



**Suri v Edulink International College Limited (Cause 734 of 2016)
[2022] KEELRC 1570 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1570 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 734 OF 2016
MN NDUMA, J
JULY 28, 2022**

BETWEEN

NARINDER SURI CLAIMANT

AND

EDULINK INTERNATIONAL COLLEGE LIMITED RESPONDENT

JUDGMENT

1. The suit was filed on May 3, 2016 and amended on June 3, 2019 in which the claimant prays for the following reliefs: -
 - a. Full salary for the period of contract.
 - b. A declaration that the claimant was by operation of law a fulltime employee of the respondent at time of termination of employment.
 - (c) Allowance as pleaded in paragraph 5 and 6 of the claim.
 - (e) A declaration that the termination was procedurally unfair.
 - c. A declaration that the claimant was wrongfully, unlawfully and unfairly terminated.
 - d. Certificate of Service.
 - e. 12 month's salary compensation.
 - f. We months' salary compensation.
 - g. Costs of the suit and interest at Court rates.
 - i. Any other order that this honourable Court may deem fit and just to grant in the circumstances.



2. The claimant (C.W.1) testified that she is a dual citizen of Kenya and Britain was employed by the respondent on January 5, 2015 as a Principal of the college on three (3) year contract ending on January 5, 2018, renewable. The contract provided a mandatory 6 months' probation period.
3. That in the course of properly setting up the office and the college, the claimant engaged various people in serious and elaborate ways including media talks, regional fares in Kisumu, Mombasa, and Eldoret and recruited students as well. That work went on well and the Principal became widely known, respected and associated with the college and was featured in East African Business Times Newspaper article in that respect. That the claimant's probation period ended in June, 2015 and the claimant continued serving under the contract for a further three (3) months until September, 2015.
4. That on September 28, 2015, a meeting was held between the claimant and respondent's representatives namely Simon Dubajic, Bharat Ratteshwar and Damien Riviez in which they informed the claimant that the respondent had decided to terminate the employment of the claimant. The claimant received a termination letter dated October 2, 2015 on grounds that the respondent was of the view that the claimant was not the right person to take the college forward and lead it to achieve its long term vision.
5. The claimant testified that the dismissal was in breach of the terms of the contract and employment law in Kenya and there was no reasonable cause for the dismissal. That the claimant suffered shame and ridicule and whenever she seeks new employment, it is turned down as soon as the prospective employer learns of the dismissal. That prior to this employment the claimant had worked with Moi University Eldoret for 12 years where she rose in academics to the rank of an academic doctor. That the claimant only resigned from the previous position at Moi University as a result of the trauma the claimant suffered after the loss of her father and mother and the claimant relocated to the United Kingdom, where she had lived from the year 2002 to 2014.
6. That the claimant had served the respondent diligently and hard as evidenced in the work reports she was required to prepare and give Mr. Simon Dubejic, who, upon joining the organization without solicitation offered to deny that he had come to take up the job of the claimant which he eventually did.
7. That the immediate manager of the college Mr. Raj Gill had been unceremoniously transferred to Dubai without consulting the claimant where he resigned shortly due to frustration from the respondent. That the respondent was on a mission to get rid of all the staff, Mr. Raj Gill had recruited including the claimant. The rest were sacked thereafter without any cause.
8. That the respondent failed to pay to the claimant in breach of contract, cost of travel from United Kingdom to Kenya; payment for the leave days earned, and bonus earned for the year 2015. That the claimant prays to be awarded as set out in the statement of claim.
9. The claimant was subjected to rigorous cross-examination by Mr. Kuyo for the respondent in which she denied she was given one month notice of termination stating that the representatives just held a meeting with her in which termination of employment was communicated. The claimant denied that the disciplinary meetings regarding her performance were held with her prior to the termination. The claimant admitted that she received a cheque of Kshs 257,497,000 all without prejudice basis upon termination. That she also got Certificate of Service.
10. Claimant said promise for payment of travel costs from United Kingdom to Kenya was verbally made and that hotel accommodation would be paid for the 1st month before she settled down. The claimant said the cheque paid to her was for return travel and baggage to United Kingdom and not for leave pay. Claimant said she never got any calculations of the terminal benefits paid to her. Claimant admitted



- that USD 900 was paid for air ticket from Nairobi to London. The claimant stated that she was not paid relocation allowance she had been verbally promised.
11. The claimant admitted that she worked for 3 months after she received letter of termination but the termination was not preceded by any disciplinary hearing.
 12. R.W.1, Bharat Ratteshwar testified for the respondent and adopted a witness statement dated February 1, 2021 as his evidence in Chief. R.W.1 testified that he held two meetings with the claimant on September 29, 2015 and October 2, 2015 respectively to discuss the performance of the claimant. That the claimant lacked leadership qualities and had failed to provide vision to the staff of the school. That despite the discussions held to allow the claimant to improve, no improvement was forthcoming. That the Board discussed these matters with the claimant on September 28, 2015 and the claimant was specifically informed of the performance lapses noted by the Board and that the respondent had to maintain international standards which the claimant failed to provide to the school. That at the Nairobi campus, Leadership lacked. That at the meeting of October 2, 2015, R.W.1 was not present but he was aware that performance of the claimant was discussed and the claimant provided her explanation on the noted lapses. That Board members were based in Dubai and they travelled on both occasions to discuss the performance of the claimant.
 13. R.W.1 stated that there were no documents showing failure of the claimant's performance but the matter was verbally discussed with her. Pressed further during cross-examination by Mr. Bwire for the claimant, R.W.1 stated that he had no minutes of the alleged performance meetings held with the claimant.
 14. R.W.1 denied that the meeting of October 2, 2015 was requested by the claimant stating that he did not attend the meeting. R.W.1 stated that the claimant was in a higher position at the college than him being a director. R.W.1 stated that he represented the Board at the meeting and that academic director and a local director attended the meeting. That the Board was able to judge her performance. R.W.1 admitted that he was based in Dubai and was not on the ground at Nairobi to monitor the performance of the claimant. R.W.1 however stated that the Board received regular reports on performance. R.W.1 stated that the claimant's employment was terminated for non-performance.
 15. The parties filed written submissions and the issues for determination are as follows: -
 - (a) Whether the termination of the employment of the claimant was for a valid reason following a fair procedure.
 - (b) Whether the claimant is entitled to the reliefs sought.
 16. The claimant submitted that upon expiry of the six months' probation period, the probation period was not extended and so the respondent was bound to honour the three-year employment contract but unlawfully, and unfairly, breached the contract by terminating the employment on October 2, 2015. That in terms of the case of *Francis Abuya Oduk v Hasbath Kenya Limited* [2020] eKLR, the claimant had become a permanent employee upon serving her probation period. That the Court should declare so.
 17. That the respondent violated sections 43 and 45 of the *Employment Act*, by failing to give the claimant notice to show cause and a proper disciplinary hearing before terminating her employment.
 18. That the testimony by R.W.1 that the respondent "felt" that the claimant was not the right person to take the college forward and lead it to achieve its long-term vision is telling on the lack of a valid reason to terminate the employment.



19. That in terms of the case of *Agnes Yobuna Digo v PJ Petroleum Equipment Limited*, Industrial Cause No. 2049 of 2011, the proper procedure once poor performance is noted in case of an employee was to point out the shortcomings to the employee and give the employee an opportunity to improve within a reasonable time frame.
20. That no records were presented by the respondent on the procedure if any followed to evaluate and assess the performance failure and improvement path to be followed by the claimant.
21. That in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR, the court held
 - “(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.”
22. That the respondent not only failed to adduce evidence showing that the claimant was put on performance Improvement and failed to do better but also the respondent failed to produce before court, their appraisal performance policy or practice on the parameters to measure poor performance versus good performance at the respondent’s work place.
23. That the court to find accordingly and conclude that the termination of the employment of the claimant was unlawful and unfair.
24. The respondent in its submissions stated that the respondent terminated the employment of the claimant lawfully and fairly in that the claimant’s performance was noted by the Board to be poor; that prior to the termination, the claimant was called to two meetings to discuss her performance; that the claimant was provided an opportunity to make representation during the said meetings; and the claimant’s terminal benefits were duly computed and made available to her upon termination.
25. That the respondent complied with the provision of section 36, 41 and 45 of the *Employment Act*, 2007 in that as stated by the Supreme Court in the case of *Kenfreight (EA) Limited v Benson K Nguti* [2016] eKLR, the respondent terminated the employment of the claimant for a valid reason following fair procedure.



26. That the role of the court as was held in *Nazareno Kariuki v Feed the Children Kenya* [2013] eKLR, was not to reconstruct the internal disciplinary procedure adopted by an employer or to improve on the decision by the employer but to check whether in the circumstances of the case, the employer acted in a reasonable and fair manner.
27. On the facts of the case and the law, the court has arrived at the conclusion that though the respondent may have had a valid reason to terminate the employment of the claimant, they failed to adduce any tangible evidence before court that a fair and reasonable procedure was followed to evaluate, fairly the performance of the claimant and provide a fair and reasonable path of improvement with timelines and known measures failing which that would constitute a valid reason for termination.
28. No policy of performance evaluation of the Principal with set imperatives and measures were adduced before court nor was the noted performance of the criteria or set targets adduced by the claimants to arrive at a reasonable and fair decision that there was a valid reason to terminate the employment of the claimant. Equally no known criteria provided by the respondent and known to the claimant was followed before the decision to terminate was arrived upon.
29. Accordingly, the termination of the employment of the claimant was not for a valid reason and the respondent did not follow a fair procedure in arriving at the decision in violation of sections 41, 43 and 45 of the *Employment Act, 2007*.
30. The claimant was a protected employee having completed the set probation period and the termination of the contract of employment had to be done strictly in compliance with the law and the provisions of the written contract between the parties.
31. The claimant is therefore entitled to compensation in terms of section 49(1) (c) and (4) of the *Employment Act, 2007*. In this respect, the claimant had relocated from United Kingdom to Kenya to serve for a period of three years but the contract was prematurely curtailed after only a period of 9 months. The respondent did not pay the costs of the relocation from the United Kingdom and Hotel accommodation to allow a reasonable period of settlement on the basis that this cost was not put in the written contract. The claimant testified that these expenses were verbally promised to her by a representative of the respondent and that she had legitimate expectation that the same would be paid. R.W.1 the witness who testified on this matter had no concrete answer to this credible evidence by the claimant. This in court's view is credible parole evidence that the courts lawfully reads to the contract of employment. That in any event relocation costs of an employee being brought from one Country to another are reasonable expenses lawfully expected to be met by a prospective employer. The fact that the respondent paid USD 900 to relocate the claimant from Kenya to United Kingdom upon termination is valid extraneous evidence to proof that this payment was equally applicable when the claimant relocated from United Kingdom to Kenya to start her tour of employment in Kenya.
32. It is for the claimant to prove quantum of this special damage. The claimant seeks payment of Great Britain Sterling Pound 3,000 as a global relocation rate. The claimant further testified that she stayed in a hotel from January 5, 2015 to February 5, 2015 at the rate of Kshs 15,000 per day for 30 days before she was able to obtain accommodation. Again R.W.1 did not offer any credible, counter evidence against the credible testimony by the claimant in this respect. However, the claimant did not provide receipts for the payments made in the hotel she resided in.
33. The respondent calculated terminal dues payable to the claimant upon termination in the sum of Kshs 275,497, and prepared cheque No. 69 dated January 27, 2016 which the respondent intended to issue to the claimant upon the claimant compliant with post termination obligations.



34. That payment was done on May 18, 2016 together with a certificate of service. The terminal dues in terms of the computation before Court included Kshs 32,001 in respect of 3 days salary for the month of January, 2016; Kshs 223, 997, in lieu of leave days not taken; and Kshs USD 900 in respect of one way return ticket.
35. It is the court's considered decision that the claim for payment in lieu of leave was fully settled.
36. As alluded to earlier, the claimant failed to provide documentary evidence in respect of hotel accommodation claimed and the same was not sufficiently proved by the claimant. Equally, the claimant did not provide any sufficient evidence that she was entitled to payment of bonus from the year 2015 and the claim is also dismissed for want of proof.
37. In respect of the claim for relocation allowance promised and not paid to the claimant, the claimant seeks payment of Great Britain Sterling Pound 3000 but did not provide any documentary proof of the claimed amount. The Court finds that since the respondent paid the equivalent of USD 900 for the return journey of the claimant upon termination, that it is fair and reasonable that the respondent pays USD 900 in respect of the travel costs of the claimant from United Kingdom to Kenya when she started her contract in Kenya. The court finds accordingly.
38. With regard to compensation in respect of the unlawful and unfair termination of employment, the claimant lost career prospects and suffered psychological trauma, embarrassment and financial loss and damage as a result of the unlawful termination of employment. The court finds that no tangible evidence has been placed before court to show that the claimant contributed to the loss of her employment. The respondent paid terminal benefits several months upon termination. The court has considered the case of *Elizabeth Wakanyi Kibe v Telkom Kenya Limited* [2014] eKLR where the Court of Appeal found that damages are not aimed at facilitating unjust enrichment nor are compensatory awards meant to be a punishment for the employer as the Court of Appeal found in Civil Appeal No. 29 of 2014, *Standard Group Limited v Jenny Luesby* [2018] eKLR.
39. That damages should not be awarded on sanguine assessment of prospects as was stated in *Menginya Salim Murgani v Kenya Revenue Authority* – Civil Case No 113 of 2012.
40. The court reiterates that the claimant worked for a short period of 9 months but had to await several months to receive her terminal benefits partly due to the issue of handing over between the parties.
41. Considering all the circumstances of the case, the Court awards the equivalent of three (3) months salary in compensation for the unlawful termination of employment in the sum of Kshs (220,000 x 3) 660,000.
42. Accordingly, judgment is entered in favour of the claimant as against the respondent as follows: -
 - (a) Kshs 660,000 compensation for the unlawful and unfair termination of employment.
 - (b) USD 900 in respect of travel expenses from United Kingdom to Kenya at the beginning of the contract term in Kenya payable in Kenya Shillings at the equivalent rate.
 - (c) Interest at court rates from date of judgment till payment in full.
 - (d) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 28TH DAY OF JULY, 2022.

MATHEWS N. NDUMA

JUDGE



Appearances

Mr. Bwire for Plaintiff

Mr. Kuyo for Respondent

Ekale – Court Assistant

