



**Muchiri v Crescent Tech Limited (Petition 95 of 2018)
[2022] KEELRC 4020 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4020 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 95 OF 2018
L NDOLO, J
SEPTEMBER 29, 2022**

**IN THE MATTER OF ARTICLES 2(6), 10, 19, 20(1), (2), (3) & (4), 21(1) & (2), 22(1), 23(1), (2),
& (3)(A), (C) & (E), 25(A), 27(1), (2) & (5), 28 AND 42(1) & (2)(B) OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
27(1), (2) & (5), 28 AND 41(1) & 2(B) OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION
5(2) & (3), 45(1) & (2), 46(A), 51, 78, 81, & 87 OF THE EMPLOYMENT ACT**

AND

**IN THE MATTER OF RULES 3, 4, 11 & 13 OF THE CONSTITUTION
OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS) PRACTICE AND PROCEDURE RULES**

BETWEEN

HARRIET MWIHAKI MUCHIRI PETITIONER

AND

CRESCENT TECH LIMITED RESPONDENT



JUDGMENT

Introduction

1. By her petition dated September 13, 2018 and filed in court on even date, the petitioner accuses the respondent of violating of her fundamental rights and freedoms under the Constitution in particular; unlawful summary dismissal, inhumane treatment and discrimination on account of pregnancy.
2. The Respondent filed an affidavit in answer to the petition deponed by its human resource manager, Elizabeth Mwangi on February 19, 2019.
3. By way of a rejoinder, the petitioner filed a supplementary affidavit sworn on May 10, 2019.
4. The petition was urged by both viva voce evidence and written submissions.

The Petitioner's Case

5. The petitioner states that she was employed by the respondent in the position of sales account manager effective September 2012. She adds that she was confirmed by an employment contract dated May 16, 2013.
6. The petitioner worked for the respondent until April 24, 2018, when she was summarily dismissed. She terms the dismissal as unlawful and unfair.
7. The petitioner pleads that she performed her duties well upon which she was awarded a salary increment on July 1, 2015 and sales commission every half year between 2015 and 2016 and on February 7, 2017.
8. Regarding performance for the year 2017, the petitioner states that respondent, like other companies, did not perform well with sales dropping and customers defaulting on payment of debts. The petitioner assigns the decline in performance to the Kenya general elections in 2017. She adds that this resulted in the respondent opting to restructure its operations to cut down on operational costs.
9. It is in this context that on April 24, 2018, the Petitioner was summarily dismissed on account of poor performance. She claims that she was not afforded an opportunity to be heard, prior to the dismissal.
10. The petitioner avers that upon her dismissal alongside other employees in her department, the respondent closed its volume business unit. The petitioner further avers that by choosing the summary dismissal route, the respondent effectively circumvented the rigours of redundancy so as to avoid paying severance pay.
11. The petitioner therefore claims severance pay as a result of redundancy that was camouflaged as termination of employment.
12. The petitioner also accuses the respondent of failure to pay her terminal dues including her salary for April 2018, notice pay and accrued leave pay.
13. The petitioner adds that the respondent failed to pay her housing allowance or to provide housing accommodation during her employment from September 2012 to April 24, 2018.
14. In addition, the petitioner accuses the respondent of subjecting her to discrimination on account of pregnancy on two separate occasions during her service with the respondent. In this regard, the petitioner states that she was treated with partiality and differentiation as a result of pregnancy, with



the respondent withholding her salary during the first pregnancy and denying her sales commission and day off to attend her daughter's sports day, leading to a warning letter being issued to her on July 1, 2017. The Petitioner further points out that she was summarily dismissed one month after returning from maternity leave in March 2018.

15. The petitioner claims that it was normal for the respondent, through its directors, to discriminate against employees on account of pregnancy.
16. The petitioner indicts the respondent for violating her right to fair labour practices under article 41 of the Constitution in addition to unfair termination of employment under section 45 of the Employment Act. The petitioner further alleges violation of her right to equality and freedom from discrimination under article 27 of the Constitution as read with section 5(2) & (3) of the Employment Act.
17. Regarding the claim for unfair termination, the petitioner states that she was not afforded an opportunity to defend herself. She asserts that she was not subjected to an objective and fair performance appraisal in October 2017 or on April 20, 2018.
18. Further, the petitioner states that she was never subjected to a performance improvement plan or specialised training, in order to improve on her alleged poor performance.
19. The petitioner concedes that she was issued with a warning letter in October 2017 but takes issue with the fact that the said letter came during her second pregnancy, which she terms as discriminatory.
20. The petitioner pleads that the summary dismissal came as a surprise to her; she credits herself with good performance for which she earned a salary increment on 1st July 2015 and sales commission on February 7, 2017.
21. The petitioner also alleges violation of her right to dignity under article 28 of the Constitution.
22. The petitioner seeks the following remedies:
 - a. A declaration that the respondent's treatment of the petitioner during her first and second pregnancies comprises an infringement of the petitioner's right to dignity in breach of article 28 of the Constitution;
 - b. A declaration that the respondent's treatment of the petitioner during her first and second pregnancies constitutes discrimination on account of pregnancy in breach of article 27(4) and (5) of the Constitution;
 - c. A declaration that the petitioner's summary dismissal by the respondent constitutes a breach of her right to fair labour practices in breach of article 41(1) and (2)(b) of the Constitution;
 - d. A declaration that the petitioner's summary dismissal by the respondent was an attempt to by-pass or avoid the provisions of section 40 of the Employment Act on redundancy;
 - e. An order for payment of the following:
 - i. Compensation for contravention of the rights to equality non-discrimination & dignity.....kshs 1,500,000.00
 - ii. 12 months' salary in compensation for unlawful & unfair termination.....1,641,816.00
 - iii. Housing allowance.....1,068,057.00
 - iv. Unpaid salary for April 2018.....136,818.00



- v. 1 month's salary in lieu of notice.....136,818.00
- vi. Leave pay for 6 days.....27,363.60
- vii. Severance pay.....409,853.99

23. The petitioner also asks for a certificate of service plus costs and interest.

The Respondent's Case

- 24. In the respondent's affidavit in answer to the petition sworn by Elizabeth Mwangi, it is confirmed that the petitioner was employed by the respondent as a sales account manager from April 1, 2013 until April 24, 2018, when she was summarily dismissed on account of poor performance.
- 25. The respondent maintains that the petitioner's dismissal was based on legitimate reasons and was effected lawfully.
- 26. Regarding the petitioner's performance, Mwangi depones that with respect to the year 2017, performance agreements for the first and second halves of the year were entered into on December 23, 2016 and July 17, 2017 respectively.
- 27. Mwangi further depones that the petitioner's performance review for the first half of the year 2017 was conducted in July 2017, with a return that the petitioner had not achieved any of the targets set on five (5) key performance indicators, with her average score being 32%.
- 28. The petitioner's performance review for the second half of the year 2017 conducted in October 2017, showed that the petitioner had still not achieved any of the agreed targets.
- 29. Mwangi additionally depones that as a result of not meeting her targets, the petitioner was issued with a warning letter dated November 15, 2017, which she received on November 20, 2017.
- 30. According to the respondent, another review was conducted on April 20, 2018 from which no significant improvement on the part of the petitioner was noted. The petitioner was subsequently dismissed on April 24, 2018.
- 31. Mwangi counters the petitioner's assertion that the dismissal was a feigned redundancy and denies that the respondent's volumes business unit had been closed, adding that the petitioner's former position of sales accounts manager was still in existence.
- 32. Mwangi terms the petitioner's claim that she was discriminated against on account of pregnancy as baseless and states:
 - a. Regarding the withholding of the petitioner's salary in the year 2014, the petitioner, together with others in her unit, had occasioned loss to the respondent by supplying commodities to a client without receiving payment in return;
 - b. As regards withholding of the petitioner's salary in 2017, the petitioner had supplied a laptop to a customer of the respondent who, after using it, returned it having not made payment thereof. The petitioner is said to have accepted the return contrary to the respondent's sales policy against accepting return of used laptops thereby occasioning loss to the respondent;
 - c. The said laptop was retained by the petitioner and its full price deducted from her salary as confirmed by the delivery note dated December 8, 2017 and journal voucher dated August 29, 2017;



- d. As regards the petitioner not being granted permission to be absent from work on July 1, 2017, the respondent upon receipt of the petitioner's request for leave, advised her that there was a departmental meeting on that day, which she was required to attend and therefore her request could not be approved;
 - e. The petitioner's employment contract at clause 6 clearly provided that Saturday from 8.30 am to 1.30 pm was a working day and the respondent reserved the right to determine whether or not to grant permission or leave of absence.
33. On the issue of terminal dues, the respondent maintains that it has been ready and willing to remit the petitioner's terminal dues as computed but the petitioner has refused to collect the said dues.
34. Regarding the claim for house allowance, the respondent takes the position that the petitioner's salary included a component to be utilised towards securing suitable accommodation.

Findings and Determination

35. This petition presents three (3) issues for determination by the court:
- a. Whether the petitioner's summary dismissal was lawful and fair;
 - b. Whether the petitioner has made out a case of violation of her fundamental rights and freedoms under the Constitution;
 - c. Whether the petitioner is entitled to the remedies sought.

The Dismissal

36. The petitioner's dismissal was communicated by letter dated April 24, 2018 stating thus:

“Dear Mwiha ki,

Re: Employment Contract

This letter is to inform you that your services with Crescent Tech have been terminated with immediate effect.

The reason that this decision has been made is because you have been unable to achieve the agreed targets for the last one year.

A concern was raised in regards to your performance during the performance review that was conducted in October 2017, and a warning letter issued. However, you have made no significant improvement and as per the April 20, 2018 performance review, you did not present any compelling evidence of your effort to improve in the directions agreed in your performance letter.

You will be required to hand over your clients, leads and status of each account to the BU Head.

You will be paid for days worked, notice period, any leave outstanding, less statutory deductions and any monies you may owe the company.

You will be required to return your laptop, all company property in your possession, and sign the clearance form to facilitate preparation of your final dues. Please note that your final dues will be paid upon clearance of all pending debtors.

We wish you the best of luck in your future endeavors.



Yours sincerely,

(signed) (signed)

Ken Mbwaya Elizabeth Mwangi

C.E.O Human Resource Manager

37. According to this letter, the claimant's employment was terminated on account of poor performance.

38. Poor performance is one of the grounds recognised by the provisions of the *Employment Act* and termination on this account must therefore be effected within the four corners of section 41 of the *Employment Act*, which provides as follows:

- (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) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

39. In her written submissions dated May 19, 2022, the petitioner makes reference to the decision in *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR where my sister Mbaru J stated thus:

“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. 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... 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. In the event a decision is made to terminate an employee on the reason of 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.”

40. In its decision in *Magbanga Newton Raphael v Panal Freighters Limited* [2021] eKLR this court reiterated the required procedure for terminating employment on account of poor performance in the following terms:

“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.”



41. I need to add that an employee facing termination of employment on the ground of poor performance is entitled to a capability hearing as envisaged by section 41 of the *Employment Act*.
42. While acknowledging a drop in performance, the petitioner avers that there was a general downward trend within the respondent, which she attributed to an adverse macro-economic environment, occasioned by the general elections in 2017.
43. From the evidence on record, the petitioner was subjected to a performance review in October 2017 and another review in April 2018. The petitioner told the court that the first review was conducted just before she proceeded on maternity leave with the second one being conducted one month after her resuming duty from maternity leave.
44. The petitioner further told the court that she was not given an opportunity to improve on her performance. This was confirmed by the respondent's witness, Elizabeth Mwangi in cross examination. What is more, there was no performance improvement plan put in place to guide the petitioner towards improving her performance and she was not allowed an opportunity to defend herself, prior to the termination. This was also confirmed by the respondent's witness.
45. Pursuant to the foregoing, I find and hold that the allegation of poor performance made against the petitioner was not proved, meaning that there was no valid reason for the termination as required by section 43 of the *Employment Act*. I further find that in terminating the petitioner's employment, the respondent failed to follow the mandatory procedure set by section 41 of the *act*.

Violation of Fundamental Rights and Freedoms?

46. The petitioner bases her claim for compensation for contravention of her fundamental rights and freedoms on her allegation that the respondent discriminated against her on account of pregnancy.
47. On this count, the petitioner cited a number of instances where she was aggrieved by the respondent's action against her. She was however unable to establish a nexus between these actions and her pregnancy. I must therefore find that the claims under this head were not proved.

Remedies

48. Pursuant to the finding that the termination of the claimant's employment was unlawful and unfair, I award her ten (10) months' salary in compensation. In making this award, I have considered the petitioner's length of service plus the respondent's unlawful conduct in the termination transaction, including unjustifiable withholding of the petitioner's terminal dues.
49. The claims for unpaid salary for April 2018, notice pay and leave pay are admitted and are payable.
50. The petitioner also lays a claim for house allowance and in its defence, the respondent states that the petitioner was paid a consolidated salary. The petitioner's letter of appointment was not availed to the court and her filed payslips provided a figure for total earnings, which would ordinarily be inclusive of house allowance. In the absence of proof of underpayment, the claim for house allowance is without basis and is disallowed.
51. Similarly, there was no evidence of the position held by the petitioner being declared redundant. Consequently, no basis was established for the claim for severance pay which also fails and is disallowed.
52. In the end, I enter judgment in favour of the petitioner as follows:
 - a. 10 months' salary in compensation.....kshs 1,368,180



b.	Salary for April 2018.....	136,818
c.	1 month's salary in lieu of notice.....	136,818
d.	Leave pay for 6 days (136,818/30*6).....	27,364
	Total.....	1,669,180

53. This amount will attract interest at court rates from the date of judgment until payment in full.

54. The petitioner is also entitled to a certificate of service plus costs of the case.

55. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022

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JUDGE

Appearance:

Mr. Wairoto for the Petitioner

Messrs. Chimei & Malenya for the Respondent

