



**Nyongesa v Blue River Technology Solutions Limited (Cause E626 of 2021) [2023] KEELRC 2763 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2763 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E626 OF 2021  
DKN MARETE, J  
OCTOBER 24, 2023**

**BETWEEN**

**PENINAH NYONGESA ..... CLAIMANT**

**AND**

**BLUE RIVER TECHNOLOGY SOLUTIONS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This matter came to court vide an Amended Statement of Claim dated September 14, 2021. The issue in dispute are herein cited as;
  1. Whether the claimant was an employee or consultant.
  2. Wrongful and unfair termination of the claimant's employment
  3. Failure/refusal to pay the claimant's full terminal dues
  4. General damages for injuries incurred in the workplace.
2. The respondent in a Response to Claim dated September 15, 2021 denies the claim and prays that the same be dismissed with costs.
3. The claimant in her Reply to respondents' Response to Statement of Claim dated September 23, 2021 answers the response in the negative and prays that this be dismissed with judgment entered in his favour as prayed.
4. The claimant's case is that at all material times to this suit she was an employee of the respondent under Sales Consultant Agreement at monthly retainer of Kshs.140,000 and Commission payable under the Sales Commission Policy.



5. It is the claimant further case that she performed her duties until April 12, 2021 when the respondent issued her with a notice of termination of contracts citing financial constrain as ground for so doing.
6. It is her further case that the termination of contract was unlawful and malicious and evidenced by the correspondent inter partes immediately preceding and following the termination. She cites the following as particulars of malice and bad faith;
  - a. Failing to provide an ergonomic work station
  - b. Compelling the claimant to attend the place of work even when in pain.
  - c. Purporting to take disciplinary action against the clamant without any valid reason.
  - d. Wrongfully terminating the claimant's employment
7. She prays as follows;
  - a. A declaration that the claimant was an employee of the respondent.
  - b. A Declaration that the termination of the Contract was wrongful termination of employment and amounts to unfair labour practice.
  - c. Payment as follows;  
January balance Kshs. 20,000/=  
Fabruary Ksh.140,000/=  
March Kshs.140,000/=  
April Kshs.140,000/=  
May Kshs. 51,300 (Prorated for May, 2021)  
Commissions:  
Chieni Supermarket – Kshs. 40,000/= (Calculated as 10% of the 25% GM of unit cost particulars of which are well within your knowledge.)  
Sub-total: Kshs. 531,300/=
  - d. General damages for injuries incurred in the workplace.
  - e. Damages of 12 months' salary:  $140,000 \times 12 = 1,690,000/=$
  - f. Costs of the suit
  - g. Interests on the above (c), (d) (e) at court rates from the date of filing of this suit until payment in full.

The respondent's case is a denial of the claim.

8. Her further case is that she entered into a contract with a the claimant on the 15th day of June 2020. However, the respondent avers that the claimant was retained on a contract for services rather than a contract of service and the assertion that the claimant was at employee of the respondent is denied. The claimant is therefore put to strict proof of the contrary assertions in paragraphs 3 and 4 of the Statement of Claim.
9. She also denied that the claimant performed her covenants under the contract satisfactorily as alleged. The claimant committed deliberate breaches of the contract as follows:-



- a. The claimant failed refused and or ignored all requests from the respondent to give appraisals and updates of expected targets; and
  - b. The claimant absented herself from duties for long periods of time and even failed refused and ignored to attend online meetings when called upon, and in particular:-
    - i. The claimant worked for only one week in March 2021; and
    - ii. The Clamant was totally absent from duty in the months of April and May, eve after she had been served with the notice of termination.
10. The respondent further case is that due to the said breaches of contract, the operations and financial expectations of the respondent were affected. The respondent is therefore entitled to withhold, and not be obligated to remit payments amounting to Ksh.298,633/= for the time(s) that the claimant voluntarily absented herself from her duties as follows:-
- a. In March 2021 (23 days) Kshs.107,333.00
  - b. In April 2021 (30 days) Kshs.140,000.00
  - c. In May 2021 (10 days) Kshs.51,300.00
- Total Kshs.298,633.00
11. Again, as indicated hereinbefore, the parties were entitled to terminate the contract by issuance of a 30 days' notice under clause 11.1 of the contract. In this regard the respondent avers a follows:-
- a. The respondent complied with the contractual requirement to give a 30 days' notice;
  - b. The respondent cited the harsh economic environment leading to depressed cash flow a fact well known to claimant, in the notice of termination dated the 12<sup>th</sup> of April 2021.
  - c. In deed the respondent will supplicate to the court to take judicial notice that the effect of the Covid-19 pandemic coupled with the winding up of the Tusker Mattresses Limited (Tuskys Supermarket), the largest client of the respondent by far, are factors the contributed to the frustration of the contract of the parties herein as it was no longer financially sustainable to retain the claimant; and
  - d. The fact that the claimant had wilfully deserted her duties as detailed in paragraphs and 7 above also meant that the claimant had rendered herself non-essential for the operational requirements of the respondent.
- The allegation in paragraph 7 of the Statement of claim that the termination was .....unlawfully is therefore denied and the claimant is put to strict proof.
12. The claimant's reference to unsafe working environment is denied on the following grounds;
- a. The claimant was never involved in heavy lifting and the respondent cannot be to blame for the alleged injuries sustained by the claimant;
  - b. It is apparent from the claimant's own pleadings and documents that the claimant suffered from conditions, as detailed in paragraph 11 below, which she failed to disclose to the respondent until she was absent without leave from her duties.
  - c. The claimant's duties were mainly in the field and it was not necessary for the respondent to change its office set-up.



- d. The claimant has demonstrated in her documents that she was able to carry out the duties away from the premises of the respondent but she elected to be unreachable forcing the respondents to take the unusual step of contacting her through her personal email.
13. Again, the respondent avers that the claimant has failed to plead further, better and or adequate particulars to show that the respondent is indeed liable in tort or under any other law for general damages as alleged and in particular:-
- a. The claim for damages is bad in law as it is unsupported by specific pleading of fact supporting the alleged incidence of an unsafe working environment;
- b. The claim for damages is bad for lack of specific pleading of the nature of alleged injuries sustained or damage suffered; and
- c. The claim for damages is bad in law as it has failed to establish the remoteness of damages.
14. In addition, and without prejudice to paragraph 9, 10 and 11 above, the respondent avers that this Honourable court has no jurisdiction to entertain the claim for general damages, this is a matter covered by the *Work Injury Benefits Act*, 2007. The respondent shall therefore raise a preliminary objection to have that aspect of the pleadings and claim struck out in limine.
- The issues for determination therefore are;
1. Whether the claimant was an employee or consultant.
  2. Whether the termination the employment of claimant by respondent was wrongful, unfair and unlawful.
  3. Whether the claimant is entitled to the relief sought.
  4. Who bears the costs of this suit.
15. The 1st issue for determination is whether the claimant was an employee or consultant. The claimant submits that in establishing this one should look at the intent of the parties and not the parties respective declaration of character of this contract was held in the authority of *Kenneth Kimani Mburu & another vs Kibe Muigai Holdings Limited* [2014] eKLR.
16. It is claimant's case and submission that she under the direct supervision of the respondent's Managing Director and has no latitude to discharge her obligations or subcontract. This is therefore amounted to employment as is known in law as opposed to Consultancy.
17. The claimant further, submits bad faith in the reasons for termination of employment as financial constrains whereas she had raised issued of dissatisfaction with the claimant's performance and desertion from work.
18. The respondent also claimed that the claimant had rendered herself non-essential for the operational requirements of the respondent without taking regards over his neglect and lack of accommodation for her medical condition. She therefore
19. Further, the respondent purported to terminate the employment on the basis of financial constraints. However, the respondent demonstrated bad faith in taking disciplinary action against the claimant without a valid reason (see email correspondence produced and marked "PN4"). The respondent also stated in its "Response to Claim" dated September 15, 2021 that they were dissatisfied with the claimant's work and that she willfully deserted work. This affirms the fact that the claimant was an employee as the respondent required her to conduct her duties as such, going further to admit the same.



20. Again, the respondent in the same Response to Claim alleged that the claimant ‘rendered herself non-essential for the operational requirements of the respondent’. My Lord, it is our view that the reason for termination is not genuine as the respondent was fully aware that the claimant could not work at the office due to the willful denial of a workstation that would accommodate her medical condition. The claimant provides evidence of engagement of work conducted outside the respondent’s premises
21. She ousted this by relying in authority of *Titus Muriuki Ndirangu v Beverly School of Kenya Limited* [2022] eKLR at Para 24 indicates that if a claimant is terminated on the basis of redundancy, the main question becomes whether “the respondent had good reason for declaring the claimant redundant and whether the respondent adhered to the law in terminating the claimant on the alleged ground of redundancy.”
22. The claimant further seeks to rely on section 43 of the *Employment Act* 2007 requires employers to provide proof of reason for termination. It provides as follows:
- (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 45 of the *Employment Act* 2007 indicates that a termination will be deemed to be unfair if the employer fails to demonstrate that:
- a. (2) (a) that the reason for the termination is valid;
  - b. (b) that the reason for the termination is a fair reason—
    - (i) related to the employee’s conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and
  - c. (c) that the employment was terminated in accordance with fair procedure.
23. In the penultimate the claimant submits that burden of proving unfair termination of employment or wrongful dismissal rests on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer as set out in section 47(5) of the *Employment Act*, 2007 aforesaid. We therefore submit that the termination was wrongful and unfair as the respondent failed to follow due process in terminating the services of the claimant, if indeed the respondent believed that the claimant had “rendered herself non-essential for the operational requirements of the respondent” as alleged at para 8 (d) of the Response to claim or if it was that the claimant had deserted her duties as alleged at para 6 thereof or if the real reason for termination was financial constraints experienced by the respondent cited in the Notice of Termination. The respondent therefore in the circumstances has failed to rebut a case of unlawful termination employment as required in law.
- The respondent did not profer in written submissions in defence.
24. On a balance of probabilities and preponderance of evidence, the claimant case overwhelmed that of the respondent. She has not only demonstrated that she was indeed an employee of the respondent but also that her termination of employment by the respondent was wrongful, unfair and unlawful. I therefore find a case of unlawful termination of employment and hold as such. And this answers issues number 1 and 2 above.



25. The 3<sup>rd</sup> issue for determination is whether the claimant is entitled to relief sought. She is. Having won on a case of unlawful termination employment, she becomes entitled to the relief sought.

26. I am therefore inclined to allow the claim and order relief as follows;

- a. A declaration be and is hereby made that the claimant was an employee of the respondent.
- b. A Declaration that the termination of the employment of the claimant by the respondent was wrongful, unfair and amounted to an unfair labour practice.
- c. The respondent be and is hereby ordered to make and pay the claimant as follows;

January balance Kshs. 20,000.00

February Ksh.140,000.00

March Kshs.140,000.00

April Kshs.140,000.00

May Kshs. 51,300.00 (Prorated for May, 2021)

Commissions:

Chieni Supermarket – Kshs. 40,000.00 (Calculated as 10% of the 25% GM of unit cost particulars of which are well within your knowledge.)

Sub-total: Kshs. 531,300.00

- d. One (1) month salary as compensation termination of employment  
= .....Kshs. 140,000.00

Total of  
claim.....Kshs.  
671,300.00

- e. Each party shall bear their costs of the claim

**DELIVERED, DATED AND SIGNED THIS 24TH DAY OF OCTOBER 2023.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances:

Mr. Olukaka hold brief for Wambui Kibicho instructed by Wambui Kibicho & Company Advocates for the claimant.

Mr. Mundanya instructed by A.A. Mudanya & Company Advocates for the respondent.

