the Chairman but that the Respondent failed, refused and/ or neglected to take action and respond to the same. That this prompted her to seek legal redress from the Court vide Mombasa ELRC Petition No. 137 of 2016 wherein she obtained protective Orders on 11th November 2016 and 17th December 2016 for her protection.

3. It was the Claimant's averment that the Respondent company continued to mistreat and victimize her in an attempt to coerce her towards constructive termination through various ways including appointing her to a non-existent position, failing to remit deductions for her mortgage despite making the deductions on her payslip, suspending her benefits, denying her training accorded to all other staff, and refusing to pay her leave allowance for 2016, 2017 and 2018. That the Respondent then defied the Court Orders issued in Petition No. 137 of 2016 by issuing her with a letter dated 1st November 2014 dismissing her from its employment. She particularised in her Claim how the said termination was malicious and did not consider her welfare and rights accruing to her as the Respondent discriminated against her for refusing the MD's unwarranted advances. It was the Claimant's averment that she had consequently suffered loss and damage payable by the Respondent. She particularised the special loss for which she claimed telephone allowance, pay in respect of shortfall in contract, pay in lieu of accrued leave, leave allowance, 12 months' salary as compensation, gratuity for the period not served (8 months), loss of mortgage benefit – interest, 2018 Club Membership, and school fees for 2018.

4. In her witness statement, the Claimant asserted that terms of her employment with the Respondent were later converted from permanent and pensionable to renewable contract for a period of five years. She stated that she was rated highly with an aggregate score of 75.12% in her last appraisal done on 16th January 2016.

5. Respondent's Case

The Respondent averred in its Replying Memorandum that contrary to the Claimant's averments, she was lawfully and fairly terminated. That the contract between the Claimant and the Respondent expressly provided that either party could terminate the contract by giving the other party three months' notice or three months' salary in lieu of notice. Further, that it complied with and provided the Claimant with all the statutory benefits accorded to her under the employment contract and the *Employment Act*. It further averred that the allegations of sexual harassment and creation of a hostile work environment against the Claimant were unmerited and speculative as they were unsubstantiated. That its Human Resource Policy Manual (hereinafter "HR Policy Manual") well documents a sexual harassment complaint resolution procedure that it followed while conducting investigations into the Claimant's sexual harassment complaint. It was also the Claimant's averment that it treats all its employees with utmost dignity including the Claimant and that the decision to move her to the position of Head of Special Projects was part of the Board's restructuring mandate. The Respondent's position was that the Claimant's particulars of discrimination and malice as enumerated in her Statement of Claim are baseless and that this Court should dismiss the Claim with costs.

6. The Respondent also filed a Witness Statement made by Joel Kipkemoi Kemei, who confirmed that the Respondent employed the Claimant on 20th May 2009 and that she was appointed Head of Special Projects on 30th September 2016. That the Claimant was among 11 senior managers who were transferred to head new departments but was aggrieved and thus filed a case in court in relation to her constitutional rights. He asserted that following the Orders of this Honourable Court in Petition No. 137 of 2016, the Respondent reinstated the Claimant to her previous position of Head of Sales



and Marketing leading to two people occupying the same position and disrupting the Respondent's business. Consequently, the Respondent's Board of Directors held a meeting on 30th October 2018 and resolved to terminate the Claimant's contract of employment in accordance with the termination clause therein. Enumerating the steps that the Respondent took in dealing with the Claimant's allegations of sexual harassment, Mr. Kemei stated that the Select Committee tasked with investigating the same was composed of the Company Secretary, the Gender Officer and the Chairperson of the Board. That a hearing was thereafter convened to hear all parties to the complaint and witnesses invited for an interview to present their witness statements to the Committee who found no substantive evidence of sexual harassment against the Respondent's MD. He believed the Respondent exercised its right to terminate the Claimant's employment in accordance with her contract and the law.

7. Evidence

The Claimant testified that she signed the termination of contract notice addressed to her by the Respondent's then Head of HR before her contract had expired. She asserted that the minutes of the directors' meeting that resolved to terminate her contract were never shared and that no show cause or complaints regarding her work were served upon her. That she was not given an opportunity to be heard and was only informed that she would be paid in lieu of notice. The Claimant agreed in cross-examination that other people were also reassigned to new roles but stated that all the other roles were in the Respondent's organisation structure save for her role. She asserted that the orders sought in the instant suit for wrongful termination were not similar to those of Petition 137 of 2016 that had since been dismissed. It was the Claimant's testimony that she was paid over 4 Million which was not 'everything'. She acknowledged that she had not produced any evidence on non-payment of telephone allowance, leave allowance and fees, and letters from HFCK and on the club membership. She admitted that the prayer for damages herein was disallowed in the Petition.

8. The Respondent's witness, Mr. Joel Kemei (RW1), relied on his Statement as his testimony in chief before Court. He stated in cross-examination that the Claimant was not summarily terminated but was dismissed on notice and that the same was a resolution of a meeting of the Board and not a disciplinary hearing. According to RW1, the Claimant's case was not a disciplinary case and there was no need to issue show cause as her employment was terminated in terms of clause 25(a) of her Employment Contract. He confirmed that the Claimant was paid Kshs. 4.3 Million being all her dues and that she signed off the same in agreement.

9. Claimant's Submissions

The Claimant submitted that her contract provided for a notice of 3 months and that since the Respondent terminated it with less notice, the termination was a summary dismissal as espoused in section 44 of the *Employment Act*. Further, that summary dismissal was provided for under clause 25(b) of her Employment Contract. It was the Claimant's position that since the Respondent had not produced evidence to prove that the reasons for terminating her employment are those contemplated under section 44(4) of the *Employment Act* for summary dismissal, her summary dismissal was therefore substantively unfair. That the summary dismissal was further unfair as there was no evidence that she had committed any breach of her obligations under the Contract as contemplated under clause 25(b). She further submitted that the Respondent had failed to discharge the statutory burden placed on it by section 43(1) of the *Employment Act* to prove that the reasons for termination were fair. That it was clear from the foregoing that termination of her employment was substantively unfair contrary to the provisions of sections 44, 45(1) and (2)(a)(b) of the Act and clause 25(h) of the Employment Contract.



10. As regards procedural fairness, the Claimant reiterated her testimony that she was neither invited to attend the alleged Board meeting nor did the Respondent file any minutes to disclose before this Court the circumstances in which the alleged resolution to terminate her employment was arrived at. She submitted that the Respondent's failure to issue her with a Notice to Show Cause and to accord her any hearing constituted an unfair administrative action contrary to the provisions of Article 47 of *the Constitution* of Kenya as read with section 4 of the Fair Administrative Actions Act. That it was further contrary to the Rules of Natural Justice on notice and hearing, demonstrates malice on the part of the Respondent's part and constitutes unfair labour practices contrary to Article 41 of *the Constitution*. It was the Claimant's stance that her termination was therefore procedurally unfair. On the issue of discrimination, the Claimant submitted that section 5(2) and (3)(b) of the *Employment Act* prohibits discrimination against an employee. That the Respondent discriminated against her by term terminating her contract of employment without any reason and without following due process for summary dismissal. She urged this Court to thus find that the Respondent discriminated against her and to award her damages for discrimination. They proposed damages of Kshs. 7,500,000/- as fair in the circumstances following the case of Civil Appeal No. 42 of 2015, Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR where a similar amount was awarded as damages for discrimination.
11. The Claimant submitted that she was entitled to telephone allowance pursuant to clause 17 of the employment contract that provided that she would be entitled to telephone facilities in accordance with prevailing policy. She invited the Court to note that RW1 failed to produce any evidence of the Respondent having paid her telephone allowance, pay in lieu of accrued leave and leave allowance and having remitted the deducted mortgage amount to HFC. She further submitted that clause 13 of the Employment Contract provided for gratuity and since her contract was terminated on account of a Board decision and not acts amounting to gross misconduct, this Court should allow her the claim. That clause 18 of the Employment Contract entitled him to Club Membership but which RW1 failed to prove had been paid and that the Court should also grant him School Fees entitled to him under clause 7. The Claimant urged the Court to award her the maximum 12 months' salary as compensation given the abrupt and unconscionable manner of her dismissal. In support of her submissions, the Claimant further relied on Johana Kipngeno Cheborgei v Bob Morgan Services [2021] eKLR and Alfred Sagini Nyagaka v The East African University [2023] KEELRC 530 (KLR) (27 February 2023) (Judgment) Neutral citation: [2023] KEELRC 530 (KLR) .
12. Respondent's Submissions
The Respondent submitted that clause 25(a) of the Claimant's Employment Contract provided for termination of the contract on notice by either party giving a three months' notice or salary in lieu thereof. That it was in accordance with the said clause that its Board of Directors resolved to terminate the Claimant's contract on notice and she was later informed and subsequently paid three (3) months' salary in lieu of notice. That in the premises, the termination of the Claimant's contract was lawful and fair. On this submission the Respondent relied on the decision in Alome Kasera Achayo v Mombasa Water Supply & Sanitation Company Limited [2015] eKLR where the Court in determining a similar case, found that parties to a fixed term contract can agree on a premature termination clause upon which either party can terminate the contract without reason by giving the other party notice or payment in lieu of notice. The Respondent submitted that it dealt with the allegations of sexual harassment, as raised by the Claimant, in accordance with its HR Policy Manual. That in any event, the Claimant's claim that she was sexually harassed ought to be dismissed as it is res judicata, having already been determined and dismissed by the Court in Petition No. 137 of 2016 – Lucy Rimanto Molonket v Simon Peter Ole Nkeri & 7 others; Ethics and Anti-Corruption Commission & Director, Criminal



- Investigation Department (Interested Parties) [2022] eKLR. It further submitted that the Claimant's claim that she was harassed, targeted and discriminated against by the Respondent by virtue of her redeployment should also be dismissed for being *res judicata* in similar circumstances.
13. As regards the claim for alleged discrimination, the Respondent submitted that the same has not been substantiated as no contemporaneous evidence to prove the claims was adduced in evidence. That the law is clear that for a claim on discrimination to be sustained, it must be shown that notwithstanding that the employees were under the same terms of employment, they were treated differently on grounds such as race, health status, ethnic or social origin, belief or culture as set out under Article 27(4) of *the Constitution*. That this has also been the position of the Courts in numerous decisions including: *Reuben Wamukota Sikulu v Director of Human Resource Management, Ministry of Devolution & Planning & 2 others*; *Public Service Commission (Interested Party) [2020] eKLR* by the Court of Appeal; and *Peterson Guto Ondieki v Kisii University [2020] eKLR*. It was the Respondent's submission that the claim for discrimination is therefore, unmerited and ought to be dismissed. That the Claimant having failed to prove the allegations of sexual harassment and discrimination to the required standard, or at all, her prayer for damages for sexual harassment and discrimination ought to be dismissed.
 14. The Respondent further submitted that in the circumstances, the Claimant's prayer for reinstatement is not warranted but that should this Court find that the Claimant was unfairly terminated, it ought to find that reinstatement is neither tenable nor appropriate. It urged the Court to be persuaded by the decisions in *Peter Rambeka Oinga v Mabroukie Estate [2012] eKLR* that reinstatement was not possible because the employment was a fixed term contract that was set to lapse. It further reasoned that the reinstatement of the Claimant would not be practical as the position she previously held had since been abolished and had already been disallowed by the Court in *Petition No. 137 of 2016 (supra)*. Regarding the claim for salary arrears, the Respondent submitted that there was no basis for the same as the Claimant had not demonstrated that the termination of her employment was unfair or wrongful. It relied on the decision of the Court in the case of *Teachers Service Commission v Timothy Onyango Olale [2022] eKLR* where the appellate Court declined to uphold the trial Court's award for unpaid salaries to a former employee who had been denied reinstatement. It submitted that the Claimant testified during her cross-examination that sometime in February 2019, she was paid her terminal dues in the sum of Kshs. 4,396,699.42, which included accrued leave days, gratuity and three (3) month's salary in lieu of notice. That the Claimant's claim for maximum compensation can also not ensue in the circumstances but if this Court determines that she was unfairly terminated, any compensation found due and payable to the Claimant should not exceed one (1) month' salary.
 15. On the matter of exemplary damages, the Respondent submitted that the prayer was misconceived as under common law, exemplary damages are only awarded in the law of torts and the same are not compensatory but punitive. It relied on the decision of the Court in the case of *Okumu Aziz Ramadhan v China Roads and Bridge Corporation (Kenya) [2021] eKLR*, where the appellate Court overturned the trial Court's award for exemplary damages on the basis that a former employee had led no evidence to demonstrate that his employer had committed any tortious act or omission to warrant the award of exemplary damages.
 16. The Claimant was assigned a role indicated as 'Head of special projects' a hitherto non-existent position in the Respondent. Her other colleagues who were reassigned were given positions that were in existence in the Respondent. She was singled out for deployment to a position that did not exist. She then was asked to go on leave so that the Respondent could formulate a job description and outline her role. If that is not discrimination then one would wonder what is. Differential treatment leading to inequalities as was meted to the Claimant proves her claim on the score of discrimination. In the case



of *OI Pejeta Ranching Limited v David Wanjau Muhoro* (supra), the Court of Appeal held that a sum of Kshs. 7.5 million was reasonable for compensating a victim of workplace discrimination. Given the period since the Court of Appeal decision, an award of Kshs. 10,000,000/- would suffice.

17. Regarding her alleged sexual harassment, the matter is res judicata having been determined by Ndolo J. in *Lucy Rimanto Molonket v Simon Peter Ole Nkeri & 7 others; Ethics and Anti-Corruption Commission & Director, Criminal Investigation Department (Interested Parties)* [2022] eKLR. The issue is therefore not open for determination here.
18. The Claimant was entitled to receive a modicum of fairness in termination as held in the celebrated case of *Walter Ogal Anuro v Teachers Commission* [2012] eKLR where the Court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. The hitherto much vaunted position of termination at will as the Board of the Respondent seems to rely on was jettisoned by the *Employment Act* with its requirement for reasons (see section 43 and 45 of the *Employment Act*) as well as the plethora of case law that places employers on notice that dismissal are no longer a casual affair. The Respondent fell into error to determine the contract had to come to an end with no basis for the same. It was not demonstrated that the Claimant was not doing her work as expected or that she had not met targets given. Her dismissal, it would seem, rose out of her challenge to the status quo in the Respondent which had a bent towards unpopular and unmerited decisions in management style through its MD and the Board of Directors. As such the Claimant would be entitled to certain reliefs. The Court having considered the matter, the fact that she is received notice pay though neither the Claimant nor the Respondent produced evidence of the payment, she would be entitled to only 6 months and not the maximum compensation.
19. The Claimant is not entitled to telephone allowance for the period between October 2016 and November 2018 as she was not in service of the Respondent. She is not entitled to payment in shortfall in her contract as she did not serve the balance of the contract. The Claimant is therefore entitled to the following: accrued leave, damages for discrimination and compensation for the unfair and unlawful termination.
20. In the final analysis I enter judgment for the Claimant against the Respondent for:
 - i. Accrued leave – Kshs. 908,182/-
 - ii. Damages for discrimination – Kshs. 10,000,000/-
 - iii. Compensation for unfair discrimination set at 6 months – Kshs. 4,257,600/-
 - iv. Costs of the suit.
 - v. Interest on the sums in (i), (ii) and (iii) at court rates from date of this judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2023

NZIOKI WA MAKAU

JUDGE

