



**Wambui v Borderless Tracking Limited (Cause 539 of 2019)
[2023] KEELRC 3130 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3130 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 539 OF 2019
DKN MARETE, J
NOVEMBER 22, 2023**

BETWEEN

LOISE NJERI WAMBUI CLAIMANT

AND

BORDERLESS TRACKING LIMITED RESPONDENT

JUDGMENT

1. This matter was originated by way of a Memorandum of Claim dated 5th August, 2019. The issue in dispute is herein; Unfair and unlawful dismissal from employment and unlawful withholding of terminal dues.
2. The Respondent in a Memorandum of Response dated 22nd October, 2019 denies the claim and prays that the same is dismissed with costs.
3. The claimant's case is that pursuant to a letter of appointment dated 6th May, 2019, she was employed by the Respondent as a Sales and Client Service Manager at a net salary of Kshs.90,000.00 per month.
4. The Claimant's further case is that she was posted at the Respondents office in Nairobi's Mombasa Road, where she served until her unlawful dismissal. Her performance was blemish free.
5. The Claimant pleads and avers that despite her ceaselessly serving the Respondent faithfully and diligently over the period of her employment, the Respondent through its' General Manager, engaged in unfair labour practices to the detriment of the Claimant as pleaded hereunder;
 - a. Purporting to terminate the employment of the claimant on account without following due process as laid down in law.
 - b. Terminating the employment of the claimant while in breach of the mandatory requirement to inform the Claimant of the intention or reason in writing and within the prescribed period.



- c. Subjecting the Claimant to unfavourable and harsh working conditions and environment.
 - d. severally, the General Manager of the Respondent openly verbally confronted the Claimant for no apparent reason, demeaning the Claimant's integrity and that of his job;
 - a. Refusing to issue the claimant with her monthly pay slips and proof of statutory deduction.
 - b. Failure to issue the claimant with an employment contract.
 - c) Withholding the Claimant Salary.
6. She challenges her unfair and unlawful dismissal by the Respondent for the following reasons:
- a. Purporting to terminate the employment of the claimant on account downsizing without following due process as laid down in law.
 - b. Terminating the employment of the claimant while in breach of the mandatory requirement to inform the Clamant of the intention to downsize in writing and within the prescribed period.
 - c. Refusing and/or neglecting to issue the Claimant with a certificate of service violates section 51 of the *Employment Act*.
 - d. Failing to pay the Claimant his terminal dues as provided for under the law is unlawful withholding of the Claimant's terminal dues.
7. The claimant's penultimate case is that by letters dated 3rd July 2019, the Claimant through his advocates brought to the attention of the Respondent the unfair labour practices as pleaded and averred in the preceding paragraphs and demanded redress to them, of which the Respondent completely ignored, neglected and/or refused to address.
8. She prays thus;
- a. A declaration that the Respondent's conduct in handling the Claimant during the pendency of his employment period amounted to unfair and unlawful dismissal and in breach of the *Employment Act* and principles of employment law.
 - b. Damages for unfair and constructive dismissal from employment equivalent to twelve (12) months gross salary totalling to Kshs.1,080,000/= with interest thereon at court rates from the date of Award until payment thereof in full.
 - c. A declaration that the withholding of the Claimant's terminal dues is unlawful, illegal and void ab initio.
 - d. Payment for pending off days.
 - e. Payment for accrued leave days.
 - f. Payment for one month salary in lieu of notice.
 - g. Pending salary for the 21 days worked.
 - h. Certificate of service.
 - i. Costs of the suit plus interest thereon from the date of Award.
 - j. Any other relief that this Honourable court may deem fit and just to grant in the circumstances.



9. The Respondent's case is that the claimant's contract of service was terminated for non-performance. Besides, the claimant was on probation by the time of termination. This therefore was lawful termination and in tandem with *Employment Act*, 2007.
10. Further, the Claimant avers that the Respondent's conduct through its' and the said General Manager was so grave and unreasonable that it constituted a repudiatory breach of the terms of the employment as per the said letter of appointment and the employment laws.
11. The Respondent further case is that the Claimant was not issued with contract of employment because according to appointment letter this was intended to be issued upon successful completion of probation period. She faltered on this and therefore was not due a letter for a contract of employment as Sales & Client Service Manager.
 1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Claimant is entitled to the relief sought.
 3. Who bears the costs of this suit.
12. The 1st issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant submits a case of unlawful termination of employment whereas the Respondent opposes the same.
13. The Claimant's case and submissions is that poor/non-performance is deemed as the unsatisfactory job performed and the employee's actual performance, a gap between the employee's actual performance and the level of performance required by the employer. Poor performance cannot be dealt with through just one evaluation. Instead: It involves the planning of work by an employer; Setting of expectations; Continued monitoring of performance; Building on the employees' capacity to perform; Periodically rating the performance; Rewarding good performance.
14. Further as regards performance standards, the same must be: Reasonable; Understandable; Verifiable; Measurable; Equitable; Achievable. The standards once set, must be clear to the employee if he is to be held accountable and responsible for non-attainment of the standards as was held in *Maina Mwangi vs. Thika Coffee Mills Ltd*, ELRC NO. 2177/2012 (Rika J.)
15. It is he further submission that the Respondent Company has not tendered any evidence in Court to show that the Claimant was subjected to the any alleged evaluation if any that would establish and show that the Claimant's performance was below standards.
16. The Claimant penultimate seeks to rely on authority of *Jane Samba Mulala v Ol ukai Lodge limited* Industrial Cause Number 823 of 2010; [2010] LLR 255 (ICK) where the court observed as follows
 - a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. 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.
 - b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will



not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
 - d. In the even a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.
17. The Claimant further seeks to associate with provisions of Section 41 of the *Employment Act* provides;
- (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.
18. She discounts and disagree with the Respondents submissions and reliance on the authority of Joseph Wachira Kimani v Dataguard Distributors Limited [2017] eKLR where the court made findings as follows;

“It is not in dispute that at the time of the termination, the claimant was on a probationary service. Section 42 of the *Employment Act*, 2007 provides for termination of probationary contracts of service as follows:

- 1). The provisions of section 41 shall not apply where a termination of employment terminates probationary contract.
- 2). A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employees.
- 3). No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).
- 4). A party to a contract for a probationary period may terminate the contract by giving not less than seven day’s notice of termination of the contract, or by payment, by the employer to the employee, of seven days’ wages in lieu of notice. The claimant received the termination and notice of termination letter on the midnight of 24.05.2016 by email and to the effect that the contract of service would terminate effective 01.06.2016. the court returns that the termination notice was issued per section 42 (4) of the Act and in absence of better terms of service or agreement providing for a longer period for a termination notice of the probationary service, the court returns that the



respondent complied with the minimum statutory provision. Accordingly, the termination was not unfair. As submitted and as held by Rika J in *Danish Jalang'o and Another –Versus- Amicabre Travel Services Limited* [2014] eKLR

employers have no obligation to hear employees who are serving probation for any reasons stated under section 41 of the Act on account of poor performance, misconduct, or physical incapacity prior to terminating the contract of probationary service.”

19. It is her case that this position in law has been overtaken by events and the exemption of section 42(1) of the *Employment Act*, 2007 is now bad law. And this wished to rely on authority of *Janet Nyandiko versus Kenya Commercial Bank Limited* [2017] eKLR where this court expressed itself as follows, and which was cited with approval by the Court of Appeal in the case of *National Bank of Kenya V Anthony Njue John* [2019] eKLR, thus;

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity of explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.

20. In the circumstances of this case;The Claimant was never accorded due process before termination.She was neither issued with a Notice to Show Cause nor invited to any disciplinary hearing.She was never awarded an opportunity to appear for hearing in the company of an employee of her choice or a union official.
21. The termination of employment for the Claimant was therefore wrongful, unfair and unlawful.
22. The Respondent’s case and submission is that section 42 of *Employment Act*, 2007 ousts the provision of section 41 of *Employment Act*, 2007. On this she seeks to rely on the authority of *Kelvin Gitonga Kinyua v Kenya Methodist University* [2021] eKLR and *Joan Muthoni Mathiu versus Mastermind Tobacco (K) Ltd.* [2018] eKLR which established the position of termination of contract during probation. The difference is that in the case of *Kelvin Gitonga Kinyua* above, the circumstances and particulars of the case were different from what we have today. The Respondent very initially had through investigation established matters that were detrimental to the continued employment of the Claimant.
23. Again, the constitutional probation on the merits of section 42 of *Employment Act*, 2007 has changed and this does not carry any merit any more. The provision of section 41 are now applicable in all stages of employment, probation included.
24. In the circumstances the Claimant’s case overwhelmed that of Respondent. There were anomalies in the termination of the employment of the Claimant. It did not meet the legal threshold for lawful termination of employment. I therefore find a case of unlawful termination and hold as such.
25. The 2nd issue for determination whether the Claimant is entitled to the relief sought. She is. Having succeeded on a case of unlawful termination of employment, she becomes entitle to the relief sought.
26. I am therefore inclined to allow the claim and order relief as follows;



- i. A declaration is hereby issued that the termination of the employment of Claimant by the Respondent during probation amounted to unfair and unlawful termination of employment.
- ii. One (1) months salary in lieu of noticeKshs90,000.00.
- iii. Two (2) months salary for unlawful termination of employment Kshs.180,000.00.
Total of claimKshs.270,000.00
- iv. The costs of this cause shall be borne by the Respondent.

DELIVERED, DATED AND SIGNED THIS 22ND DAY OF NOVEMBER 2023.

D. K. NJAGI MARETE

JUDGE

Appearances:

Mr Ochieng holding brief for Ogeta instructed by Ogeta Oluoch & Co. Advocates for the Claimant.

Miss Omanyia instructed by Conrand Molaba & Associates for the Respondent.

