



**Ogwang v Equator Bottlers Limited (Cause 19 of 2020)
[2022] KEELRC 1504 (KLR) (15 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1504 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 19 OF 2020
S RADIDO, J
JUNE 15, 2022**

BETWEEN

CLAY ONYANGO OGWANG CLAIMANT

AND

EQUATOR BOTTLERS LIMITED RESPONDENT

JUDGMENT

1. The Cause was heard on 31 March 2022. Clay Onyango Ogwang (the Claimant) and a Human Resource Coordinator with Equator Bottlers Ltd (the Respondent) testified.
2. The Claimant filed his submissions on 25 May 2022 (should have been filed and served before 30 April 2022), and the Respondent on 13 June 2022.
3. The Court has considered the pleadings, evidence, and submissions.

Background facts

4. The Claimant was employed by the Respondent in 2005 as a Sales Representative, and he had risen to the position of an Area Retail Manager by the time of separation.
5. The Respondent issued a cautionary letter dated 20 May 2019 to the Claimant, and the subject was poor asset verification scores (score of 20% against a target of 95%). The Claimant was given two weeks to show an improvement, after which another review would be undertaken.
6. On 6 June 2019, the Respondent issued another cautionary letter to the Claimant, and the issue this time was a failure to close critical business opportunities identified by the immediate Line Manager.
7. The Respondent also put the Claimant on a Performance Improvement Plan on the same day, with monthly reviews. The Claimant was informed of the results of the first review on 17 July 2019.



8. On 21 August 2019, another review was held, and the Claimant was informed of the outcome on 22 August 2019. The performance was rated below expectations.
9. The third review was conducted on 9 September 2019, and the rating was again, below expectation. The Claimant was advised that the Performance Improvement Plan would not be extended and that he would get a termination notice.
10. The Respondent issued a termination letter to the Claimant on 10 September 2019. The Claimant was offered pay in lieu of notice, earned wages, accrued leave days and provident fund benefits

Unfair termination of employment

Procedural fairness

11. Section 35(1)(c) of the *Employment Act*, 2007 envisages written notice of termination of employment of at least 28 days (unless it is a case of summary dismissal).
12. The Claimant's termination letter referred to the cautionary letter of 6 June 2019.
13. The cautionary letter did not inform the Claimant of the contemplated termination of employment in unambiguous terms. It merely advised him to desist from future acts of dishonesty and failure to be accountable.
14. The Court finds that the cautionary letter did not meet the threshold set by section 35(1)(c) of the *Employment Act*, 2007 of warning an employee of contemplated termination of employment in clear terms.
15. The Respondent sent another letter dated 10 September 2019 to the Claimant. It notified him that after review, his performance was still below expectations and that the Performance Improvement Plan would not be extended but a termination notice would be served. The notice was served the same day.
16. Apart from a written notice of termination envisaged by section 35(1)(c), section 41 of the Act requires the employer to allow the employee to make representations in the company of a co-worker before termination of employment on grounds including poor performance.
17. The Respondent did not demonstrate that it afforded the Claimant an opportunity to make either written or oral representations accompanied by a fellow employee after the notice dated 10 September 2019.
18. In the Court's view, the performance review meetings did not and cannot, without more, substitute the hearing envisaged under section 41 of the Act.
19. The Court finds that the termination of the Claimant's employment was devoid of procedural fairness.

Substantive fairness

20. Sections 43 and 45 of the *Employment Act*, 2007 require the employer to prove the reasons for terminating an employment contract as valid and fair.
21. The reason for the termination of the Claimant's employment was poor performance.
22. The Respondent produced the Claimant's performance reviews/evaluation. The evaluation was discussed with him, and targets were agreed upon. The Claimant was allowed time to improve, but there was no improvement.



23. The Respondent, as the employer, was right to set targets for the Claimant and evaluate the performance.
24. The Claimant was not up to scratch. He did not produce any evidence to show that the targets agreed were unreasonable or that there was bias in the evaluations.
25. The Court is satisfied that the Respondent proved valid and fair reasons to terminate the contract.

Compensation

26. The Claimant served the Respondent for about 14 years.
27. The Court has found that though there were valid and fair reasons to terminate the contract, the process was tainted.
28. In consideration of these factors, the Court is of the view that the equivalent of 5-months gross wages as salary would be appropriate (gross was Kshs 112,00/- according to the confirmation letter dated 21 January 2019).

Certificate of Service

29. A Certificate of Service is a statutory entitlement, and if one was not issued, the Respondent should issue one to the Claimant.

Conclusion and Orders

30. The Court finds and declares that the termination of the Claimant's employment was procedurally unfair.
31. The Claimant is awarded:
 - (i) Compensation Kshs 560,000/-
32. The decretal sum to attract interest at court rates from the date of judgment.
33. Respondent to issue a Certificate of Service within 21-days.
34. The Claimant to have costs of the Cause.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF JUNE 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant E.A. Ochieng & Co. Advocates

For Respondent Kiragu Wathuta & Co. Advocates

Court Assistant Chrispo Aura

