



**Salim v Xplico Insurance Company Limited (Cause 178 of 2018)
[2023] KEELRC 2492 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2492 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 178 OF 2018
NZIOKI WA MAKAU, J
OCTOBER 3, 2023**

BETWEEN

FRIDA NDUKU SALIM CLAIMANT

AND

XPLICO INSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim against the Respondent through a Statement of Claim dated 14th February 2018. She averred that on 19th September 2013, the Respondent offered her employment as a Marketing Co-ordinator upon terms contained in the Letter of Appointment of even date and that she accepted the said offer on 24th September 2013 thereby creating a contract of service. That the terms of the contract between them was that the date of commencement of work would be 1st October 2013 at a starting remuneration of ksh 100,000/- per month. She would also be entitled to annual leave of 22 working days for every 12 months worked, leave travelling allowance at 40% of the basic salary, medical cover both her and her immediate family, and an annual bonus of 2.5% of production/collection of the premiums upon attainment of the annual target. That she was also subject to a probationary period of three (3) months and would be appointed to a permanent staff subject to satisfactory work progress and general behaviour. In addition, once she was made a permanent staff, the Respondent retained the power to terminate her employment without giving reasons thereof on payment of one month's salary in lieu of notice.
2. It was the Claimant's averment that the implied terms of her contract of service with the Respondent were inter alia that the Respondent would, before terminating her contract on the grounds of poor performance, explain to her the reasons for which it was considering termination and she would be entitled to have another employee present during the explanation. Moreover, the probationary period was not to be more than six (6) months but could be extended for a further period of not more than six (6) months with the agreement of the Claimant. Lastly, the Respondent was not to terminate



- her contract wrongfully or unfairly. The Claimant averred that after commencing employment at the Respondent company on 1st October 2013, she worked for a period of three years nine months, way after the probation period was over on 1st January 2014. That since she was not notified of any extension of the probationary period or of her contract having been terminated, the contract was deemed to have been confirmed with effect from 1st January 2014 and she was entitled from then on to serve under the confirmed contract of service. It was the Claimant's stance that she diligently worked for the Respondent without either being subjected to any disciplinary action or issued with a warning or suspension letter.
3. She further averred that on 28th July 2017, the Respondent wrote to her indicating that it was undergoing restructuring and that having assessed her skills and professional experience against her current job description, it had found her services to be unsatisfactory. That the said letter purported to then terminate her services with immediate effect, which termination she pleaded was wrongful and unfair as it was not without a one month's notice or alternatively, one month's pay in lieu of notice. Secondly, the Respondent did not give reasons for the termination nor substantiate its claim of unsatisfactory performance. Finally, the procedure adopted in the termination contravened the process set out in the Letter of Appointment at clause (b) under termination of employment and that the same was thus null and void, ab initio. The Claimant averred that reinstatement would not be an appropriate remedy in view of the deteriorated relationship between her and the Respondent. She claimed to have suffered injury and damages as a result of the wrongful and unfair termination, that is: salary for May to July 2017, leave travel allowance for May 2016 to July 2017, one month's pay in lieu of notice, loan deduction not paid to her account for February to July 2017, statutory pension deduction from June 2016 to July 2017, and unutilised 18 leave days for the period October 2016 to July 2017. The Claimant thus prayed for Judgment against the Respondent for a declaration that her termination of employment was unlawful and unfair and that the Respondent be ordered to pay her ksh 1,345,520/- and interest on the said sum at court rates from 28th July 2017 until payment in full. She also sought 12 months' salary as compensation for the unlawful termination, costs of the suit together with interest and a Certificate of Service.
 4. In reply, the Respondent averred in its Response dated 16th March 2018 that the Claimant's contract of employment was lawfully terminated for reasons clearly stated in the termination letter including her failure to fully and effectively discharge her contractual obligations and for poor performance. It denied that the Claimant was entitled to be terminated as under clause (b) and (c) of her Letter of Appointment and further refuted claims of having suffered damages as particularised in her Claim. It further averred that the dismissal of the Claimant was proper and in accordance with the law and or laid down rules and that she was thus not entitled to any compensation and or declaration sought or at all. It contended that the Claimant's Statement of Claim disclosed no reasonable cause of action against it, was frivolous and an abuse of Court process and that it should be struck out with costs to the Respondent.
 5. At the hearing, the Claimant testified that during her employment at the Respondent company, her salary was reviewed from ksh 100,000/- to 143,000/- and then later to 172,000/- per month. She stated that she used to report to the General Manager and that she had taken a car loan that was approved by the Respondent and for which she began remitting payments in September 2015. She notified the Court that the Respondent's pension was at Pioneer Assurance and that when she was let off from the company, the Pension Scheme indicated to her that her remittance was short by one (1) year, with the last month having been May 2016.
 6. The Respondent did not call any witness to testify and the Defence case was deemed closed.



Claimant's Submissions

7. The Claimant submitted that termination of her employment was unfair, unlawful and an affront to fair labour practices and that it should have followed the prerequisite legal procedure set out in sections 41, 43 and 45 of the *Employment Act* as affirmed in the decisions of the Court in *Fredrick Odongo Owegi v CFC Life Assurance Limited* [2014] eKLR and *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR. She further submitted that the Respondent's actions were contrary to the provisions of section 41(2) of the *Employment Act* in that it failed to inform her the charges it was contemplating using to dismiss her, it did not accord her an opportunity to prepare and to be heard in defence whether in person, writing or through a representative or shop floor union representative if possible, and it did not hear and consider her representations before making the decision to dismiss her. On the issue of unlawful and/or unfair termination of employment, the Claimant cited the Court of Appeal case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR referred to in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR where the Court observed that 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 was the Claimant's submission that her testimony before court was that the Respondent neither accorded her the chance to be heard nor informed her of the reason for her termination in the presence of another employee of her choice as required by the law. Furthermore, the Respondent had the obligation to show to this Court that it had put in place an employment policy or practice on how to measure good performance as against poor performance. That the Respondent's reason for terminating her employment was thus invalid because she was never subjected to any assessment that would have revealed the parameters used to gauge her services to conclude that her performance was poor thereby warranting dismissal.
8. Regarding the Respondent's failure to call any witnesses to support its case, the Claimant submitted that this meant that her evidence remained uncontroverted and therefore unchallenged. She cited section 107 of the *Evidence Act* (Cap 80) Laws of Kenya which provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. That in the case of *Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another* [1997] eKLR, the Court held that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed as allegations by the defence is not evidence. That in the case of *Karuru Munyororo v Joseph Ndumia Murage* [1988] eKLR, the Court of Appeal held that in the absence of the defendants and or their counsel to cross-examine the plaintiff on the evidence, the evidence remained unchallenged and uncontroverted and that it was thus credible and the kind of evidence a court of law should be able to act upon. It was the Claimant's submission that she had proved her case on a balance of probability in the absence of the defendant's evidence and her prayer was that this Court thus finds her evidence to be credible, pleaded and proved.
9. On the reliefs sought, the Claimant submitted that having led evidence that her termination was substantively and procedurally unfair, this Court ought to find that the Respondent's actions amounted to unlawful termination and that she was hence entitled to the remedies under section 49 of the *Employment Act*. That this Court should consider that her conduct did not warrant summary dismissal, she had no previous record of wrongdoing and that she faithfully and industriously worked for the Respondent for four (4) years while earning more salary.
10. The Respondent did not file any submissions.
11. The Claimant was apparently dismissed for poor performance. It was at a time the company was undergoing restructure and suddenly, as if by some magic, it found her performance unsatisfactory.



Her stay at the Respondent was replete with salary increments. Something that does not speak to poor performance. The genesis of the dispute is the letter of 28th July 2017. The Respondent wrote to the Claimant indicating that it was undergoing restructuring and that having assessed her skills and professional experience against her current job description, it had found her services to be unsatisfactory. That letter purported to then terminate her services with immediate effect. This termination was wrongful and unfair as the Respondent did not give one month's notice nor pay one month's salary in lieu of notice. No adherence to the provisions of section 40 (if this was a redundancy) nor was there adherence to section 41 if the termination was on account of poor performance. The Respondent thus did not follow the procedure set out in law and the termination thus contravened not only her letter of appointment but ran afoul the law. Her termination was therefore *ipso facto* unfair, null and void *ab initio*. The Claimant is therefore entitled to recompense under section 49 of the [Employment Act](#) for the unfair and unlawful termination of employment.

12. In the final analysis I enter judgment for the Claimant against the Respondent for:-
- a. ksh 516,000/- being outstanding salary for 3 months
 - b. 18 leave days – ksh 103,200/-
 - c. 3 months salary as compensation for unfair and unlawful termination – ksh 516,000/-
 - d. Interest at court rates on the sums in a), b) and c) above from the date of judgment till payment in full.
 - e. Costs of the suit
 - f. Certificate of service.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2023.

NZIOKI WA MAKAU

JUDGE

