



**Mulu v Dodla Dairy (K) Limited (Cause 729 of 2018)
[2023] KEELRC 2140 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2140 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 729 OF 2018
NZIOKI WA MAKAU, J
SEPTEMBER 20, 2023**

BETWEEN

JUSTUS MUTUA MULU CLAIMANT

AND

DODLA DAIRY (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent claiming unlawful and unfair termination of his employment. He prays for judgment against the Respondent for a declaration that his dismissal from employment was unlawful and unfair, the Respondent be ordered to pay him the terminal dues set out in the Claim, an order that the Respondent issues him with a certificate of service, interest at court rates from the date of filing the claim, costs of this suit, and such other or further relief as this Court may deem just to grant. The Claimant averred that on 1st October 2017, he entered a one-year contract of employment with the Respondent as a Sales Supervisor in its sales department, in charge of its Nairobi East territory. That he worked for the Respondent for about six (6) months and four (4) days before his contract of employment came to an end and that he was earning a net salary of Kshs. 70,000/- by the time he left the Respondent's employment.
2. It was the Claimant's averment that the Respondent failed to give him a statement of disciplinary rules immediately after employing him as required under section 12 of the *Employment Act* (hereinafter "the Act"). That on 4th April 2018, the Respondent terminated his services by sending him a notice of termination effective 5th April 2018 and without subjecting him to any disciplinary process or giving him the reason for his termination in accordance with the law. Moreover, he contended that he had never been issued with any warning letters and that the dismissal and/or termination was only meant to embarrass him. He also contended that the Respondent acted contrary to the principles of justice and equity. The Claimant further averred that he used to work past regular working hours on all Saturdays



(8am to 8pm inclusive of public holidays that fell on Saturdays) but was never paid overtime for the extra hours that he worked.

3. In response, the Respondent filed a Reply to Statement of Claim and Counter Claim wherein it averred that the Claimant earned a consolidated monthly salary of Kshs. 35,000/- and that it also had a variable of Kshs. 35,000/- which was subject to Key Performance Index (KPI). It further averred that the Claimant had failed to meet set target leading to the Respondent losing Kshs. 158,148.83, being money from goods supplied but not paid for. That the Claimant's probation was consequently not renewed due to poor performance and particularly for losing the Respondent's money under his supervision. The Respondent further contended that the Claimant did not have specific working hours as it used to concentrate on his performance and sought to have the Claimant's Statement of Claim dismissed.
4. In the Counter Claim, the Respondent averred that upon employment, the Claimant was subject to a probation of three (3) months. That by February 2018, the Claimant had failed to reach the agreed sales that would entitle him to the variable of Kshs. 35,000/- and this was because:
 - a. The Claimant stated he had supplied milk to clients who insisted they had not received the milk.
 - b. Most of the clients claimed to have made payments for the milk supplied yet the Respondent had not received the money.
 - c. The Claimant had an assistant under his direct supervision but whom he intentionally failed to supervise.
5. It averred that by March 2018, the Claimant's department had incurred an unexplained loss of Kshs. 158,148.83, which it thus claims against the Claimant plus damages for loss (being 12 months of Kshs. 35,000) and cost of this suit.
6. In his response, the Claimant denied the contents of the Counter-Claim and averred that the Respondent never issued him with any KPI measure. He further averred that throughout his employment period with it, the Respondent deducted from him Kshs. 1,600/- per month towards NHIF contributions, which as per the new rates, was regard to persons earning a gross monthly salary of Kshs. 90,000/- to Kshs. 99,999/-. He stated that it was the Respondent's salesmen, and not him, who were tasked with the responsibility of supplying milk to customers and that money paid by clients was remitted directly to the Respondent's paybill account. That at no time did he receive payments directly from the clients in respect of milk supplied and that each client had a specific account with the Respondent through which they would make their payments. He also asserted that he supervised his assistant as and when required and denied that the Respondent incurred a loss resulting from his negligence. He prayed for the Respondent's Reply and Counter Claim to thus be dismissed and struck-out with costs to the Claimant and judgment entered in his favour as prayed in the Statement of Claim.
7. Evidence

The Claimant testified that the Respondent failed to make NHIF payment for him in January 2018 and deducted one (1) day's pay. He asserted that he was not notified that the contract was coming to an end and that he never went on leave during the employment period. The Claimant admitted in cross-examination that he was on probation for the first three months of his employment with the Respondent, which ended in December 2017. He stated that his probation was extended one (1) months 23 days after expiry of probation and that the letter extending his probation was signed on 23rd February 2018. He further stated that his job was to follow up on whether the salesmen had distributed the products.



8. The Respondent's witness, Mr. Anand Baptay (RW1), testified that the Claimant's role was to appoint the agents, ensure purchase was made and the agents had remitted and then do reconciliation. That they told the Claimant to ensure that money is paid into the system. He asserted that the Claimant had a three months' contract that he signed on 19th December 2017 despite having started operations in October 2017 and that he was given an extension of three months from 1st January 2018 to 31st March 2018 but he still did not improve his performance. He explained that the Claimant's salary constituted a fixed amount of Kshs. 35,000/- and a variable amount of Kshs. 35,000/- from KPI targets of distributorship and collection. That the Claimant failed to give an outcome in March 2018 and they called and asked him to collect and clear the trade of Kshs. 158,000/- before they pay him but that they had never received the said trade. He further testified that they never asked people to work late and that if any of them worked late then it was on their time. RW1 stated in cross-examination that they had meetings with the Claimant to discuss his performance though they had not filed any such documents in court. He confirmed that the Claimant was paid Kshs. 70,000/- in the first three months and that his probation ended on 31st March 2018 without a renewal. Further, that the Claimant worked for the Respondent for 6 months and 4 days. That marked the end of oral testimony and the parties were to file written submissions.

9. Claimant's Submissions

The Claimant argued that the issues for determination were: whether the Claimant was serving probationary period when his employment was terminated; whether the Claimant's termination was unlawful and unfair; and whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim. The Claimant submitted that he was an employee of the Respondent from 1st October 2017 to 4th April 2018 on a contract basis. That whereas section 42(2) of the *Employment Act* prescribes the probationary period to be not more than six (6) months, the period may be extended for not more than six (6) months with the employee's agreement. That in his case, the Respondent extended his three-months probationary period for three more months from January 2018 to March 2018 without his agreement or discussion about the extension and that he even only received the extension letter 23rd February 2018 when he affixed his signature. He relied on the case of *Mwilo v Absa Bank (K) PLC (Cause 31 of 2020) [2022] KEELRC 53 (KLR) (5 May 2022) (Judgment)* in which the Court held as follows:

- “23. In the present case, the Claimant's probationary period terminated on December 12, 2019, and with or without formal confirmation to his employment by the Respondent, the Claimant stood confirmed to his employment by operation of the afore stated statute upon the lapse of his probationary period on December 12, 2019.
24.
25. The foregoing letter purported to arbitrary “extend” in retrospect an already lapsed and/or terminated probationary period and to “change” in retrospect, the date of commencement of the Claimant's employment. This was an outright illegality on the part of the Respondent.
26. It matters not whether or not the Claimant signed on the said in acknowledgment of receipt of the same. Signing in receipt of the said letter did not validate the contents of the letter. The said letter does not state that the



Claimant had agreed to its contents. The letter simply purported to advise the Claimant on the Respondent's apparent illegal decision.”

10. The Claimant argued that his contract was automatically confirmed by effluxion of time upon expiry of his probation on 31st December 2017 and having received no communication on extension or termination of his contract from the Respondent. He cited the case of Benjamin Nyambati Ondiba v Egerton University [2014] eKLR where the Court, in finding that the claimant's employment was constructively confirmed after the respondent deferred the confirmation unilaterally, observed that that failure must be interpreted to the benefit of the employee (claimant) who effectively became permanent and pensionable. In the instant case, it was the Claimant's submission that he was therefore not serving a probationary period when his employment was terminated as he was a permanent employee of the Respondent. As to whether the termination of his employment was unlawful and unfair, the Claimant submitted that the Respondent did not comply with the statutory procedure as envisioned in section 41 of the *Employment Act* as he was neither issued with warning letters nor taken through a disciplinary process before the termination. Moreover, he was not informed of the reason for the termination in the presence of another employee of his choice or a shop floor union representative pursuant to section 43 of the Act. That the Respondent's witness confirmed in his testimony to the court that a disciplinary hearing was not conducted and equally confirmed that the Claimant was terminated on grounds of poor performance i.e. failure to meet targets in the performance of his duties. According to the Claimant however, there was no proof whatsoever that he had performed poorly in his duties. He relied on the case of Francis Aboge Oduk v Hasbah Kenya Limited [2020] eKLR wherein the Court held that it was trite law that poor performance be supported by evidence of specific performance targets, appraisal of performance, with specific results and that it was not enough to claim that an employee's performance was poor. It was the Claimant's submission that from the foregoing, it was clear the Respondent had failed to prove to this Court the reasons for terminating his employment and the termination was hence unfair as per section 43 of the Act. That the Respondent had thus failed to discharge its burden of proof as prescribed under section 47(5) of the Act.
11. On the reliefs sought, the Claimant submitted that the salary clause in the letter of appointment dated 1st October 2017, that is on record, stated that he would be paid a consolidated salary of Kshs. 70,000/- per month. That he had also explained how the monthly deductions made to NHIF marked against the rates at that time would make his salary be Kshs. 70,000/-. He submitted that he had not agreed to the part-payment of his salary in February 2018 and the non-payment of his salary in March 2018, which were therefore wrongful. That the statement by RW1 that the Respondent withheld the Claimant's salary on condition that he got back the deficit of the products given to him worth Kshs. 158,148.83, was a reason not embedded in law. He asked the Court to thus award him the unpaid salary as prayed. He further submitted that the Court should award him the transport allowance sought as since he went to work and was never paid his March salary. That he was also entitled to notice pay because he was neither issued with a one month notice nor paid in lieu of notice prior to termination of his employment contract contrary to section 36 of the *Employment Act*. On the claim for overtime, he submitted that it was unfair labour practice in contravention of Article 41 of *the Constitution* of Kenya for the Respondent to have failed to compensate him for working overtime. Regarding the claim for leave pay, he submitted that there was no evidence on record by the Respondent to show he proceeded for leave during the period he worked for it. That section 28(1)(b) of the Act entitles him to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service and he is therefore entitled to payment in lieu of leave days not taken. The Claimant also argued that he was entitled to damages for unfair dismissal, equivalent of six (6) months' salary being the remainder of the contract period.



12. Respondent's Submissions

The Respondent submitted that the Claimant's probation period came to an end and was not confirmed into the intended contract of employment for reasons provided in the letter of non-confirmation of contract dated 4th April 2018. That he had also properly been informed of the same but chose to delay in the collection of his letter and that the provisions of section 42(2) of the Employment Act were therefore adhered to. It was the Respondent's submission that in view of the provision of the contract of employment that the company is entitled to recover property or money lost in the hands of an employee in whichever means possible, it was justified to hold the Claimant's salary until he had refunded the lost money (Kshs. 158,000/-). It further submitted that the Claimant's salary was a Kshs 35,0000/- while the rest was subject to his performance in sales, which he underperformed to the extent it could not retain him after the end of the probation period. That subsequently, it confirmed having paid the Claimant's salary for February 2018 while that for March 2018 would be available for payment once he refunds the lost money. Further, the Respondent denied the claim for transport allowance, submitting that the Claimant's salary was consolidated. It also argued that the claim for notice pay should not arise as the nature of termination of the Claimant's employment was non-confirmation of contract after probation period. That the prayer for overtime is unfounded as its witness confirmed in his testimony that the Claimant had a flexible self-managed working time. On the prayer for leave days, the Respondent submitted that the Claimant, who was on probation, did not at any point make an application for leave and the same was denied and that in the circumstances, the Respondent cannot be found of any breach of contract or statute. Lastly, the Respondent submitted that the issue of damages cannot arise as termination of the Claimant's employment was not occasioned by the Respondent but by effluxion of the contract.

13. On the issue of costs, it was the Respondent's submission that the Claimant should meet the same as he failed in the performance of his work that occasioned the Respondent a loss of Kshs 158,000/-.
14. The Claimant was dismissed for allegedly not having met the key performance indicators of the Respondent and for occasioning a loss of Kshs. 158,148.83 from the sale of goods and 'damages for loss' amounting to Kshs. 420,000/- which the Respondent claimed by way of counterclaim.
15. Section 41 of the Employment Act provides that

41.

(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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

16. This provision was not adhered to by the Respondent who readily admits there was no hearing as envisaged under the Act. The dismissal was therefore ipso facto unfair and unlawful. The Claimant was



entitled to be either placed on a performance matrix or dismissed having been accorded a fair hearing. As the Respondent chose not to follow the law, it must meet the consequences. The Claimant was a sales supervisor and was not responsible for the payment of sales proceeds to the Respondent. The Respondent had a strict payment option for the suppliers who carried its products in the shops with deadlines for payment which were enforceable by the finance department of the Respondent. This was not the responsibility of the Claimant and as such any losses on account of products delivered by the Respondent to its customers cannot be placed at the door of the sales supervisor. The counterclaim is therefore unmerited and dismissed accordingly albeit with no orders as to costs. In the final analysis, I enter judgment for the Claimant against the Respondent for:-

- a. Unpaid portion of February 2018 salary – Kshs. 30,000/-
- b. Salary for March 2018 – Kshs. 70,000/-
- c. One month's salary as notice – Kshs. 70,000/-
- d. Unpaid leave on pro rata basis – Kshs. 35,000/-
- e. Damages for unlawful dismissal equivalent to 5 months – Kshs. 350,000/-
- f. Costs of the suit
- g. Certificate of service.
- h. Interest on the sums in (a), (b), (c), (d) and (e) above at court rates from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nairobi this 20th day of September 2023

Nzioki wa Makau

JUDGE

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