



**Muganduka v Emmerging Ecomm Ventures INC Limited (Cause E017 of 2023) [2023] KEELRC 3071 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3071 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E017 OF 2023  
M MBARÚ, J  
NOVEMBER 16, 2023**

**BETWEEN**

**VENESSA MUGANDUKA ..... CLAIMANT**

**AND**

**EMMERGING ECOMM VENTURES INC LIMITED ..... RESPONDENT**

**JUDGMENT**

1. On 1<sup>st</sup> November 2022, the respondent employed the claimant as the retail lead – Nairobi and Coast region. The claimant worked until 3 March 2023 when her employment was terminated. At the time she was earning Kshs. 110,000 per month.
2. The claim is that there was wrongful and unfair termination of employment. There was no notice, hearing or reasons given leading to termination of employment.
3. The claimant is seeking the following terminal dues;
  - a. One-month notice pay Ksh110,000;
  - b. Unpaid salary for February 2023 Kshs. 110,000;
  - c. 3 days for March 2023 Kshs. 11,000;
  - d. Compensation of unfair termination of employment Kshs. 1,320,000;
  - e. Unpaid incentives for November 2022 Kshs. 40,000;
  - f. Certificate of service;
  - g. Costs and interests.
4. The claimant testified that her first employment with the respondent was on a contract of 3 months in operations which was renewed to the position of lead retail, Nairobi. The initial contract expired on



- 30 September 2022 and a new contract was signed with the human resource, Marceline and sent via email. She was not given a hard copy but she continued to perform her duties as per the contract and received due salaries. Her duties required operations between Nairobi and Coast regions.
5. Upon termination of employment, the respondent offered to pay for February and March 2023. The CEO offered to pay incentives for November 2022 at Kshs. 40,000 and based on this formula this is due.
  6. The claimant testified that on 1<sup>st</sup> March 2023 Shahzard sent her notice termination employment whereas the contract was ending on 30 September 2023. He was not the human resource and no certificate of service was issued.
  7. The first contract was based on probation and it ended and then renewed. There was unfair termination of employment since the last contract had not lapsed. No reasons were given for termination.
  8. There was no response filed to the claim.
  9. The respondent submitted that the claimant's employment was not confirmed after probation. The first contract ended on 30 September 2022, and she continued working until October 2022 without a contract until February 2023 when employment was terminated. The respondent then considered her contract to be on a month to month employment under the general provisions of Section 9 of the *Employment Act* as held in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR. without a signed contract, the claimant worked for 4 months and the contract was lawfully terminated and the claims made should be dismissed with costs.

### **Determination**

10. The issues which emerge for determination are the nature of employment between the parties and whether the remedies sought should issue.
11. Without any response by the respondent of filing of any work records are required under Section 10(6) and (7) of the *Employment Act*, 2007 (the Act), the court is left with the evidence of the claimant only.
12. It is not contested that the claimant had the contract dated 20 June 2022 running from 11 July to 11 October 2022 a period of 3 months. this contract started and ended on its terms.
13. It is the claimant's case that in October 2022 she was assigned the duties of a trainer but had no contract. There were negotiations for a contract and in November 2022 a contract was issued which she signed and delivered to the human resource manager which was retained and no copy was issued to her but her salary changed from Kshs. 70,000 to Kshs. 110,000 from November 2022 based on the new contract as negotiated.
14. Through notice dated 28 February 2023, the respondent issued the claimant with notice to terminate her employment with effect from 30 March 2023 on the reasons that a decision had been taken not to renew her contract. They gave the claimant the option of not reporting to the office upon this notice.
15. Indeed, the claimant testified in court that upon returning the signed contract, she was not issued with a copy thereof by the respondent. There is no contract of employment covering the period of November 2022 to March 2023.
16. Without any written contract, the claimant became covered under the provisions of Section 8 of the *Act* read together with Section 37 thereof. An employee who is employed under an oral contract or under employment without any written contract for period of over 24 hours one month and continues



- to undertake duties that are not completed in that time is protected under the Act with rights and benefits therein. Before termination of employment, the employee should be taken through the due process, issued with notice and given reasons leading to termination of employment.
17. Although the respondent issued notice dated 18 February 2023 to take effect on 30 March 2023 and offered the claimant not to report for work, the pay for such period is due. Employment terminated on 30 March 2023 and hence the salary for March 2023 is due.
  18. No reason is given for termination of employment as required under Section 43 and 45 of the Act. The motions of Section 41 of the Act were also not gone into with regard to any matter of misconduct, performance or capacity which are imperative to address before employment is terminated.
  19. The essence of employment is to ensure that before termination of employment the rights of each party are protected. It is not sufficient that the employer no longer requires the services of the employee. The due process requires notice with given reasons leading to termination of employment and failure to which, the result in unfair termination of employment.
  20. This is the import of Section 41(1) of the Act that 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. Without the due process, termination of employment was unfair.
  21. In the case of Jane Wairimu Machira v Mugo Waweru & Associates [2012] eKLR the court held that the proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give an employee an opportunity to improve over a reasonable length of time. Reason(s) leading to the decision to terminate employment must be given. This is what is defined as fair procedures as held in the case of Walter Onuro Ogal v Teachers Service Commission.
  22. For the unfair termination of employment, the claimant worked from November 2022 to March 2023, notice issued before employment terminated and one-month compensation is hereby found appropriate all at Kshs. 110,000.
  23. Notice issued and cannot be claimed. The respondent allowed the claimant not to report to work during this period. However, the salary for that month is due all at Kshs. 110,000 together with salary for February 2023, if not paid.
  24. On the claim for unpaid incentives in November 2022, without a contract giving such a benefit, the application of Section 8 and 37 of the Act do not allocate the same.
  25. A certificate of service should issue at the end of employment.
  26. On costs, these are discretionary in terms of Section 12(4) of the Employment and Labour Relations Court Act, 2011 and the claimant has been awarded her terminal dues as above outlined and hence each party to bear own costs.
  27. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
    - a. Compensation for unfair termination of employment Kshs. 110,000;
    - b. Pay for February and March 2023, if this has not been paid Kshs. 110,000 each;
    - c. Certificate of service shall be issued in terms of Section 51 of the Employment Act, 2007;



d. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 16TH DAY OF NOVEMBER 2023.**

**M. MBARŪ**

**JUDGE**

