



**Korir v Bunson Travel Services Limited (Cause 160 of 2018)
[2022] KEELRC 4134 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4134 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 160 OF 2018**

**M MBARÚ, J
JUNE 30, 2022**

BETWEEN

STELLA CHELANG'AT KORIR CLAIMANT

AND

BUNSON TRAVEL SERVICES LIMITED RESPONDENT

JUDGMENT

1. On May 17, 2016 the respondent offered the claimant employment in the position of sales and marketing executive and issued her with letter of employment. the claimant completed her probation period and was issued with letter dated November 25, 2016 on confirmation of her employment.
2. On August 2, 2017 the claimant was summoned for a meeting with the respondent's managing director and was informed that the respondent intended to change her contract to a service level agreement and would be paid a fixed retainer plus commissions. It was agreed that the respondent would draft the proposed contract for the claimant to review and execute. However, the claimant was issued with letter dated August 7, 2017 referenced "performance concerns" which falsely indicated that the performance issues outlined therein were discussed at the meeting held on August 2, 2017.
3. In a letter dated September 28, 2017 the claimant was notified of the termination of her employment with the company. Such action was unlawful and contrary to natural justice and contrary to section 41(1) of the *Employment Act* as the claimant was not given any explanation, there was no disciplinary hearing and there were no valid reasons.
4. The claimant is seeking for a declaration that her employment was unfairly terminated and payment of compensation at 12 months at Ksh1,020,000, issuance of a certificate of service and costs of the suit.
5. The claimant testified in support of her case that upon employment by the respondent she worked diligently as the sales and marketing executive. She was never assigned the role of a programme manager



as alleged by the respondent in the response. Her employment contract outlined her role and duties which were not changed.

6. The claimant testified that on August 2, 2017 she was out of the office for a meeting with the financial director when she was called back to the office by the managing director and operations directors who proposed that her employment contract be changed to a service level agreement on a retainer and payment of a commission. They were to draft the contract for her confirmation. The claimant wanted to review such contract before execution. Nothing was discussed about her work performance.
7. The claimant testified that she was surprised on August 7, 2017 to receive a letter referenced “performance concerns” which matter had never been discussed before. no explanation was given or any performance appraisal carried out to justify issuance of such letter.
8. The claimant consulted with the finance director on the matter and was advised to ignore the communication but on September 28, 2017 she was issued with letter terminating her employment on the grounds that business was not doing well. Her employment was terminated immediately. Such was unlawful and unfair as the due process was not followed and there was no reason to justify termination of employment.

Response

9. In response, the respondent’s case is that the claimant comprises of falsehoods and should be dismissed. during the tenure of her employment, the claimant was not faithful, diligent or professional and treated her duties with disdain and failed to meet her set targets. The claimant failed to meet client’s needs due to lack of attention to details while responding to tenders which resulted in details in the submissions of the same, inadequate communication with her line manager with regards to attending client meetings, and not updating management on the status of tenders, despite due dates having expired. The claimant performed her duties poorly despite being allowed time to improve.
10. On August 2, 2017 a meeting was held with the claimant to discuss her poor performance which was affecting the company general outlook and needed to be addressed. There was no intention of changing the claimant’s contract as alleged and any claims of such nature are false.
11. The claimants work performance was found wanting and she failed to improve to ensure that assignments were done well and operations concerns well handled. These interventions fell on deaf ears leading to a downward trajectory of poor performance.
12. The respondent terminated the claimant’s employment on account of her wanting performance with respect to her assigned duties. During the entire employment, the claimant was under-performing and the claims made are not justified and should be dismissed with costs.
13. Michael Scott testified in support of the respondent’s case that there was no job description for the position held by the claimant, sales and marketing executive. She was not the programme manager and her role was outlined in the contract of employment.
14. Employment was confirmed upon successful completion of probations period and an appraisal of the claimant’s work.
15. The claimant was not the only sales and marketing executive. There were several others. The claimant was not solely responsible for the update of tenders her performance was not discussed before termination of employment save for a meeting and emails exchange with the managing director.
16. At the close of the hearing, both parties filed written submissions.



17. The claimant submitted that termination of her employment was unfair and contrary to article 41 of the *Constitution* of Kenya, which gives every person the right to fair labour practices, and Sections 41 and 45 of the *Employment Act*. The Court of Appeal in the case of *Naima Khamis v Oxford University Press (EA) Limited* [2017] eKLR was authoritative that the provisions of both sections 43(1) and 45(2) (c) of the *Employment Act* require justification of the reasons for the termination and to be according to a fair procedure.
18. In the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* (2013) eKLR, the court held that where poor performance is shown to be reason for termination, the employer is placed at a high level of proof. 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.
19. In the case of *Jason Mogaka Otiso v Shadrack Obuga Mukanda* (2016) eKLR, the court held that an employer has the duty to keep all work records of each individual employee which may help the employer in their defence once a suit is filed in court.
20. The respondent has not produced any records/ evidence in support of the allegations of poor performance made against her and that it is a fact she was only appraised once before being confirmed into employment. There is also no evidence showing that her alleged poor performance was assessed against a policy or evaluation system and discussed at any point before termination of employment and that the respondent ignored due process all through. She submitted that termination of her employment was therefore unlawful and unfair for want of valid reasons and fair procedure
21. The claimant submitted that she was an employee of the respondent for a period of 15 months and is therefore entitled to a certificate of service from the respondent as under section 51 of the *Employment Act*. That there is no evidence on record that she had a previous warning on performance issues and she was six months pregnant when she was unlawfully terminated and that she is thus entitled to maximum compensation. In determining the level of compensation under section 49(l)(c) of the *Act*, the Court is guided by the factors set out in section 49(4) of the *Act*. The Supreme Court in the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) upheld the decision of the trial court in *Simon Gitau Gichuru v Package Insurance Brokers Ltd* [2017] eKLR in awarding the appellant 12 months' salary compensation and observed that the same was sufficient given the circumstances in the case.
22. When she signed the discharge voucher, she was not consenting to the manner in which the employment relationship ended but was only accepting what was rightfully owed to her. The Court of Appeal in the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR held that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the industrial court from enquiring into the fairness of a termination.
23. The respondent submitted that in compliance with section 41(1) of the *Employment Act*, it explained to the employee the reasons for considering termination of her employment and that it had previously outlined its concerns and the repercussions in the event of no improvement. That the claimant was given sufficient time to improve her performance and when she did not improve, it was forced to terminate her employment after undertaking a disciplinary hearing. It submitted that the claimant has failed to satiate the burden proof contemplated in section 47(5) of the *Employment Act* and no evidence was led to the effect that the claimant was ever intimidated, threatened or coerced to execute the clearance form. That this court is under a duty to give life to the discharge clause in the employee clearance form and the claimant is bound not to claim any further than the agreed sums paid to her.



24. The Court of Appeal in the case of *Costal Bothers Limited v Kimathi Mithika* [2018] eKLR stated that the settlement agreement/ discharge voucher was a binding contract between the parties and the ELRC was required to give effect to the intention of the parties as discerned from the settlement agreement.
25. The respondent submitted that it has proved that it followed due process before terminating the claimant's employment. that however if this honourable court finds that due process was not followed and that the termination was not fair, the court should consider the actions of the claimant leading to the termination and filing of this claim and award a minimal sum of one month's salary as damages. The court should also consider the age of the claimant and the fact that she has not led evidence to convince the court that she has been able to get employment elsewhere subsequent to the termination of employment in issue.

Determination

26. On the pleading, evidence and filed written submissions which is put into account and the sole issue for determination is whether employment terminated unfairly and the remedies sought due.
27. Before addressing the issue above, the issue of the discharge voucher signed by the claimant in accepting payment of her terminal dues was contested. On the one hand the claimant's case is that such signing was in acceptance of what was owed to her and not a discharge of the respondent from other claims while the respondent relied on the Court of Appeal judgement in *Costal Bothers Limited v Kimathi Mithika* [2018] eKLR that the settlement agreement/ discharge voucher was a binding contract between the parties.
28. In my humble view, a discharge voucher though executed by the subject employee does not override the provisions of section 35(4)(a) of the *Act* which allow the employee a right to challenge the lawfulness or fairness of the termination of employment. such right does not cease or abate with the execution of the discharge voucher.
 - (4) Nothing in this section affects the right—
 - (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
 - (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.
29. In a letter dated September 28, 2017 the respondent terminated the claimant in her employment as the sales and marketing executive on the reasons that there were concerns with regard to her performance and that her work had been monitored since August 2, 2017 and there was little improvement in the areas of concern.
30. The details with regard to matters discussed at the alleged meeting of August 2, 2017 are not filed pursuant to section 10(6) and (7) of the *Employment Act*, 2007.
31. One major areas where the law directs an employer on what to do is poor performance of an employee. Section 41 (1) of the *Employment Act*, 2007 directs the employer, before termination of employment on account of poor performance to explain to the employee the reasons thereof and to allow the employee to give her explanations and or defences in the presence of another employee. This is what is called due process, natural justice and fair procedures.
 - (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.

32. Section 41 of the *Employment Act*, 2007 remains the crux of procedural fairness and provides for what must be present in the process leading to termination of an employee's employment or summary dismissal of an employee, in order for it to be considered procedurally fair. See *Joram Gakumo v Thika Coffee Mills Limited* [2013]eKLR.
33. Inbuilt are the principles of natural justice.
34. Where the employer applies the reason of poor performance as the reason leading to termination of employment, notice must issue to the employee and the employee allowed making her representations before employment can be found to have been lawfully terminated.
35. It is therefore not sufficient for an employer to cite poor work performance as a reason and proceed to terminated employment. the due process of the law is imperative.
36. The Court of Appeal in dealing with a similar matter in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR held that;

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 leveled against him by the employer.

37. And in the case of *Professional Clean Care Limited v Danson Mwendwa Muthoka* [2021]eKLR the court reiterated the required procedure for terminating employment on account of poor performance and held that;

The procedure for terminating employment on the ground of poor performance is now clear and it is this; that the employee is first made aware of their shortcomings and allowed a reasonable time to improve. Further, any performance appraisal upon which the decision to terminate is made must have the input of the employee (see *Jane Wairimu Machira v Mugo Waweru and Associates* [2012] eKLR and *Joshua Kabaka v Tandu Alarms Systems Limited* [2019 eKLR])

38. The respondent has not pleaded any matter that there was any effort to allow the claimant a hearing before the letter and notice dated September 28, 2017.
39. The meeting held on 2ht august, 2017 is without any record. The claimant on the one hand testified that at such meeting a proposal was made to change her employment to a Service level agreement to be paid on retainer and a commission and on the other hand, the respondent's case was that the meeting was to discuss her downward work performance. Without any record, the court must believe the employee.
40. Having acted contrary to the mandatory provisions of the law, the resulting termination of employment is hereby found unfair and without justification and is contrary to the mandatory provisions of section 41, 43 and 45 of the *Employment Act*, 2007.



41. Pursuant to section 45 and 49 of the Employment Act, 2007 compensation is due. the claimant was last earning a gross salary of Ksh85,000 per month and a compensation of 6 months' salary is hereby found appropriate all at Ksh 510,000.
42. A certificate of service should issue in accordance with the provisions of section 51 of the Employment Act, 2007.
43. Accordingly, judgement is hereby entered to the claimant against the respondent in the following terms;
 - a. A declaration hereby issues that the claimant's employment was terminated by the respondent unfairly;
 - b. Compensation awarded at Ksh 510,000;
 - c. Costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Peter Kigotho

..... and

