



**Wasike v Nzoia Sugar Company Limited (Cause 90 of 2017)
[2022] KEELRC 61 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 61 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 90 OF 2017**

**JW KELI, J
MAY 19, 2022**

**BETWEEN
CHRISTOPHER MUNG'OMA WASIKE CLAIMANT
AND
NZOIA SUGAR COMPANY LIMITED RESPONDENT**

JUDGMENT

Issues in Dispute

unlawful/unfair termination of claimant

1. The Claimant brought the suit dated June 23, 2016 upon termination of his employment contract by the Respondent on grounds of unsatisfactory performance seeking the following reliefs:-
 - a. A declaration that the termination of the Claimant was both unfair and in breach of mandatory proceedings and process of the Constitution of Kenya, Employment Act and the Respondent's disciplinary proceedings.
 - b. General damages equivalent to twelve months based on the gross pay as at the time of termination
 - c. Reinstatement of Employment in similar capacity under prevailing terms.
 - d. A declaration that the termination of the Claimant by the Respondent was unlawful
2. The Claimant in addition filed list of documents dated 23rd June 2016 and the bundle of documents.
3. The Respondent entered appearance through the law firm of J. O. Makali & Company Advocates and filed response to the statement of Claim dated August 9, 2016 and list of documents dated August 9, 2016 marked 1 to 14.



4. The Claimant in addition filed supplementary list of documents dated August 26, 2016 and annexed the said documents being various newspaper advertisements by the Respondent.
5. The Respondent filed witness statement of Benson Kwatenge signed and dated September 25, 2017.
6. On June 26, 2018, the court received Claimant's undated additional list of documents together with the bundle documents paginated 4 to 32. There was notice of change of advocates for Claimant to Liko & Anam Advocates dated January 16, 2018.
7. On the November 8, 2021 the Court received a further witness statement of the Respondent witness Brian Keya dated October 25, 2021.

The Hearing

The claimant's case

8. The claimant's case was heard by Justice Nduma on the 25th March 2019 with the Claimant as only witness of fact. He testified on oath and was cross examined. He also produced his documents.

Evidence of claimant during cross examination.

9. The Claimant told the court he was sacked on ground of unsatisfactory performance during probation and that he was paid for days worked and one month's salary in lieu of notice and in lieu of leave claims, travelling allowances equivalent to basic salary and pension dues.
10. CW on being asked what had not been paid he said the matter in court was different . He got a notice to show cause . He responded to the notice. Probation was subject to appraisal. He got show cause letter before end of probation period on October 5, 2015 he received a warning letter which was before end of probation period and pursuant to the show cause letter. The company had discretion to extend his probation, they did not do so. He was never confirmed but as per Human Resource Manual he was good as permanent. The Board Committee never met to appraise him. Time had lapsed hence not seeking reinstatement. His name was put on newspapers so he cannot get another job as issue is raised whenever he is called to interview. On whether he had Diploma in supplies Management he said he had done course work and not concluded project work. On authentication of his Degree from Malaysia Limpqogin University by employer , the Claimant said he produced all the information they needed. He denied he was sacked justly. The Claimnant told the court there was audit, that he invited the auditors, information of tender and quotation from CS was there but the period he was employed it happened once during his time and he intervened to stop the payment.

The Respondent's Case

11. This court heard the Respondent's case on December 8, 2021. RWI (Brian Keya) was a witness of fact for Respondent . He adopted his statement dated October 25, 2021 as his evidence in chief. Produced list of documents dated August 9, 2016, marked as exhibits No.1 to 14.
12. During cross examination, RWI told the court he had been in employment of the Respondent for 24 years, that he had undergone disciplinary proceedings as an employee on reason of lateness and not for being drunk. RWI confirmed that the Claimant had been appointed as a purchasing Manager (page 13 of claimant's bundle of documents), he added that Claimant was also head of department. The probation period under Clause 6 of the Appointment letter was 6 months. RW1 confirmed in his experience probation can only be extended for further 6 months and probation should not be extended for more than 6 months.



13. That at time of termination of the employment, the Claimant had served from March 11, 2015 to June 17, 2016. RWI agreed that as per the law the Claimant was not on probation as at time of termination . RWI agreed that as per Clause 17 of the letter of appointment that deals with retirement benefits scheme pensionary applies after confirmation of employment. Clause 1.1.6 of the Staff Procedure Manuals (page 26 of Claimant’s bundle) deals with permanent staff to extend what one is eligible if they have confirmation letter The termination of service letter addressed pension dues. RWI agreed that based on the termination letter the Claimant was a permanent basis employee entitled to pension.
14. RWI told the court as at time of termination the Claimant was not on pension. That he was treated as a permanent employee because of his seniority in employment. RWI told the court Clause 1.14 (page 25 of Claimant’s documents) dealt with pension. RWI said it was the Managing Director who decides to extend the probation period. Under Clause 1.14 (a) of the Manual the Human Resource Advisory Committee can advise on the probation, the composition of the committee is broad (page 60 of claimant’s bundle). Clause 8.5 is an disciplinary procedure. RW1 confirmed he was not aware of records of disciplinary committee on the Claimant.
15. RW1 told the court that the termination letter was issued after the probation period and talks of performance during the probation period. RWI was not aware that the Claimant was on performance contracting. (Clause 9.2.7). RWI confirmed he had documents that during the period the Claimant was put under performance review. RWI confirmed Claimant had received a number of workings and one of May 16, 2016 was issued after the probation period but he was still on probation. Under the manual, staff is entitled to 3 warnings before dismissal. RW1 said there was an exception under Clause 8.2.3.4. Claimant had not been issued with final or 3rd warning. Letter of termination refers to a meeting and no show cause letter is issued on the offence. Claimant responded to the show cause letter dated August 31, 2013 on insubordination vide letter dated September 2, 2015. RW1 confirmed that the letters to suppliers by confirm procurement was above board(pages 110-111 and pages 87 and 103 of the bundle of documents by Claimant.)
16. RW1 agreed letter of response by Claimant of 22nd April 2016 in response to memo was of March 3, 2013 was detailed and Claimant made a number of recommendations (page 137 of the Claimant’s bundle). The said Memo had said Claimant used abusive language. RW1 confirmed there was no report but internal Memo (page 113-116). RW1 was asked to read paragraph 21(B) of his witness statement. He confirmed that in internal Memo dated 24th May 2016 from Claimant to MD, the Claimant told the MD the law prohibits appointment of another valuation committee. (at page 142 of the Claimant’s Bundle of documents) The said memo by MD seeking to stop the procurement did not disclose the complainants.
17. RW1 confirmed that the said MD is facing anti-corruption Case No. 1 of 2017 at Bungoma Law Courts. He is charged with together with Benson Khwatenge Wafula who was the CS and was to testify in this case.
18. RWI said the company does not produce white sugar and that he was not conversant with the white sugar issue. RWI was aware of the query of the Claimant’s qualifications. Clause 1-3 of the staff Manual (Page 22 claimant’s bundle documents)would apply to the Claimant.
19. RWI confirmed applications are to the MD and HR analyses, the Board shortlisted and set interview date. The Claimant had been on employment before at G4S, he was aware that on December 1, 2007 to 31st October 2010 the Claimant was a Procurement Manager at Tata Magadi , that the Claimant was a member of Kenya Institute of Supplies Management. RWI stated that as Human Resource



they do background checks procedurally in response to the accusation that the question of academic qualifications was after thought to already made decision to get rid of Claimant.

20. During re exam RW1 repeated that at time of termination the Claimant was on termination, they exercised dismissal under clause 8.2.3.4 of the Human Resources Manual of the Respondent hence no hearing conducted before dismissal, the internal memo report is backed by attached documents(pages 117 to 119 of the claimant's bundle) Court notes the said printouts are not signed by the author.

Final Submissions.

21. The court gave directions for the parties to file and serve written submissions after hearing. The court extended time for parties to file their final submissions to March 15, 2022 when both parties were absent and had not filed submissions. The Court gave judgment date.

Determination

Issues for determination

22. The Claimant had identified issues in its claim to be
- a. Breach of express provisions of *Constitution* and *Employment Act*.
 - b. Unlawful/unfair termination of the Claimant.
 - c. Breach of express and implied terms of employment
 - d. Reinstatement of the Claimant
 - e. Damages for loss of employment and future earnings

The Respondent did not file list of issues for determination.

23. The court having considered the case by both parties it has considered in dispute and placed by the parties for consideration by court and determination of the dispute are as follows:-
- a. Whether the claimant at time of termination of employment was on probationary terms of service.
 - b. Whether the termination was lawful and fair
 - c. Whether the Claimant is entitled to reliefs sought.

Whether the Claimant at time of termination of employment was on probationary terms of service.

24. The Respondent's letter dated June 17, 2016 addressed to the Claimant and titled "Termination of service" states: 'Please note that your case was presented for confirmation before the 223rd Board of the Directors meeting held on June 17, 2016 which declined to confirm you and instead terminated your services of employment for the reason that your performance during the probation period has not been satisfactory'. It is apparent for the said letter the Claimant had not been confirmed to employment as per said letter and employer treated him as if still on probation.
25. RWI confirmed that the Claimant as at time of termination had served from 11th March 2015 to date of termination of June 17, 2016. RWI worked in the Human resources department of the Respondent, confirmed as per the law the Claimant was not on probation as at time of termination.



26. Section 42 (2) of the *Employment Act* reads “ a probationary period shall not be more than six months but it may be extended for a further period of not more than 6 months with agreement of the employment”. Further Section 42(3) reads “ No employer shall employ an employee under probationary contract for more than the aggregate period provided under subsection 2”.
27. The limit of probationary period with the Claimant whose contract of service had provided for 6 months probation is on March 12, 2016. He was issued with termination of services letter dated June 17, 2016. The court finds and determines as at June 17, 2016 the probationary contract of service had converted automatic to confirmation into employment of the Respondent.
28. The court finds that the Claimant’s contract of service having automatically been confirmed on lapse of aggregate period of 12 months as at March 12, 2016 he is henceforth entitled to all benefits of the confirmed employees under the law and under the terms of service of the Respondent.

Whether the termination was lawful and fair

29. Section 43 of the *Employment Act* places the burden of proof of the validity of reasons of termination of employment contract on the employer as follows:-

“ 43(1) in any claim arising out of termination of 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”.

Section 43 (2) of the Act reads “ the 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”.

30. Section 45 of the *Employment Act* reads; -
 - i. No employer shall terminate the employment of employee unfairly.
 - ii. A termination of employment by an employer is unfair if the employer fails to prove :-
 - a. That the reason or the termination is a fair reason.
 - b. The reason for the termination is a fair reason –
 - i. Related to the employee’s conduct, capacity and compatibility.
 - ii. Based on the operation requirements of the employer
 - c. That the employment was terminated in accordance with fair procedure 45 (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. The Claimant having served continuously for more than 13 months has a right to complain of unfair termination.



31. Section 45 (5) of the *Employment Act* provides “ In deciding whether it was just and equitable for an employer to terminate the employment of the employee. Consider: -
- a. The procedure adopted in reaching decision to dismiss the employee, the communication of the decision to the employee on any appeal against the decision.
 - b. The conduct and capability of the employee upto the date of termination
 - c. The extent to which the employer has complied with any statutory requirement connected with the termination including issuance of certificate of service and procedural requirements under Section 41.
 - d. Previous practice of the employer in dealing with the type of circumstances which led to the termination.
 - e. Existence of any previous warning letters issued to the employee”.
32. Section 41 of the *Employment Act* provides for the procedure to be complied with by an employer who is contemplating termination of the employment contract of an employee or grounds of misconduct, poor performance or physical incapacity. The employer should explain to employee in language he understands the reason the employer is considering termination, the employee shall be entitled to have another employee or shop floor Union representative of his choice present during this explanation.
33. Applying the foregoing outlined provisions of the *Employment Act* , the court proceeds to consider whether the termination of the Claimant’s service was lawful and fair on 2 levels:-
- a. Where the reasons for termination were valid and justified.
 - b. Whether the procedure before termination was fair

Whether the reason for termination were valid and justified.

34. The letter of termination of the employment by the Respondent dated June 17, 2016 states that the Board terminated the Claimant’s services of employment for reason that his performance during the period of probation was unsatisfactory. RWI agreed that there was no appraisal report on the performance of the Claimant. RWI admitted that the termination referred to the performance probation period which the court found ended on or about March 12, 2016 and termination was on June 17, 2016. RWI relied on the internal memo of March 3, 2016 from the Chief Internal Auditor to the Managing Director titled ‘Abnormal Procurement Activities’. Paragraph 1 of the said Memo states that the exercise was carried out in the month of February 2016 following the discussion with the Managing director and an observation by procurement Manager on a suppliers amount which had been inflated. That it was also a follow up on the recommendations made on activities of the department after ad hoc audit on irregular activities in the Nzoia Supply Chain dated February 25, 2015.
35. RWI said there was no hearing because dismissal was under Clause 8.23.4 where cases of gross misconduct will compel management to make a decision without referring to the disciplinary procedure. The court finds and determines that the said Clause 8.2.3.4 of the manual is contrary to Section 45 and 41 of the *Employment Act*. Every termination of Employment must comply with the law on procedural fairness.



36. The court finds that for termination on ground of poor performance of an employee to be valid, the same must be justified with a clear criteria applied to conclude poor performance by the employee. There was no appraisal report of the Claimant presented to the court or any other criteria. The court finds that the internal memo cannot amount to evaluation of performance as it also refers to an ad hoc audit report of February 24, 2015 before the employment of the Claimant and also it is not specific to the Claimant's performance.

Proof of poor performance was addressed in a decision cited with approval by the Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR and *Jane Samba Mukala v O1 Tukai Lodge Limited* Industrial Cause Number 823 of 2010 LLR 255 (ICK) (September 2013) where the court held as follows:-

- a. Where poor performance is shown to be reason for termination, the employer is placed at high level of proofThe employer must show that in arriving at the decision of noting the poor performance as against poor performance, 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 that measures are in place to enable them assess the 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 the decision must be established.
- c. Beyond having such an evaluation measure and before termination on the ground of proper performance, an employee must be called and explanation on their poor performance share where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons of poor performance the employee must be called again and in the presence of an employee of their choice, the reasons or termination shared with the employee”.

37. The above decision was upheld by the court of Appeal as the correct procedure on termination on grounds of poor performance. In dismissing the appeal(Supra) , the court of Appeal stated, “we find no fault on the Judge’s finding that an appraisal ought to have been conducted on the Respondent’s performance in 2014 to confirm whether the Respondent had improved on his performance rating before termination of his employment and that in the absence of such proof termination of the Respondent’s employment with the Bank was unfair.” The court finds the foregoing to be proper law in dismissal on ground of performance and upholds the decision by the Court of Appeal.

38. The burden of proof of the reasons for termination of employment contract lies with the employer. The court finds the issues of existence of academic certificates was not stated under the letter of termination hence irrelevant for purposes of Section 43 of the *Employment Act*. In the instant case the employer has failed to prove the reasons for termination of the services of the Claimant on ground of poor performance as stated in the letter of termination of services. Poor performance was the disclosed reason for the termination of the contract not the certificates. The Court finds that the Respondent’s decision of dismissing the Claimant for poor performance falls short of the court of Appeal (Supra) interpretation of the law. Consequently the court finds and determines the termination was unlawful for lack of valid reasons.



Whether the procedure for termination was fair.

39. RW admitted that the Claimant was not invited for disciplinary proceedings before the termination. This is also evident from the letter of termination. The court finds and determines there was no compliance with the procedural requirements of Section 41 of the Employment Act before termination of services of the Claimant, with the Respondent. The court finds that section 41 of the employment act is couched in mandatory terms and cannot be ousted by the employer's human resources manual or any other document as indicated by RW that the disciplinary procedure was not followed as clause 8.2.3.4 of the manual allows management to summarily dismiss on account of fraud or gross misconduct. The court in conclusion finds and determines that the termination of the employment services of the Claimant was unlawful and unfair.

Whether the Claimant is entitled to reliefs sought

40. The court declares that the termination of the Employment Services of the Claimant by the Respondent was unlawful and unfair. The court the considers the remedies under section 49 of the employment act on reliefs sought.

Compensation pay

41. Section 49 (1) (c) of the employment act provides remedy of equivalent of a number of months wages or salary not exceeding 12 months wage or salary of the employee at time of dismissal which is found unfair. Section 49 (4) provides for the factors the court should take into consideration and the relevant ones to the instant case to the compensation are:-

- “(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination”.
- (c) The employees length of service.
- (d) The reasonable expectation of the employee as to the length of time for which his employment with that of employer might have continued but from the termination,
- (e) The opportunities available to the employee for securing a comparable or suitable employment with another employer.”

42. The court found that the Claimant had completed his lawful probation period of 1 years and served for extra 3 months hence reasonable expectation he was serving under permanent terms basis. The court held there were no valid or justified reasons for termination of services. The Claimant told the court he was unable to get work due to publications on him by the Respondent in newspapers (Claimant's supplementary list of documents dated August 26, 2016). The Claimant produced exhibits of the adverts placed in the standard newspaper dated June 30, 2016, Daily Nation dated June 29, 2016 and standard Newspaper dated June 28, 2016. The advert in Daily Nation Newspaper of June 29, 2016 is titled “ Public Notice”. Christopher Mung'oma Wasike to effect that he had ceased to be an employee of the Responded with effect from June 15, 2016. Therefore he is not authorized to transact any business on behalf of the Respondent . The company shall not accept liability arising from his action. The date of ceasing employment was corrected in subsequent advert of 30th June Daily Nation to read June 17, 2016. In all the Claimant's photographs was placed.



43. The Claimant told the court these adverts created a negative perception on his reputation which came up in all subsequent interviews hence he remains unemployed.
44. The court is persuaded that the said adverts may have affected negatively the future chances of employment of the Claimant. The Respondent during the hearing did not justify why it did the adverts considering the reasons given for termination of services. During the probation period the claimant was issued with 2 warning letters which he gave evidence of having responded to with detailed reasons and recommendations and no further action was taken by the Respondent. The court considered that the employer was satisfied with the response.
45. Considering all the foregoing the court finds that this a case that deserves maximum compensation of 12 months under Section 49 (1) (c) of the *Employment Act*. This is an employee who had previously worked in credible organizations and may never be employed again and this party due to conduct of the Respondent. In placing the unjustified adverts the court the Respondent negatively affected the future career service of the Claimant. There was no valid reason for the termination and no procedural fairness. The Court finds and determines that the Claimant is entitled to compensation equivalent of 12 months last gross salary at amount of kshs.371,449.00 (March 2016 pay slip page 30, Claimants documents relied in court on 26th June 2018).

Thus 317,449.00x12 months total award sum of kshs. 4,457,388/-. The award is subject to statutory deductions.

Conclusion and Disposal

46. Judgment is entered for claimant against the Respondent as follows:-
- a. A declaration is hereby made that the termination of the Claimant's employment contract by the Respondent was unlawful and unfair.
 - b. The Respondent to pay the Claimant compensation for unfair and unlawful termination for the sum equivalent of 12 months of last gross monthly salary of kshs. 371,449.00. Total compensation awarded at total sum of kshs.4,457,388/- to be paid subject to statutory deductions.
 - c. Interest awarded on the sum (b) at court rates from date of Judgement until payment in full.
 - d. The Respondent to pay costs of the suit.

JUDGEMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF MAY 2022 IN OPEN COURT.

J. W KELI

JUDGE.

In the presence of:-

Court Assistant : Brenda Wesonga

For Claimant: In person

For Respondent: Mr. Murunga

