



**Aluoch v Plan International Kenya Limited (Cause 1215 of 2017)  
[2022] KEELRC 12712 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12712 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1215 OF 2017  
M MBARŪ, J  
JUNE 30, 2022**

**BETWEEN**

**GILBERT ONYANGO ALUOCH ..... CLAIMANT**

**AND**

**PLAN INTERNATIONAL KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant is an adult male. The respondent is an international organisation having its registered offices in Kenya.
2. On February 1, 2016 the respondent employed the claimant under a fixed term contract as the Monitoring and Evaluation Advisor on its OVC-Nilinde project at a salary of Ksh 708, 655.46 per month.
3. On January 23, 2016 the respondent issued the claimant with a warning letter with various accusations.
4. On February 17, 2017 the respondent issued the claimant with a show cause notice and invited him to a disciplinary hearing but the claimant was not allowed to appear with his legal representative.
5. The claim is that In a letter dated March 17, 2017 the respondent terminated the claimant's employment without payment of notice or terminal dues which resulted in unfair termination of employment and he is claiming the following dues;
  - a) A declaration that employment terminated unfairly;
  - b) Payment of salary for March, 2017 Ksh 708,655.46;
  - c) Notice pay Ksh 708,655.46;
  - d) 12 months compensation Ksh 8,503,865.52;



- e) Breach of contract and payment for the remaining terms of 21 months Ksh 14,881,746.66; and
  - f) Costs of the suit.
6. The claimant testified in support of his claim that he previously worked for Danya International Kenya and when the parent organisation Danya International USA donated Danya International Kenya to Plan International USA in December, 2015 the employees thereof were asked to join the respondent and on 1<sup>st</sup> February, 2016 he was issued with a 3 years contract by the respondent as a Monitoring and Evaluation Advisor.
  6. The claimant was under the supervisor of the Chief of Party and their relations were not good. On January 26, 2017 while the claimant was in Mombasa he got a call from the human resource manager informing him that he had a letter and on February 6, 2017 when he returned to the office he found that this was a warning letter dated January 23, 2017. He did not have a chance to discuss the warning letter with the supervisor who had by then travelled to Mombasa who then sent him a harsh email prompting the claimant to lodge a complaint with the Deputy Country Director who offered to intervene but the supervisor declined to a meeting and that a meeting would only be held with human resource manager.
  7. The claimant also testified that he was surprised to be issued with a letter of suspension on February 17, 2017 and when he petitioned the Country Director, he was assured of a fair hearing and he responded to the allegations and attended hearing on March 13, 2017. He was ambushed with fresh allegations. There was a recording of the proceedings on tape but when he requested for a copy he was only issued with written proceedings which were at variance with what had actually happened.
  8. The claimant also testified that he objected to the disciplinary panel specifically the role of the accuser the Chief of Party and the role of the deputy who was still on probation and lack of objectivity. The claimant also raised the concern that there was lack of a professional monitoring and evaluation expert since the bulk of the accusations against him were technical in nature but the chair of the panel overruled him and that he could not appeal since the panel decision was final.
  9. On March 17, 2017 the claimant was dismissed from his employment which was unfair since there was no due process and this has caused him untold suffering since he was the sole bread winner for his family, he was been taking care of orphans and widows; he had a mortgage facility based on his salary and following the unfair termination of employment he was unable to service the same and the bank has issued demand for payment.
  10. The claimant also testified that following a staff meeting on December 18, 2016 he was issued with a first warning letter on January 23, 2017 and later he was issued with a show cause notice on allegations which had no basis. He was invited to a hearing and did not know he had a right to bring another witness and his witness he had been rejected by the respondent. The hearing was on March 13, 2017 and he was in attendance and he responded to the entire allegation made.

## **Response**

11. In response, the respondent's case is that on February 1, 2016 the claimant was employed under a 35 months contract which was summarily terminated on March 17, 2017 on grounds of gross misconduct.
12. The respondent is an international organisation committed to promoting child rights. The claimant was employed as a monitoring and evaluation advisor of Nilinde project and which employment was subject to terms and conditions thereof and the respondent's human resources policy and procedures manual and the law.



13. In December, 2016 the claimant was subjected to a disciplinary process as a result of complaints made against him of intimidation, bullying and non-physical assault against fellow employees and subordinates which amounted to work place harassment; writing of unprofessional and harshly worded emails to fellow employees which resulted in acrimonious working environment for other workers and in breach of respondent's policies; and general unprofessional conduct that risked denting the respondent's image.
14. Following the disciplinary hearing, the claimant was issued with a last warning and advice that his employment would be terminated in the event of any other complaints made within 12 months.
15. Barely two months later, the claimant was subjected to another disciplinary hearing on the complaints that he failed to implement and operationalize key strategies for the respondent's programmes which amounted to failure to follow and obey lawful command and required under his employment; there was failure to provide management oversight and supervision which led to the respondent suffering a loss of Ksh 4,962,500; and intimidation of fellow workers and failure to undertake team-building and inclusivity.
16. For these reasons, a second disciplinary hearing was conducted and the claimant found to be in breach of the respondent's code of conduct and summary dismissal was justified.
17. During the disciplinary hearing, the claimant was treated fairly and allowed to make his defence and to bring a witness. There was a basis to the termination of employment. The claimant was subjected to performance appraisals and due to his worrying conduct, failure to act as per the job description and general refusal to comply with the organisational policies and code of conduct, the summary dismissal was justified. The claims made should be dismissed with costs.
18. In evidence the respondent called Grace Lintari the Senior Coordinator HR and who reiterated the filed response and that she did not work with the claimant since she joined the respondent after his employment terminated and her evidence is based on the records. The claimant had been taken through a disciplinary process before following complaints by fellow employees and a first warning issued. The matter had related to unprofessional conduct of the claimant.
19. The claimant then got verbal warnings and then notice to show cause dated January 23, 2017 and a hearing for his disciplinary case relating to his work performance which had also been raised in December, 2016 but there was no change. The appraisal period was June, 2016 to June, 2017 and a review was done between the supervisor and the claimant and there was underperformance and the issues the claimant faced were so gross and if allowed to work it would have affected the organisation reputation. Under section 44 of the *Employment Act*, the respondent found justification for summary dismissal on the grounds of poor performance of duty by the claimant. Being a senior officer, it was part of his duty to be of good work performance.
20. Lintari also testified that the claimant's employment terminated both due to his conduct and poor work performance. His final warning had not related to poor work performance. The disciplinary minutes were never signed but these are the valid records for the meeting. No witness was called to address any case of misconduct and the supervisor presented the case of poor performance.
21. At the close of the hearing, both parties agreed to file written submissions. Only the respondent complied.



## Determination

22. On the pleadings, evidence and written submissions put into account the issues which emerge for determination are whether there was unfair termination of employment and the reliefs sought justified.
23. In a letter dated March 17, 2017 the respondent dismissed the claimant from his employment on the grounds that;

... it was found you have conducted yourself in a manner that demonstrates professional negligence which has led to substantial additional resource allocations and a heightened risk of Nilinge failing to deliver donor expectations due to an unreliable M&E framework. Furthermore, the management complaints raised against you have been fully demonstrated, leading to Plan International's loss of confidence and trust in your ability to execute your role as the M & E Advisor on the Plan International Kenya Nilinge project.

The above falls under Act of Gross Misconduct according to the provisions of the Human Resources Policies and Procedures Manual Chapter 11, clause 11.5.4.

Conduct which brings the image of Plan International Kenya into disrepute and/or contravenes the general code of conduct Misrepresentation or behaving in a manner that can put Plan International Kenya name into disrepute. Employee knowingly fails to obey a lawful command which is within the scope of his duties, issued by a supervisor officer of Plan International Kenya.

24. For these reasons, the claimant was summarily dismissed from his employment with effect from March 17, 2017.
25. Where an employee is found in breach of the employment contract or is of gross misconduct, an employer is allowed the sanction of summary dismissal. In terms of section 44(4) of the *Employment Act*, 2007 (the Act) where an employee is absent from duty without permission, an employee is found intoxicated while at work, an employee wilfully neglects to perform any work which it was his duty to perform, an employee uses abusive or insulting language, an employee knowingly fails, or refuses, to obey a lawful and proper command or the employee commits a criminal act, the employer is justified to dismiss such an employee for a lawful cause.
26. The employer is further allowed, under its business operations and taking into account the unique circumstances at the shop floor to develop policy procedures and disciplinary measures in terms of section 12 of the *Act*. Such is to address the details necessary for the employees and to bring such matters to their attention to ensure compliance.

### 12. Statement on disciplinary rules

- (1) A statement under section 10 shall—
    - (a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;
    - (b) specify the person to whom the employee may apply—
      - (i) if dissatisfied with any disciplinary decision relating to the employee;
- and



- (ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and
  - (c) where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.
- 27. Therefore, other than the provisions of Section 44 of the Act, the employer is at liberty to apply the provisions of Section 12 of the Act.
- 28. In this regard, the respondent has in defence and in the evidence of Ms Lintari made reference to a Human Resources Policies and Procedures Manual. Such document and the rationale for its provisions is not filed pursuant to section 10(6) and (7) of the Act. as the employer relying on this record, the legal duty to produce was on the respondent.
- 29. The cited chapter 11 and clause 11.5.4 of the alleged Human Resources Policies and Procedures Manual, the rationale and import of it is not given attention.
- 30. The provisions of section 44 and 41 of the Act with regard to the alleged misconduct and gross misconduct shall apply.
- 31. Before the disciplinary panel, the claimant was accused of failure to implement and operationalize the M&E strategy for the Nilinde project, failure to provide management oversight, supportive supervisor and mentorship to Nilinde and M&E staff, lack of honesty and transparency in the performance of your duties, intimidation and failure in team-building abilities and inclusivity. Whereas the employer has the right to reorganise its business so as to achieve its objectives, where an employee is alleged to be of poor work performance and such matter results in disciplinary process, the provisions of section 41 of the Act apply.
- 32. Ms Lintari testified that the claimant was appraised by his supervisor and was due for a period of June, 2016 to June, 2017 to undertake his annual appraisal. Where the claimant performance his duties poorly within this period, the motions of Section 41 of the Act required that notice be issued and the claimant allowed addressing the alleged poor work performance.
- 33. The issue of poor work performance has been addressed by the court and the Court of Appeal and in the case of National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR the Court held that;
  - 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 event 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.
34. Before the respondent could cite the claimant for alleged poor work performance, an appraisal ought to have been conducted on him for the stated period of June, 2016 to anticipated June, 2017 to confirm whether he had improved from the date of employment on 1<sup>st</sup> February, 2016 compared to an objective performance rating before termination of his employment. therefore alleged poor work performance creates a duty and responsibility upon the employer too demonstrate the measures taken to support a poor performing employee before this can become a disciplinary matter.
35. The claimant was employed on February 1, 2016. Ms Lintari testified the performance appraisal was to commence on June, 2016. By March, 2017 when the disciplinary hearing was undertaken, the claimant was midway his performance tools. No policy document is produced on the support systems in place to ensure the claimant received support and he failed to address. See [\*Janet Nyandiko v Kenya Commercial Bank Limited\* \[2017\] eKLR;](#)

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 to 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.

36. In the absence of such proof of poor work performance in terms of Section 41 of the Act, termination of the claimant's employment with the respondent is hereby found unfair.
37. The claimant was also accused of misconduct. that he intimidated other employees had failed in team-building. Such are very subjective allegations and call for evidence.
38. Before the disciplinary panel, the case was that, on 14<sup>th</sup> November, 2016 one Alex Masibo sent an email to the claimant noting that he had been sending demeaning, nasty ad unprofessional emails on work related matters and copying colleagues especially his juniors. That the emails from the claimant demonstrated bullying, intimidation and workplace harassment.
39. The panel was told of the claimant's response to Alex Masibo that;

Dear Alex,

Please go ahead. It takes two to tango. I will keep on pointing unprofessional behaviours you exhibit if necessary. and also note that it is not only Gilbert. I wish you soul searched and checked your approach. Nut please, do whatever you deem fit. And stop copying me in emails that are annoying like the one where you behave as I know it all.

40. As noted above, complaints of this nature are subjective. in context are the offended employee and the circumstances of the emails exchanged. As of necessity, the motions of section 41 of the Act then called the respondent to address and ensure for completeness by call of the offended employee. In the absence



of any work place policy and procedures, I take it, on the provided panel proceedings and the outlined outcome deliberations; Alex Masibo was not before the panel to state his case.

41. The general allegations of bullying, nasty and unprofessional exchange of emails on the background that Alex Masibo had earlier on warned the claimant that;

... Otherwise, I will not accept; bashing, disrespect, and being demeaned through emails, directly and indirectly or in front of my colleagues & especially my direct reports.

I hope that his will come to an end. ...

On a separate mail, I will be forwarding the emails, I consider rather intimidating and unacceptable to HR. ...

42. The issue weighed objectively, both employees ought to have been summoned at the disciplinary panel. To have one in the absence of the other was to ignore the foundation of the allegations and deal without evidence from the subject employee and complainant, Alex Masibo.

43. Ultimately, whether the claimant was of misconduct or gross misconduct, the provisions of section 41(2) of the Act were mandatory. The respondent as the employer legally carried the duty to secure such rights;

(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.

44. The court reiterates the findings above, in the absence of such proof of misconduct based on an objective criterion in terms of section 41 of the Act, termination of the claimant's employment with the respondent is hereby found unfair.

45. Notice pay is due pursuant to section 35 of the Act at one month's gross salary at Ksh 708, 655.46.

46. Compensation is also due pursuant to section 45 and 49 of the Act and which provisions invite the court to look at the conduct of the employee prior to termination of employment and put this into account in assessing the compensation to be awarded. Section 45(5) (b) and (e) of the Act that;

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the court shall consider—

(a) ...

(b) the conduct and capability of the employee up to the date of termination;

(c) ...

(d) ...; and

(e) the existence of any previous warning letters issued to the employee

47. The claimant does not contest that he had a previous warning issued after a disciplinary process found him culpable of work place misconduct. such matter put into account, compensation is hereby assessed at one month's gross salary all at Ksh 708, 655.46.

48. The claimant is seeking payment for the full term of his contract. Employment terminated on March 17, 2017 and the same is found unfair and this has been addressed. To claim for work not done is not



found justified. In the case of *DK Njagi Marete v Teachers Service Commission* [2013] eKLR the court held that;

... the plaintiff was able bodied, intellectually and professionally well- endowed man, likely to find occupational engagement outside the defendant's employ. ... that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration. The claimant has moved on, and that he is serving as a Judge, attests to his sharp intellect, professionalism and high level of employability.

49. On the claim for payment of salary for march, 2017 the claimant is entitled to pay for 17 days worked until employment terminated at Ksh 401, 571 if such salary was not paid.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a. Compensation Kshs 708,655.46;
- b. Notice pay Ksh 708,655.46;
- c. Pay for 17 days worked in March, 2017 Ksh 401,571 where such salary has not been paid;
- d. Each party shall bear own costs.

**DELIVERED IN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Peter Kigotho

..... and .....

