



Munyua v Industrial Promotion Services (K) Limited & another (Cause 1358 of 2018) [2023] KEELRC 2429 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2429 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1358 OF 2018
SC RUTTO, J
OCTOBER 6, 2023**

BETWEEN

CAROLYN MUNYUA CLAIMANT

AND

INDUSTRIAL PROMOTION SERVICES (K) LIMITED 1ST RESPONDENT

HELLEN AKELLO 2ND RESPONDENT

JUDGMENT

1. It is not in dispute that through a letter dated 16th June, 2018, the Claimant was offered employment by the 1st Respondent for the position of Group Human Resource Manager- Organization Development. She took up the assignment and commenced work on 2nd July, 2018.
2. According to the Claimant, her appointment was enabled by the Respondents' appreciation of her extensive experience, skills and ability to manage and execute organizational development strategies in the change management process. She avers that as a result of the 2nd Respondent's assurance that her position would be permanent and secure, she chose to forego offers from other organizations which were interested in her services and which fact was within the knowledge of the 2nd Respondent.
3. From the record, the employment relationship was short-lived seeing that the Claimant was terminated on 10th August, 2018, barely two months into her employment.
4. The Claimant further avers that her termination was driven by mischief, malice and bad faith on the part of the 2nd Respondent. It is against this background that the Claimant seeks against the Respondents jointly and severally:
 - a. A declaration that her dismissal was unfair and unlawful;



- b. A declaration that her dismissal violated her constitution rights under Articles 24, 25, 28, 41, 47, 48 and 50 of *the Constitution*;
 - c. An award of 12 months' salary being damages for loss of employment and livelihood;
 - d. In the alternative to (b) above to be awarded an award of 5 months' salary being the balance of the probationary employment period;
 - e. Kshs 900,000 being salary for one month in lieu of notice;
 - f. Kshs 300,000 being salary for the 10 days worked in the month of August;
 - g. An order that she be issued with a certificate of service;
 - h. Costs of the suit; and
 - i. Interest at court rates.
5. The Respondents did not take the Claim lying down. Through a joint Response, the Respondents have denied the Claimant's allegations as contained the Statement of Claim and put her to strict proof. The Respondents aver that the 2nd Respondent is the Group Head of Human Resource of the 1st Respondent and is not supposed to be a party to these proceedings as her actions were not of a personal nature but rather carried out for and on behalf of the 1st Respondent.
 6. The Respondents further aver that prior to issuance of the contract of employment, the Claimant underwent a comprehensive interview during which she was made aware of the importance of having the relevant skills, knowledge, experience and capability that was required in order to provide competent as well as satisfactory services to a very high level expected of an organization of the 1st Respondent's status. That at the time, the 1st Respondent was at a phase where it was implementing structures for executing its five year business strategy.
 7. It is the Respondents' case that upon evaluation of the Claimant's performance, glaring gaps were identified as far as her competency is concerned. That with the aim of remedying the worsening situation, the Group Chief Executive Officer and the 2nd Respondent held a meeting with the Claimant. That at the meeting, the 1st Respondent realized the degree of the Claimant's inability to understand the Corporate Business Strategy and the impact it would have on the change management. Consequently, a decision was made to terminate the Claimant's employment. Terming the suit as having been filed in bad faith, the Respondents have asked the Court to dismiss the same with costs.
 8. The matter proceeded for hearing on diverse dates, during which both parties called oral evidence.

Claimant's case

9. The Claimant testified in support of her case. She adopted her witness statement and produced the documents filed on her behalf as exhibits before court.
10. The Claimant described herself as a Human Resource Management specialist with extensive experience. She stated that at the time of her recruitment into the 1st Respondent's employment, she was an associate consultant at the firm of Resource Associates (HR Consulting firm) where she had been engaged in an assignment at the Commercial Bank of Africa and previously at the Housing Finance Group. In her capacity as a consultant, she performed several assignments relating to Organizational Development as well as change management and as such, had extensive hands-on experience.



11. Recounting her recruitment process with the 1st Respondent, the Claimant stated that sometimes in April, 2018, the 2nd Respondent sought her with an offer for employment within the 1st Respondent. Together with the Chief Executive Officer (CEO) of the 1st Respondent, the 2nd Respondent arranged and interviewed her for the job on diverse dates within the month. After the interviews were conducted, all went quiet and the 2nd Respondent never got back to her until the month of June. In the intervening period, a company by the name Bliss Pharmaceuticals approached her with an offer for a job, of which she accepted and was on the verge of reporting, when the 2nd Respondent resurfaced with a feedback that the Company wished to recruit her immediately and urged that she should decline any other offers for her services and where necessary, rescind acceptance. In good faith, she rescinded her engagement with Bliss Pharmaceuticals.
12. Subsequently, vide a letter of offer dated 16th June, 2018 the 1st Respondent engaged her on a permanent and pensionable basis as a Human Resource Manager in charge of Organizational Development. That it was a term of the Contract that she would serve an initial six months' probation period and thereafter the engagement would be enhanced to permanent and pensionable status upon successful confirmation of probation. In consideration for her services, she would earn a monthly gross salary of Kshs. 900,000/=.
13. It was the Claimant's testimony that at the time of her employment, the 1st Respondent was in the process of rolling out a 5 year strategic plan for growth, which process would inevitably require change management. In this regard, her task would be to develop and execute a strategy for organizational development and change management process. In execution of her duties, she would work hand in hand with the Group's CEO and the CEOs of the respective line companies which comprise the 1st Respondent Group.
14. Her job description in summary was to "design and delivery of people and organizational development strategies and the management of change in support of the Group's strategic and operational plans, providing information, advice and services as required".
15. The Claimant further stated that upon assumption of office, she embarked on performing her duties diligently, guided by the 1st Respondent's 5 year strategic plan and in accordance with the directions of the 2nd Respondent and concurrence of the Group CEO and respective line companies.
16. Among her first observations was that the 1st Respondent lacked a Human Resource (HR) Policy Manual setting out inter-alia a disciplinary process. She impressed it upon the leadership of the organization to have the manual rolled out and distributed as soon as possible, but until the time of her termination, the organization was yet to adopt the HR Policy Manual.
17. She further stated that as part of her mandate, she submitted all periodic and necessary reports to the 2nd Respondent.
18. The Claimant further stated that on 10th August, 2018, while attending a meeting at the 1st Respondent's Premier Foods Limited, the 2nd Respondent summoned her for a meeting at the 1st Respondent's offices. Upon arrival, she was casually and in a manner most callous, informed by the 2nd Respondent that she was terminating her employment with immediate effect and that she did not care whether she gave reasons or not. It was only upon demand by herself for a formal letter indicating termination, that she (2nd Respondent) scrambled a quick letter of termination and only included reasons for termination as an afterthought, after she (Claimant) had perused through the 1st draft and noted that she had in fact not stated any reasons.



19. In the Claimant's view, the 2nd Respondent's conclusions were impulsive, arbitrary and not based on any laid down objective criteria for assessment.
20. The Claimant further pointed out that at no point did the 2nd Respondent or any of the 1st Respondent's subsidiary Company CEOs/managers report that her work was unsatisfactory and/or out of conformity with the 1st Respondent's strategic plan. That the 2nd Respondent acted unilaterally and her decision was arrived at without giving her a hearing before a competent and impartial organ of the 1st Respondent. She further stated that it was beyond the 2nd Respondent's competence and authority to unilaterally make a finding as to the conformity of her performance with the strategic plan of the 1st Respondent.
21. She further termed the manner in which she was terminated as unfair, unlawful, unconstitutional and manifestly callous. That because of the termination, her only means to a livelihood was interrupted, thereby subjecting her to untold suffering and distress.
22. Concluding her testimony in chief, the Claimant asked the Court to allow her Claim as prayed.

Respondents' Case

23. The 2nd Respondent testified on her own behalf and on behalf of the 1st Respondent. She identified herself as the 1st Respondent's Group Head of Human Resources. Similarly, she asked the Court to adopt her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondents as exhibits before Court.
24. It was RW1's testimony that before joining the 1st Respondent's employment, the Claimant was shortlisted from LinkedIn, a recruitment and/or hiring platform for professionals, which indicated that she had handled change management at Kenya Wine Agencies Limited and at UAP. That for management positions at the 1st Respondent, it is a requirement that an assessment carried out for both competence (an assessment for skills, knowledge and experience demonstrated by a candidate's resume) and competency (an individual's natural behavior that guides the organization on whether the person would be a good cultural fit).
25. RW1 further stated that the Claimant's recruitment process entailed face to face meetings with both herself and the Group CEO. This was then followed by a competency-based assessment. The Claimant's Personal Development Analysis (PDA) Assessment reported invalid results notwithstanding having been given more than one chance to undertake the same.
26. It was her evidence that under normal circumstances, when a candidate's report is invalid a second time, it is recommended that such a person should not be hired simply because there is a very likelihood that the individual is manipulating the assessment. Be that as it may, the 1st Respondent was at a phase where it was implementing structures for executing its 5 year strategy, which included a Human Resource Strategy and structure aligned to the delivery of the business strategy.
27. One of the vacant positions as per the Human Resource Strategy was that of Group Human Resources Manager, Organization Development, to take on the strategic change initiatives. Based on the Claimant's background at Kenya Wine Agencies Limited and UAP, she was recommended for the role, which was lower than the position of Group Human Resources Manager that she (Claimant) had originally been interviewed for.
28. It was RW1'S further evidence that notwithstanding the Claimant's Personal Development Analysis (PDA) Assessment being invalid, the decision to hire her was also informed by the comfort provided by a senior member of the 1st Respondent's change management core team who informed the entire



- change core team that he had checked out the Claimant's profile independently and reassured that she could be tried for the lower job.
29. Prior to and even after joining the 1st Respondent's employment, she met with the Claimant on several occasions to clarify the role and address any queries that she may have had.
 30. The Claimant formally joined the 1st Respondent's employment on 2nd July, 2018 and on 3rd July, 2018, an induction programme was emailed to her for commencement of the induction process.
 31. On 8th July, 2018, together with the Group CEO, she provided the Claimant with a detailed brief about the leadership forum for all the 1st Respondent's CEOs that would happen in Naivasha on 4th August, 2018. The purpose of the leadership forum was to cascade the 1st Respondent's (EA) strategy. In the said meeting, the Claimant was taken through the action tracker for the change management and leadership forum agenda. The action tracker on change management was one of the Claimant's Key Performance Indicators.
 32. RW1 added that with regards to the leadership forum, the Claimant was asked to arrive in Naivasha on Friday, 3rd August, 2018 but she was adamant on not traveling on that day. On the morning of 4th August, 2018, the Claimant arrived half an hour late for the forum claiming to have had problems with her vehicle. That although she had advised the Claimant that she was the rapporteur for the forum, she did not take any notes.
 33. Upon a further evaluation of the Claimant's performance, glaring gaps were identified as far as her competency is concerned. RW1 highlighted the Claimant's gaps as follows;
 - i. Strategic thinking-clear inability to understand the linkage between Corporate Strategy and how the Human Resources Strategy links into execution.
 - ii. Poor stakeholder engagement;
 - iii. Inability to collaborate and consult;
 - iv. Lacking in her learning agility, ability to be results driven, capacity to adapt to change, critical thinking, team work and self-awareness;
 - v. Low Emotional Quotient (EQ); and
 - vi. Low problem solving skills.
 34. Upon identification of the Claimant's gaps, and with the aim of remedying the worsening situation, on 9th August 2018, she held a meeting with her to go through the output of the leadership forum and her Key Performance Indicators.
 35. That ahead of the said meeting, the Claimant was asked to prepare the actions emanating from the leadership forum in Naivasha. Unfortunately, because she had not taken notes at the forum, the actions were totally inconsistent with the actual outputs. To make matters even worse, the Claimant adamantly continued to inform the meeting on the inconsistencies between the "Compelling Business Need" figures and the 2023 strategy figures.
 36. Together with the Group CEO, she tried to correct the Claimant because the Compelling Business Need has no figures attached to it but she remained adamant about it and it is at this point that the 1st Respondent realized the degree of her inability to understand the strategy and the impact this would have on the change management.



37. Consequently, a decision was reached by the 1st Respondent to terminate the Claimant's employment in terms of her appointment letter as well as all applicable labour laws. The termination letter was issued on 10th August, 2018.
38. RW1 termed the Claimant's termination as fair and asked the Court to dismiss the suit with costs.

Submissions

39. It was submitted on behalf of the Claimant that she had a legitimate expectation that unless terminated for lawful cause, she would be in employment of the 1st Respondent for at least six months. It was further submitted that her termination was done in contravention of Sections 35,36, 41, 43 44 and 45 of the *Employment Act*. That the actions of the Respondents constituted unfair labour practices in contravention of her rights under Article 41(1) and (2) of *the Constitution*.
40. In further submission, the Claimant stated the incorrect reasons advanced by the 2nd Respondent in terminating her unfairly soiled her otherwise good reputation as a skilled Human Resource Management Specialist thereby inhibiting her chances for future employment. In support of the Claimant's submissions, reliance was placed on a number of authorities including *Duncan Mbatia Mulevi vs Wanandegge Co-operative Savings & Credit Society Limited* (2018) eKLR and *Fredrick Odhiambo vs Kenya Safari Lodges & Hotels Ltd* (2015) eKLR.
41. At the time of writing this Judgment, the Respondents' submissions were missing from the Court's physical record and were not traceable on the online portal. In any event, as per the Court's directions issued on 24th July, 2023, the same were to be filed by 11th August, 2023.

Analysis And Determination

42. Flowing from the pleadings by both parties, the evidentiary material placed before me and the submissions on record, this Court is being called upon to resolve the following questions:
- a. Was the Claimant's termination unfair and unlawful?
 - b. Is the Claimant entitled to the reliefs sought?

Was The Claimant's Termination Unfair And Unlawful?

43. Pursuant to Sections 41,43 and 45 of the *Employment Act* (Act), an employer is required to prove that there was substantive justification to warrant the termination of an employee's contract of service and that the said termination was undertaken procedurally. Essentially, these are the two tests to be applied in determining whether an employee's termination from employment was fair and lawful.
44. At the outset, I find it imperative to point out that the Claimant's termination was undertaken during her probationary period. That being the case and in light of the provisions of Section 42(1) of the *Act*, the 1st Respondent was not strictly bound by the provisions of Section 41 which provide for procedural fairness. This is further noting that at the time the 1st Respondent effected termination of the Claimant contract of service, the said provision was still good law in light of the determination in the case of *Monica Munira Kibuchi & 6 others vs Mount Kenya University* (2021) eKLR. Therefore, with regards to procedural fairness, it can very well be said that the 1st Respondent applied the law as it was then hence cannot be deemed to have acted outside the law.
45. However, the same cannot be said with regards to the requirement for substantive justification under Sections 43 and 45(2) (a) and (b) of the *Act*. Under Section 43, an employer is required to prove the reasons for termination while Section 45(2) (a) and (b) provides that a termination of employment is



unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employees conduct, capacity or compatibility; or its operational requirements.

46. It is worth mentioning at this juncture that despite the Claimant having been terminated while on probation, she was entitled to substantive fairness. Put another way, she was protected under Sections 43 and 45 of the Act from unfair termination just like other employees not serving on probation.

47. My position is fortified by the determination by Radido J. in the case of *Mercy Njoki Karingithi vs Emerald Hotels Resorts & Lodges Ltd* [2014] eKLR, where the learned Judge held that:

“ 19. I say so because the fairness of termination of employment is not evaluated merely on the basis of the employer complying with procedural fairness but also on the basis of substantive fairness.

20. The question in other words, is whether the provisions of section 45 of the *Employment Act* are ousted or are not applicable in complaints of termination during probationary period.....

21. It cannot be disputed that although still serving under probation, an employment relationship between parties has commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of the parties arise. These obligations are in terms of duties and rights. Duties of the employer (Respondent) and rights of employee (Claimant) and vice versa.

22. The fundamental rights of employees not to be unfairly terminated and the Claimant in this case, as provided for in Section 45(1) and (2) of the *Employment Act* cannot be abrogated during the probation period unless clearly expressed so. The only right as far as termination is concerned which has been abrogated during the probationary period is the right to procedural fairness in section 41 of the Act. That is the import of section 42 of the *Employment Act*.

23. However the security of tenure given to ordinary employees by section 45 of the *Employment Act* is still applicable. The employees’ right not to be unfairly terminated still binds the employer and is applicable during the probationary period. An employer is obliged to prove the reasons and that the reasons are valid and fair reasons.”

48. The Court (Makau J) arrived at a similar finding in the case of *Happiness Nyabonyi Maingo vs Shreeji Chemicals Limited* [2020] eKLR expressing himself thus:

“Whereas, a probationary contract is a sort of “testing waters” engagement, the rights of the employee are not sacrificed. The employees remain entitled to the protection of the law from arbitrary and whimsical terminations by employers. For example, the law has put in place certain safeguards in favour of employees regardless whether they are employed under a probationary contract... In view of the foregoing, I reiterate that the obligation to justify the reason for terminating contract under section 43,45 and 47 (5) of the *Employment Act* applies equally to termination of probationary contract. Consequently, an employee has every right to challenge termination for probationary contract for want of substantive fairness.” Underlined for emphasis



49. I fully subscribe to the positions taken by the learned Judges in the aforementioned precedents and hold that the 1st Respondent was not only bound to give reasons for the Claimant's termination, but to also justify the same as being fair, valid and related to her conduct, capacity or compatibility; or its operational requirements.
50. That said, it is discernible from the Claimant's letter of termination that the reasons for the separation was her inability to understand the strategic direction of the organization, which according to the Respondents, would impede the implementation of the change programme. It was further stated in the letter of termination, that the Claimant's persistence on what she intends to and what she had started driving from as change perspective was not aligned to the corporate strategy the 1st Respondent was cascading. According to the Respondents, the desired change results would not be forthcoming due to the Claimant's adamance on the understanding of the change management and failure to have read and understood the overall corporate strategy.
51. In light of the foregoing, it is apparent that the reasons advanced for the Claimant's termination fell within the ambit of Section 45(2) (b) (i) of the Act which relates to compatibility.
52. In her testimony before Court, RW1 stated that the Claimant was terminated after they concurred with the 1st Respondent's Group CEO that she was not a good fit for the organisation. It was her evidence that they were not driving the same agenda and that the Claimant was not the right person to run with the change management programme.
53. Making reference to the meeting of 9th August, 2018, between herself, the Claimant and the Group CEO, RW1 stated that the Claimant continued to inform the meeting on the inconsistencies between "Compelling Business Need" figures and the 2023 strategy figures. That together with the CEO, RW1 corrected the Claimant that the Compelling Business Need has no figures but she remained adamant.
54. Seemingly, this meeting was the turning point as RW1 stated that it is thereafter, that the 1st Respondent reached a decision to terminate the Claimant's employment.
55. Despite the significance of the said meeting, no minutes were exhibited by the Respondents to cement the assertions by RW1 that the Claimant was on a different wave length with regards the change management programme the 1st Respondent intended to implement.
56. Further, RW1 stated that the Claimant had failed to take notes at the leadership forum held at Naivasha hence the "actions" were inconsistent with the "actual outputs". Notably, both parties exhibited a similar document titled "Leadership Forum Feedback". The Claimant stated that she prepared the said document. This assertion was not controverted by the Respondents. Further, it is worth noting that the Respondents did not point out the alleged inconsistencies in the "actions" and "actual outputs" in the said document. To this end, I am led to question where the incongruence was between the "actions" and the "outputs"?
57. In light of the foregoing, I cannot help but find that the assertions by the Respondents that the Claimant was not a good fit for the 1st Respondent, was not substantiated.
58. Over and above, it is notable that the Claimant's period of service with the 1st Respondent was considerably short. From the record, she only served for one month, 10 days. This was approximately 5 weeks.
59. In as much as the period of probation is a time of discovery and preliminary assessment of an employee, by all means a period of 5 weeks is too short in my view to gauge an employee's performance and fitness for an organisation.



60. In addition, there is no evidence that the 1st Respondent brought the gaps it had noted in the Claimant's performance to her attention and gave her time to take remedial action prior to her termination.
61. In the same breath, it is also notable that at the time, the Claimant's Key Performance Indicators (KPIs) were yet to be firmed up. RW1 admitted as much in her testimony before Court. From the record, one of the agenda items of the meeting slated for 8th August, 2018 was to firm up the Claimant's KPI's.
62. Indeed, without KPIs in place, one wonders how the 1st Respondent was in a position to objectively assess the Claimant's performance and find that she was not a good fit for the organisation. This is further coupled by the short period of engagement which was inadequate to allow a proper and an objective assessment of the Claimant's ability to perform as per the standards acceptable to the 1st Respondent.
63. All in all, in my considered view, the decision to terminate the Claimant after only 5 weeks was too rash as she was not given adequate time to prove her competence.
64. In light of the foregoing, it is this Court's finding that the 1st Respondent has failed to satisfy the requirements of Section 43(1) read together with Section 45(2) (a) (b) of the Act by proving it had a valid and fair reason to warrant termination of the Claimant's employment. Ultimately, the Claimant's termination was substantively unfair.
65. Having found as such, what reliefs avail to the Claimant?

Reliefs?

66. As the Court has found that the Claimant's termination was unfair for want of proof and justification of reasons, she is awarded compensation equivalent to three (3) months of her gross salary. This award has also taken into account the period served by the Claimant as well as the circumstances attendant to her termination.
67. With regards to notice pay, the Claimant's letter of termination provided that she was to be paid one (1) month's salary in lieu of notice. Apparently, this was in line with clause 10.1 of her Employment Contract. It was the Claimant's case that no payment was made to her following her termination from the 1st Respondent's employment. The Respondents did not dispute this assertion and did not lead evidence to prove that the Claimant was paid accordingly. Consequently, she is entitled to the same.
68. In addition, there is no evidence that the Claimant was paid salary for the days worked in the month of August, 2018. She is therefore entitled to the same.

Orders

69. In total sum, Judgment is entered in favour of the Claimant against the 1st Respondent in the following manner:
 - a. A declaration that the Claimant's termination from employment was unfair.
 - b. The Claimant is awarded one (1) month's salary in lieu of notice being the sum of Kshs 900,000.00.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 1,800,000.00 being equivalent to three (3) months of her gross salary.



- d. The Claimant is further awarded salary for 10 days worked in August, 2018 being Kshs 300,000.00.
- e. The total award is Kshs 3,000,000.00.
- f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
- g. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

STELLA RUTTO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

