



**Kimani v Technoserve (Cause 764(N) of 2009)
[2022] KEELRC 1273 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1273 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 764(N) OF 2009
MA ONYANGO, J
JULY 20, 2022**

BETWEEN

LUCY KIOKO KIMANI CLAIMANT

AND

TECHNOSERVE RESPONDENT

JUDGMENT

1. Lucy Kioko Kimani was until 1st September 2009, an employee of the Respondent, Technoserve Kenya, a branch of Technoserve Inc., a non-profit organisation incorporated under the laws of New York State, in the United States of America. Its mission is to help entrepreneurial men and women in poor areas of the developing world to build businesses that create income, opportunity and economic growth for their families, communities and countries.
2. In the advertisement for the position that was eventually offered to the Claimant following competitive selection, the Respondent wanted to fill the position of a Coffee Stakeholder Manager to support the Coffee Initiative Director in the day to day leadership and management of the Coffee Initiative Project.
3. The Claimant was on October 14, 2008 issued with a letter of offer of employment for the position of Stakeholder Manager – Coffee Initiative. Upon reporting for duty on November 3, 2008, she was issued with a letter of “offer Of Employment And Re-designation As Deputy Director – Coffee Initiative”. The appointment was effective for November 3, 2008. It was a fixed term contract for three years which was to cease on 31st October 2011 at 5.00 pm. The position was based on a four year grant from November 2007 that was expected to cease on 31st October 2011 at 5.00 pm unless additional funds were secured before the said date.
4. In the letter of offer of employment, the Claimant’s salary was stated as Kshs.255,000/- per month being a consolidated salary. She was entitled to annual salary review following performance appraisal



conducted in the months preceding June every year. The salary review was to be based on satisfactory performance.

5. Other terms of employment included gratuity equivalent to 15 calendar days for each year worked should the Claimant leave the Respondent due to reorganisation of office, a non-contributory pension scheme at 10% of gross monthly salary, medical cover and annual leave. The contract was for a fixed period of 36 months, with an option of renewal subject to performance and availability of funds should the project be extended.
6. The Claimant accepted the letter of job redesignation from the title Stakeholder Manager – Coffee Initiative to Deputy Director – Coffee Initiative by her email dated 25th November 2008. The email is reproduced below:

From: **Lucy Kimani** [mailto:lkimani@technoserve.or.ke]

Sent: 24 November 2008 14:16

To: 'Logan, John'

Cc: tkamaliki@technoserve.or.ke; fogana@technoserve.or.ke

Subject: Re-Contract and re-designation to DD =1

Dear John,

Our discussion on Friday 21st on the above matter refers.

I have received and signed my contract. I am pleased to have my job re-designated to fit in with the recognized job categories at Technoserve Kenya and give the position the weight and recognition it deserves; I must hastily add however that although I understand that these job gradings do actually exist, I am yet to see them and get a better grasp of the organisational/reporting structure. I also acknowledge that fact the terms and conditions of my new designation remain the same as with Stakeholder manager position. In this regard therefore, I wish to seek clarification as to which grade the new designation is in now and whether (now or in future after probation period) my remuneration will be appropriately adjusted to reflect the redesignation. My desire is to serve TNS CI with dedication and commitment and I hope the organization will reciprocate in fairness and a just reward.

Thank you.

Regards,

Lucy Kimani,

Stakeholder Manager,

Technoserve Coffee Initiative”

7. By letter dated January 3, 2009, the Claimant was confirmed in employment after completing three months probationary period.
8. It is the Claimant’s case that part of her job description was to act in the place of the Director. That it was also one of her roles to recruit staff. That she recruited a program assistant who came in as a consultant. That while discussing what the programme assistant should be paid the Human Resources Manager opened a page containing the Respondent’s salary structure which the Claimant took away to study. That according to the salary structure, the Deputy Director’s salary was Kshs.400,000/- yet she was being paid Kshs.255,000/-.



9. The Claimant raised this issue with John Muga, the Human Resources Manager who sent her to discuss the issue with John Logan, the Program Director, who informed her that what she was earning was her correct salary.
10. The Claimant testified that she discovered that the change of her title was made to support the application for work permit for John Logan. That in the application it is stated that a deputy director was recruited to understudy John Logan. That her particulars and CV were submitted to the NGO Council in support of the application without her consent.
11. It is the Claimant's case that about three to four months after her confirmation she was called for a performance evaluation. That John Logan pulled out a template and assessed her. He put her on Performance Improvement Program (PIP) on her behaviour. The Claimant declined to undergo the PIP on grounds that she had scored well in her performance evaluation on all her key performance indicators.
12. The Claimant testified that on September 1, 2009, she was called for a meeting by John Logan and the Human Resources Manager. She was informed that she did not agree with the organisational rules and regulations and was offered an exit package which she rejected as she was never told of any disciplinary issues. She was thereafter issued with a letter of termination of employment.
13. It is the Claimant's case that there was no valid reason for termination of her employment.
14. In the memorandum of claim dated 26th November 2009 and filed 2nd December 2009, the Claimant seeks the following remedies:
 - a) The sum of Kshs,19,528,419/- as particularized below:
 - i. Salary arrears (Kshs.440,000 - Kshs.255, 000 x 10 months) Kshs.1,850,000
 - ii. Salary till the expiry of the full term of the contract (36 months – 10 months x Kshs.440,000) Kshs.11,440,000
 - iii. Damages for breach of contract, unlawful, unfair termination and employment discrimination (Kshs.440,000 x 12 months) Kshs.5,280,000
 - iv. Annual Leave (damages) ($\frac{21}{30}$ x 440,000 x 10 months less Kshs.81,137) Kshs.175,530
 - v. Annual pension ($\frac{10}{100}$ x 440,000 x 10 months less Kshs.108,000) .Kshs.330,000
 - vi. Pension till the expiry of the contract ($\frac{10}{100}$ x 440,000 x 26 months less 108,000) Kshs.1,114,000
 - vii. NHIF contributions till the expiry of the contract (Kshs.3,840 x 26 months) Kshs.8,320
 - viii. Employer NSSF till expiry of the contract (Kshs.200 x 26 months) Kshs.5,200



- ix. Total disability till the expiry of the contract (Kshs. $\frac{3,790}{12}$ X 26 months) Kshs.8,212
- x. Medical cover till expiry of the contract term (Kshs. $\frac{146,625}{12}$ x 26 months) Kshs.317,687
- Total Kshs.19,528,419

b) Gratuity pay (Kshs.440,000 x $\frac{15}{30}$ x $\frac{10}{12}$) Kshs.183,333/-.

c) Costs of this suit.

d) Any other relief that this Court may deem fit and expedite to grant.

15. For the Respondent, it is averred that the position advertised in 2008 was Coffee Stakeholder Manager and included the job description for the position. That upon successful interview, the Claimant was issued with a letter dated October 14, 2008.
16. That before the Claimant was issued with the contract of employment the Respondent's coffee program directors and vice president human resource and administration held a meeting in Nairobi to discuss the implementation of the Coffee Initiative Human Resource Strategic Plan and redesignated that the Coffee Stakeholder Manager position in Kenya, Rwanda, Tanzania and Ethiopia be changed to Deputy Director, Coffee Initiative as the title "Stakeholder Manager" was not common within East Africa and may not command recognition by government officials and stakeholders.
17. It is the Respondent's position that the Claimant accepted the re-designation as is evident from her email dated November 25, 2008. That the change of title did not alter either the Claimant's duties or her terms of service as is evident from the job descriptions issued to the Claimant before and after the re-designation.
18. It is the Respondent's position that in February 2009 the Claimant raised the issue of compensation following the re-designation. That the Respondent informed the Claimant that in view of the fact that the coffee initiative program had only been in existence for a few months the Respondent was in the process of developing the compensation structure for the program.
19. It is the Respondent's case that its operational manual, a copy of which was issued to the Claimant, provided for both annual and mid-year review of performance. That by email dated February 11, 2009, the Respondent informed all employees including the Claimant about the multi-source 360-degree feedback which entails feedback from supervisors, peers and subordinates as part of performance evaluation process. That since the Claimant was new, no performance review was carried out for her in 2008 and March 2009 as she was still new.
20. That in April 2009, the Respondent scheduled the Claimant's six months performance review which was carried out on April 30, 2009. The performance review rated the Claimant as "Requiring Development" to improve on building trust and relations, team work and accepting judgment of others.
21. The Respondent therefore put the Claimant on a performance improvement program (PIP). By letter dated May 15, 2009, the Claimant objected to PIP insisting that she met expectations. In its response



to the Claimant dated May 28, 2009, the Respondent explained, the reason for putting the Claimant on PIP being:

- a) Not meeting all the Respondent's expectations and the need for development;
- b) Poor relationship between the Claimant as a senior manager and the subordinate employees; and
- c) To help the Claimant develop the basic requirements for the leadership role.

22. The Claimant however still insisted that her performance was satisfactory prompting the Respondent to opt for an Employee Review Audit instead, with the consent of the Claimant.
23. The Employee Review Audit confirmed that the Claimant required to be put on PIP to support her development. The Claimant again rejected the outcome of the audit. This was viewed by the Respondent as gross misconduct hence the termination of employment on 1st September 2009.
24. At the hearing of the case, the Claimant testified on her behalf while the Respondent called one, Mwanaisha Rashid, its human resource manager at the time of termination of the Claimant's employment who testified on its behalf. The parties thereafter filed and exchanged written submissions.
25. I have considered the pleadings, evidence and the submissions. I have further considered the authorities relied upon by both parties. The issues arising therefrom for determination are the following: -

(i) Whether the termination of the Claimant's employment was fair and for a valid reason

26. It is the Claimant's position that the termination of her employment was without valid reason and that she was never taken through a disciplinary process. The Respondent however states that the Claimant was guilty of gross misconduct and was taken through a disciplinary hearing on September 1, 2009 as is evident from minutes of the said meeting annexed as appendix TNS 25 of the Respondent's bundle.
27. The Claimant's letter of termination gives the reason for termination as follows: -

Lucy Kioko Kirnani

Box 48858 – 00100

NAIROBI

1st September 2009

Dear Madam,

RE: Termination of Employment

Further to our meeting of September 1, 2009, I regretfully

confirm that your employment with us is terminated with effect from September 1, 2009 with immediate effect.

As stated at our meeting, the reasons for terminating your employment with us are as follows:

1. That following a performance evaluation conducted by your supervisor on 30/4/2009 you were rated as 'development required' and recommended to undergo a Performance Improvement Program (PIP).
2. That despite being explained the basis of the rating and the contents of the PIP, you declined to sign or undertake the PIP.



3. That to address the issues you had raised and with your consent, a review of the performance evaluation was subsequently carried out by an independent supervisor where the process and your performance were reviewed and discussed between yourselves and the overall performance rating explained. The audit recommended some training in addition to the PIP.
4. That despite the assurances given that the PIP is intended to assist you improve your performance and meet the required standards, you have expressly stated that you will not sign or undertake the same.
5. That the importance of the PIP was explained to you, including the fact that failure to meet the required performance standards will lead to termination of employment.
6. That your refusal to undertake the PIP. is therefore unacceptable as it amounts to a refusal to comply with the organization's policies and performance standards.

Attached please find your cheque of Kshs.249,591.00 and Kshs.71,400.00 in payment of your terminal benefits computed as follows:

1. Accrued salary in the amount of Kshs.11,591.00.
2. Accrued leave days in the amount of Kshs.81,137.00.
3. Payment of 30 days salary in lieu of notice in the amount of Kshs.255,000.00
4. (Less applicable taxes in the amount of Kshs.98,251.00).
5. Accrued Pension in the amount of Ksh.102,000.00
(Less accrued taxes in the amounts of Ksh.30,600.00).

Any questions regarding the above computation may be addressed to the undersigned.

Attached also is your Certificate of Service for your record.

In the meantime, you are kindly requested to clear and handover all company property entrusted to you to Aisha Rashid before leaving the office.

I take this opportunity to thank you for working with us and wish you all the best for your future endeavours.

Yours faithfully,

Signed

Fred Ogana - Country Director”

28. From the letter it is clear that the reason for termination was the Claimant's refusal to undertake PIP. Section 41(1) of the *Employment Act* provides that before terminating the employment of an employee on grounds of gross misconduct or poor performance the employee must be taken through a disciplinary process as provided under Section 41(2) of the Act.
29. The minutes of the meeting held on 1st September 2009 do not disclose a disciplinary meeting or hearing. The meeting was called to inform the Claimant of the decision to terminate her employment. At the meeting the Claimant was only told why a decision had been reached to terminate her employment. The only option given to her was to either accept the “Employee Settlement and Release Agreement” letter which offered her three months' salary over and above her terminal dues, or be terminated. Section 41 provides that at a disciplinary hearing the employee is heard before the decision whether or not to terminate employment is reached. This was not the position herein where the



Claimant was called only to be informed of the decision to terminate her employment and to issue her with the settlement agreement.

30. From the foregoing I find that the Respondent had valid reason to terminate the employment of the Claimant for her refusal to undergo PIP but did not give her a hearing as envisioned under Section 41 of the Act before terminating her employment contract. The termination was therefore procedurally unfair under Section 45(2) of the Act.

Remedies

31. Is the Claimant entitled to the remedies sought? I will consider each of the prayers sought.
- (a) Salary arrears
32. It is the Claimant's averment that she was underpaid, that she was entitled to a salary of Kshs.400,000/- per month but was paid Kshs.255,000/-. She seeks the difference as arrears.
33. The Claimant relies on her appendix LK8 which contains a table of titles and payments. It is titled "gross per annum" the salary for Deputy Country Director in the table is as follows:
- Deputy Country Director
- Level 1 Kshs.440,000
- Level 2 Kshs.420,000
- Level 3 Kshs.400,000
34. The other titles are country director, senior business manager, senior business advisor, business advisor and assistant business advisor.
35. The Claimant was employed as Deputy Director Coffee Initiative, not Deputy Country Director. She has not stated the difference between the Country Director and the Deputy Country Director as opposed to Coffee Initiative Director which is the position that was held by John Logan, her immediate supervisor with herself as Deputy Director Coffee Initiative. The was the position of Country Director was held by Fred Ogana who signed both the Claimant's employment contract and the letter to NGO coordination board requesting for work permit for John Logan, her supervisor. From the explanation given to the Claimant after she demanded adjustment of her salary based on the table at her appendix LK8, it is clear that the table referred to "country" director position and not coffee initiative project staff.
36. As explained by the Respondent's witness, the project had only been in existence of a few months and the Respondent was yet to develop the structure and remuneration package for the project. The Claimant signed a contract accepting the terms as enumerated in her contract including the remuneration package and the job description.
37. I find that the Claimant has not proved either that she was underpaid or that she is entitled to arrears as claimed or at all.
- (b) Salary, pension, NHIF, NSSF, medical cover, total disability till expiry of contract
38. These are speculative prayers and they are based on date of expiry of the contract. There is a long list of decisions of this Court and the Court of Appeal where the courts have stated that such payments would



constitute unjust enrichment. The Respondent has relied on the case of *Aisha Omar Ramadhan v Chairman, Langata Constituency Development Fund* [2019] eKLR where the Court held as follows: -

“The claimant prayed for payment of the salary for the remainder of the term of her contract being two years and seven months. This is not payable as it is neither a provision of her contract nor recognised in law. As was stated in the case of *D. K. Njagi Marete v Teachers Service Commission* [2013] eKLR Industrial Cause No 379 (N) of 2009 where the court held:

“What remedies are available to the Claimant? This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

The claimant has not proved that she became incapacitated from earning a living by virtue of termination of her employment. Further, employment relationships are expected to be terminable upon compliance with the statutory and contractual procedure _ for termination and the law only provides for remedies for the unlawful or unfair termination, not of speculative future earnings. This is why every contract of service of necessity provides for a termination clause, and if none is provided, the provisions of the *Employment Act* relating to notice of termination of employment relationship will apply.

The prayer for salary for the remainder of the contractual term is thus not payable and is declined.”

39. Any prayer contemplated upon the future termination of the contract of employment must therefore fail.

(c) Damages for breach of contract

40. The *Employment Act* provides for payment of compensation for unfair termination of contract up to a maximum equivalent of 12 months gross salary. It does not provide for payment of damages for breach of contract.

41. In this case having found that the Claimant’s employment was unfairly terminated as she was not taken through a disciplinary hearing as envisaged in Section 41 of the Act but noting that there was valid reason for termination of the contract, further the Claimant had served for less than a year and that taking into account that the Respondent had offered to pay the Claimant three (3) months’ salary for a mutual separation which she rejected, I will award her three months’ salary as compensation in the sum of $Kshs.255,000 \times 3 = Kshs.765,000/-$.

(d) Annual leave and accrued pension

42. The Claimant was paid in lieu of outstanding pension for annual leave and person of the period she served, which she has acknowledged.

43. Having found that her salary was Kshs.255,000/- as per contract and not Kshs.400,000/- as she alleges, the Claimant is not entitled to any further payment under these two heads.

(e) Gratuity

44. The Claimant’s contract provided for gratuity as follows:

“8. 3 Gratuity



You shall be entitled to a gratuity equivalent to 15 calendar days pay for each year worked should you leave TechnoServe (K) due to reorganization of office.”

45. The Claimant is not entitled to payment under this head as it was only available should she leave office under re-organisation and not on grounds of termination for gross misconduct. The prayer therefore fails.

(f) Costs

46. Having awarded the Claimant what she would have been paid had she accepted the settlement and noting that she did not succeed in the prayer for unfair termination as well as the bulk of her prayers, I make no orders as to costs.

47. Interest on the decretal sum shall accrue from date of judgment.

48. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF JULY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

