



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mungai v Kilimall International Limited (Cause 1657 of 2016)  
[2022] KEELRC 3823 (KLR) (18 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3823 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1657 OF 2016  
AN MWAURE, J  
AUGUST 18, 2022**

**BETWEEN**

**CHARLES MUNGAI ..... CLAIMANT**

**AND**

**KILIMALL INTERNATIONAL LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. In his Memorandum of Claim filed on August 18, 2016 the Claimant (Charles Mungai) claimed that he was unfairly and unlawfully terminated contrary to the labour laws of the country. He thus prayed for the following reliefs:
  - a. A declaration that the termination of the Claimant's employment by the Respondent was unfair in terms of procedure.
  - b. A declaration that the termination of the Claimant's employment by the Respondent amounts to unfair and unlawful termination contrary to the *Employment Act*.
  - c. A declaration that the termination of the Claimant's employment by the Respondent amounts to unfair administrative action contrary to the *Fair Administrative Action Act* of 2015.
  - d. Compensation for unlawful and unfair termination amounting to 12 month's salary i.e Kshs 150,000\*12= Kshs. 1,800,000.
  - e. General damages for unfair discriminative action.
  - f. General damages for career regression.
  - g. Interest on (d), (e) and (f)



- h. Costs of this suit.
  - i. Any other relief the court deems fit to grant.
2. The Respondent Company filed its response to the statement of claim on February 9, 2017 wherein it defended itself against the allegations of the Claimant.

### **The Claimant's Case**

3. The Claimant avers that he was employed as a Digital Marketing Manager by the Respondent on or about November 9, 2015. His duties included among others; overseeing the marketing team, developing and implementing market structures, assisting in marketing planning, identification of problem areas in the marketing process in developing leads for sales and managing the selection, training and development of the marketing team.
4. It is the Claimant's case that he was always a top notch performer and due to his excellence performance the Respondent Company's sales reached greater heights. He states that he ran a successful campaign which increased efficiency of the marketing department. He avers that he worked dutifully for the Respondent who appointed him through a rigorous, free, fair and transparent process.
5. He states that his employment was terminated on 20<sup>th</sup> of April 2016 on the grounds that he failed to meet the Respondent's expectations. He disputes the Respondent's position by stating that his employment was always punctuated with numerous compliments from his supervisors to the extent that he was being identified as a role model.
6. The Claimant states that he had on many occasions requested for the amendment of his draft employment contract to remove some inconsistencies therein before he could append his signature but the same bore no fruits.
7. The Claimant contends that his termination was unlawful, unfair, discriminatory and amounted to total violation of settled legal principles and known labour practices. He states that the issues that led to his termination were never tabled before a forum in which both parties were represented.
8. He further avers that he was never given an opportunity to be heard, a warning letter or a notice to show cause. It is his position that this violated his right to fair administrative action and right to fair labour practices guaranteed under Articles 47 and 41 of *the Constitution* of Kenya respectively. The Respondent's reason for terminating the Claimant were unfounded since his performance was at no time under review, he adds.

### **The Respondent's Case**

9. The Respondent admits having offered the Claimant employment as a Digital Marketing Manager who was to report to the Marketing Director. However, it denies ever specifying the Claimant's job description as stated in the Memorandum of Claim.
10. The Respondent states that the Claimant did not duly accept the offer as he refused to and or failed to signify his acceptance by signing and returning a copy of the letter of offer.
11. It is the Respondent's position that the Claimant was not a top notch performer and that he failed to meet the organisation's targets on several occasions. He did not put in any diligence and his supervisor complained about his performance, indifference and negative approach to duty.



12. The Respondent states that when the employment offer was made he refused to sign it and nothing could proceed beyond that point. The Claimant was given a letter of appointment which he sat on in an attempt to be left to work on his own terms and choose his position in the Company.
13. The Respondent avers that the employment offer had no inconsistencies. Further, it stated that the termination of the services were lawful, fair and not discriminatory in nature since the Claimant was accorded a fair hearing and was given notice and a warning over his dismal performance.
14. It is worthy of note that during the hearing the Respondent was unavailable and no service could be effected upon it or its counsel who had since closed their operations from the year 2019. Consequently, the case proceeded without the Respondent's presence.

### **Issues for determination**

15. As is custom, the Court has considered the pleadings by both parties, oral and witness testimony of the Claimant and the Claimant's submissions. It has thus framed the following as issues for determination:
  - a. Whether the Claimant was unfairly and wrongful terminated
  - b. Whether the Claimant is entitled to the reliefs sought

### **Whether the Claimant was unfairly and unlawfully terminated**

16. The Claimant told the Court that he was unfairly and unlawfully terminated since his employer did not follow the stipulated substantive and procedural law governing termination of employment under the [Employment Act](#).
17. In the event of a claim of unfair termination, the burden of evidence to prove that it occurred rests on the Claimant. Section 47(5) of the [Employment Act](#) 2007 provides that:

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

18. Section 47(5) of the [Employment Act](#) is construed to mean that an employee needs only to prove existence of prima facie evidence that termination occurred. When this is done, the evidential burden to prove that the termination occurred shifts to the employer. In the case of Josephine M Ndung'u & others v Plan International Inc [2019] eKLR the Court stated:

Under section 47(5) of the [Employment Act](#), the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.

19. In the present case, the Claimant has satisfied the requirements of Section 47(5) of the [Employment Act](#). The burden now lies with the Respondent to prove that the termination was lawful. In the letter of termination dated 20<sup>th</sup> April 2016, the Respondent stated that the termination was lawful by dint of Section 44 (4)(c) of the [Employment Act](#) which provides as follows:

44(4)(c) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall



not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

20. The Respondent did not however tender before this Court any evidence to prove that the employee had willfully neglected his duty. It also failed to prove poor performance by the Claimant if anything the claimant claims he was awarded a performance bonus. In the case of *Jane Samba Mukala v Oltukai Lodge Limited* [2010] LLR 225 the Court observed that:

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.

21. The respondent did not produce any evidence to establish he had a performance evaluation tool in place. Additionally, the Court observes that the Respondent did not provide any evidence showing that the Claimant was issued with a notice to show cause or a warning letter as a result of his dismal performance. The Court finds that the employee was not accorded a fair hearing process and that he was condemned unheard against the rules of natural justice. His right to fair administrative action resident under Article 47 of *the Constitution* of Kenya and the *Fair Administrative Action Act* 2015 was infringed on.

22. The Court appreciates the wisdom in the case of *Republic v Fazul Mahamad & 3 others Ex-Parte Okiya Omtatab Okoiti* [2018] eKLR where learned judge stated that:

Article 47 of *the Constitution* provides that every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The *Fair Administrative Action Act* was enacted to illuminate and expand the values espoused under Article 47 of *the Constitution*. Section 4(3) of the Act provides the broad parameters which bodies undertaking administrative action have to adhere.

23. The Court also relies on the case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR where the matter of fair administrative action was discussed by the Court of Appeal as hereunder:

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”



24. The Respondent terminated the Claimant without regard to the procedure set out in Sections 41 and 45 of the *Employment Act* 2007. Before terminating an employee, an employer must have a valid reason for termination as provided in section 45 of the *Employment Act*. Furthermore the employer must follow the right procedure as provided in Section 41 of the Act:

41. (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.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

25. The Respondent has failed to prove that it followed the above procedures. It has not provided any letter to show that it invited the Claimant to a disciplinary meeting or even the minutes of the meeting and neither was he advised to take a long a fellow employee or shop floor representative to be his witness at the hearing. The Court thus finds that the Claimant was unfairly and unlawfully terminated.

### **Remedies**

26. Having found as hereinabove, this Court enters judgment in favour of the Claimant as follows:

- a. A declaration be and is hereby issued that the termination of the Claimant's employment by the Respondent was procedurally unfair and, unlawful.
- b. Compensation for unlawful and unfair termination amounting to 2 months' gross salary i.e Kshs 150,000 x 2 = Kshs. 300,000/= considering the brief period the claimant served the respondent.
- c. General damages for discriminative action is not proved and is declined.
- d. General damages for career regression is also not allowed as is not proved.
- e. Costs are awarded to the clamant.
- f. Interest is also awarded at court rates from date of Judgement till full payment and final award is Kshs.300,000/=.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18<sup>TH</sup> AUGUST, 2022.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of



21<sup>st</sup> 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 had 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

