



**Nyangweso v Roto Moulders Limited (Cause 437 of 2019)
[2022] KEELRC 4147 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4147 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 437 OF 2019
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

SHEM MANYURA NYANGWESO CLAIMANT

AND

ROTO MOULDERS LIMITED RESPONDENT

JUDGMENT

1. In his Statement of Claim dated July 2, 2019, which was amended on November 1, 2021, the Claimant states that he was employed by the Respondent on temporary basis, on 11th April 2013.
2. He was employed regularly as Sales Manager after 6 months.
3. He performed excellently, exceeding sales growth, ensuring that the Respondent outperformed sister companies within the Flame Tree Group. He became the Country Sales Manager.
4. Surprisingly, he was issued by the Respondent a letter dated September 12, 2018, titled ‘termination with notice.’ He was dismissed on various grounds, which included drop in sales in all regions of the country, except one. He did not attend disciplinary meeting, and had no knowledge of such meeting alluded to by the Respondent in the termination letter.
5. The Claimant avers that the actual reason for termination of his contract, was his strong objection to the interference with his docket, by the Respondent’s General Manager, Raymond Goes. The Claimant was the only one singled out for dismissal on the fabricated ground of poor sales. Those who worked under him were unaffected.
6. His monthly salary at the time of termination was Kshs 349,280.
7. He prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair and unlawful.



- b. Compensation for unfair termination at Kshs 4,191,1365. 04
 - c. Compensation for discrimination at Kshs 4,191,1365.04 [Kshs 41.9 million or Kshs 4.19 million?].
 - d. Terminal dues / severance pay from 11th April 2013 to September 12, 2018, at 15 days' salary for each year of service, at Kshs 873,201.05.
 - e. General damages for unlawful and/or unfair termination of employment [5 years' salary] at Kshs 1,746,402.
 - f. Costs.
 - g. Any other suitable relief.
8. The Respondent filed its Statement of Response dated July 18, 2019, which was amended on November 24, 2021.
 9. It is admitted that the Claimant was employed by the Respondent as pleaded in the Statement of Claim. It is denied that termination was unfair, unlawful or discriminatory. The Parties were governed by the contract dated April 11, 2013.
 10. The Claimant's performance for the year 2018 was wanting. He was taken through various discussions on improvement, and his performance appraised, as shown in the notices dated March 7, 2018 and March 12, 2018. Actions taken against the Claimant were taken on account of his failure in discharge of his role as Sales Manager.
 11. Fair procedure was followed. Several meetings were held between the Parties leading to termination. The Claimant was repeatedly called upon to improve his performance. Disciplinary hearing was held on September 11, 2018. Before the outcome was pronounced, the Claimant opted to take leave. A decision was taken to terminate the contract, which was communicated to the Claimant through the termination letter dated September 12, 2018. The Claimant undertook the clearance process. He was issued his Certificate of Service. He is not entitled to the prayers claimed. The Respondent prays the Court to dismiss the Claim with costs.
 12. Parties went for mediation but there was no settlement. Mediation Report on record states that Parties were not able to agree. Ideally, a Mediation Report should be designed to offer more information such as, why the Parties were not able to agree; and whether there were issues where there was agreement. The mediation, process should serve to narrow down issues, if not resolve all issues. It is hardly believable that mediation or conciliation process results in not a single issue settled. Why are Claims that are taken through mediation or conciliation processes, brought to Court with issues such as issuance of a Certificate of Service still pending?
 13. The Claimant and General Manager Raymond Goes, gave evidence for the respective Parties, on June 7, 2022, when the hearing closed. The Claim was last mentioned on July 19, 2022, when Parties confirmed filing and service of their Submissions.
 14. The Claimant adopted the contents of Statements of Claim and Witness on record. He exhibited his Documents number 1-4. He worked for 5 years and 4 months. He held a meeting with the Respondent on September 11, 2018. It was a normal sales meeting. In the afternoon however, the Group Human Resource Manager called him, with the instructions that the Claimant resigns, or his contract would be terminated. He declined resignation. He was told to go home, and would be recalled. He filled leave application form and gave it to the General Manager. In the evening, the Human Resource Manager



- called him, and told him to report the following day. Upon report, he was issued the termination letter. He had salary increment shortly before termination. He was never warned about poor performance, except once. There was no letter to show cause. He did not attend disciplinary hearing.
15. Cross-examined, he told the Court that sales improved from Kshs 20 million from the date he joined, to Kshs 57 million at the time of his departure. The General Manager was his Supervisor. The Claimant did not agree with the Supervisor when he alleged that the Claimant did not meet his targets. The Claimant responded to his Supervisor's letter through e-mail. He did not exhibit the e-mail before the Court. Salary increment was based on good performance. The letter communicating increment did not mention good performance. The Claimant said he needed time to reorganize his team. If his team was not performing, he would not be registering good performance. The meeting was a discussion on performance. The Claimant filed a copy of the minutes. It is true that he had not seen them earlier. He complained verbally about interference by his Supervisor, to the General Manager and the Group Human Resource Manager. The Claimant applied for leave, because he could not just go home as instructed, without any document. He appealed against termination decision. Redirected, the Claimant maintained that salary increment was based on good performance. The minutes of the meeting was not a correct record of what transpired. His contract did not have a clause on performance.
 16. Raymond Goes adopted Respondent's Pleadings, Documents [1-8], and his own Witness Statement, in his evidence.
 17. The Claimant's contract was terminated for non-performance. The Board of Directors had set sales target. The Claimant failed to deliver. The Respondent had various uncollected sums from sales. The Claimant and his team were not meeting budgetary targets. Raymond called the Claimant to his office. There was a discussion and the Claimant agreed to improve. Raymond issued the Claimant a letter dated May 7, 2018 on improvement. It was not interference. Raymond was Claimant's Supervisor. He monitored Claimant's sales. There was a sales meeting every month. The Respondent reviewed performance monthly. It was felt that performance had stagnated. The Claimant mentioned that some uncollected sums, were occasioned by fraudulent sales. He gave a list of these fraudulent sales. He explained that there were more. It was his duty to follow up.
 18. Cross-examined, Raymond told the Court that the employment contract was not a performance contract. Sales meeting was not a disciplinary meeting. Disciplinary meeting was held later. There were several letters issued on performance. The Claimant did not agree with some of the issues raised in the letters. He collected termination letter on September 12, 2018. The meeting was held on 11th September 2018. Redirected, Raymond told the Court that the Claimant was to deliver 95-100% of budgeted targets. He did not.
 19. The issues in dispute are whether termination was fair in substance and procedure; and whether the Claimant merits the remedies sought. These issues are founded on Sections 41, 43, 45 and 47 of the [Employment Act](#), 2007.

The Court Finds: -

20. It is agreed that the Claimant was employed by the Respondent initially as a Sales Manager, on April 11, 2013. He was confirmed after 6 months. He rose to the position of Country Sales Manager. He was in this position as of September 12, 2018, when the Respondent terminated his contract, for alleged poor performance. His last salary was Kshs 349,280 monthly.
21. There are some prayers in the Claim which are unclear, or unsupported in law and fact. In both Amended and Un-Amended Statements of Claim, compensation and damages are pleaded based on a figure of Kshs 41,911,365.04. One would think that the Claimant meant to plead 4.19 million, but



- why is the sum not amended, while there is an amended Statement of Claim on record? Going by the salary earned by the Claimant monthly at Kshs 349,280, what would the sum of Kshs 41.9 million, or 4.19 million as pleaded, represent?
22. There is no evidence on discrimination of the Claimant. He was dismissed for his role as the Country Sales Manager. He could never compare himself with Employees who worked under him. They were not sharing his role as the Country Sales Manager.
 23. There is no evidence to support the prayer for terminal dues/severance pay at Kshs 873,201. What terminal dues/severance pay? Is this based on the contract or the law? The Claimant has not specified what clause in his contract, provision in any statute or workplace policy, this prayer is founded.
 24. Besides the double prayer for compensation at Kshs 41.9 million each, the Claimant prays for general damages for unlawful and unfair termination, calculated on the basis of 5 years' service, at Kshs 1,746,402.1. How is this prayer to be distinguished from the previous prayers for double compensation?
 25. Prayers c[i] and c[iii] in the Amended Statement of Claim, are rejected from the outset.
 26. Validity of reason. The first thing that must be pointed out is that a contract of employment need not include a clause, that the Employee shall perform his duties to the best of his ability. Good performance is implied in all contracts of employment, as is other unwritten and presumed terms, such as duty of care; health and safety; duty to pay the salary; trust and confidence; and loyalty to the Employer. These rights and obligations are read from the intention of the Parties; by employment custom and practice; by common law; and implied by statute. It is not correct therefore, for the Claimant to float the idea that there was no obligation for him to post good performance, imposed by his contract of employment. Good performance was an implied term of his contract.
 27. The performance improvement areas dated March 12, 2018, identified by Raymond to the Claimant, were so broad. They were not framed as specific targets, against which the Claimant's performance could be judged. It is hard to tell if these concerns were in the nature of a performance appraisal. There were 21 areas of improvement identified which were: -
 - I. You are clueless with regard to sales/ collection/ team during the meeting with the Directors.
 - II. No action taken for customers who are falling in 30 days' credit period but paying beyond 90 days.
 - III. Does not know the whereabouts of your sales' team.
 - IV. Extending credit without checking overdue accounts.
 - V. Not liaising with your sales team.
 - VI. Not giving feedback.
 - VII. You are giving conflicting and false reports about collection and deliveries.
 - VIII. Insisting on releasing orders despite overdue accounts or no accounts.
 - IX. Causing conflicts between staff.
 - X. Not checking on commissions being given at counter sales.
 - XI. Not taking action on defaulters.
 - XII. Not checking on fraudulent/ fake LPOs.



- XIII. Follow-up to January Sales and Collection-Industrial Product-No improvement.
 - XIV. Delivery notes being misplaced, and no follow up.
 - XV. January Sales and Collection Meeting- it was agreed old debts should be collected before end February – No Improvement.
 - XVI. Dovetail Account not resolved.
 - XVII. No follow up on banners.
 - XVIII. Targets: to be posted on WhatsApp group- not been done.
 - XIX. No improvement in Central and sales are dropping.
 - XX. Not going on safari and not supporting salesmen.
 - XXI. Follow up on vernacular stations.
28. The Claimant was not asked to show cause why precipitate action should not be taken against him, following identification of the conflated areas of concern, identified by Raymond above. He was not asked to give a written explanation. The concerns were left unspecified and un-explained. Were they in the nature of a performance appraisal; were they charges against the Claimant; or were they a general communique on performance, addressed to the Claimant?
29. The meeting of September 11, 2018 which the Respondent characterized as a disciplinary meeting, came up with 4 charges, which are not exactly a match for the 21 areas of concern, communicated by Raymond to the Claimant above. These were: -
- I. Fraud and theft cases that were not reported to the police during the period they happened [ranging from 2015 to April 2018]. Fraud and theft cases were only reported after the insistence by the General Manager and Director, Sonia Bangera and Group Finance Manager. One case was reported by Purchasing Manager Oliver Salins regarding fake LPOs brought in by Ibrahim Chisaka.
 - II. Outstanding monies /uncollected payments. The General Manager and Finance Manager have had many meetings with you regarding the ageing debtors' list, but nothing was done. Refer to ageing debtors' list from the Accounts' Office.
 - III. Many delivery notes dating back to the year 2015 which at the time you were in charge of dispatch until September 2017.
 - IV. There are occasions you decided to go on leave and yet meetings to discuss sales and collections had been scheduled beforehand.
30. These revised areas of concern/charges were again not reduced into a letter to show cause, or disciplinary charges, before the meeting of September 11, 2018. They were just listed in the minutes of the meeting of September 11, 2018. It is not recorded what was asked of the Claimant, either based on the earlier 21 list areas of concern, or the 4 on-the-spot disciplinary charges, and what the Claimant stated in response. The minutes do not detail evidence produced by the Respondent at the meeting, to support the 21 listed areas of concern or the 4 charges. It was just about the Chairman rehashing the clause on termination, restating the Claimant's poor performance record, and giving generalized statements to justify termination. No details or evidence were given, supporting the charges.



31. The lack of valid reason or reasons in justifying termination, is further evidenced in the letter of termination, dated September 12, 2018. This time the Respondent gave 9 reasons to justify termination, which again do not match on all fours, the charges stated at the meeting held only the day before, September 11, 2018. It was for instance stated that as the Country Sales Manager, the Claimant did not constantly visit the various regions.
32. The Court does not find a structured performance appraisal system, job description, performance targets and Performance Improvement Plan, put in place by the Respondent, against which the Claimant's performance was weighed, and found wanting in the end, to justify termination.
33. The Claimant testified, and this was not clearly discounted by the Respondent, that his salary was consistently increased, based on his good performance. The letters on salary increment, exhibited by the Parties, ranging from 2016 to 2018, uniformly have the Respondent thanking the Claimant, for "your contribution to the Company." Although it was not expressly stated that the Claimant was being rewarded with salary increment for his good performance, he was thanked for his contribution to the Company. He would not be thanked, if his contribution was as negative as portrayed by the Respondent.
34. The Respondent alleges failures from the Claimant, from as early as 2015. Yet, he earned salary increment in the years following 2015. Why, in any event, would an Employer revisit issues happening in 2015, and bring an Employee to a disciplinary hearing on such issues, 3 years later, in 2018?
35. The Respondent did not establish valid and fair reason or reasons, to justify termination, under Sections 43, 45 and 47 of the [Employment Act](#).
36. Fair Procedure. Procedure was flawed, mainly on grounds already alluded to, in examining validity or reason. There was no letter to show cause. There were no charges preceding the hearing. The Claimant was called upon to answer charges identified on the floor of the disciplinary hearing. Charges were not specifically put to the Claimant, and an answer recorded on every charge. In the end there was a mishmash of high-sounding accusations, with not an iota of evidence to support any of them.
37. Termination was flawed, both in substance and procedure, under Sections 41, 43, 45 and 47 of the [Employment Act](#), 2007.
38. The Claimant worked for 5 years and 5 months. His record as far as can be seen by the Court, was clean. His contract was term-indeterminate. He expected to go on working. He did not contribute to circumstances leading to termination.
39. He is granted 5 ½ months' salary in compensation for unfair termination at Kshs 1,921,040.
40. Costs to the Claimant.
41. Interest allowed from the date of Judgment till payment is made in full, at court rates.

It is ordered:-

- a. It is declared that termination was unfair.
- b. The Respondent shall pay to the Claimant 5½ months' salary in compensation for unfair termination at Kshs 1,921,040.
- c. Costs to the Claimant.
- d. Interest allowed at court rates, from the date of Judgment till payment is made in full.



**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH
DAY OF SEPTEMBER 2022.**

JAMES RIKA

JUDGE

