



**Mayka v Bridge International Academies (Cause 553 of 2015)
[2022] KEELRC 3940 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3940 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 553 OF 2015
MA ONYANGO, J
SEPTEMBER 23, 2022**

BETWEEN

LIA GLORIA MAYKA CLAIMANT

AND

BRIDGE INTERNATIONAL ACADEMIES RESPONDENT

JUDGMENT

1. By the statement of claim dated and filed in court on April 8, 2015, the Claimant filed the instant Claim seeking the following reliefs:
 - a. A declaration that the Claimant's termination of employment was unlawful and unfair;
 - b. A declaration that the Claimant's work environment was contrary to the dignity afforded to the Claimant by the Constitution of Kenya;
 - c. An order the payment of USD 1,333.00 on account of the Claimant's terminal dues for days worked up to and including February 12, 2015;
 - d. An order for payment of USD 3,333.00 on account of one month's salary in lieu of notice;
 - e. An order for payment of the Claimant's terminal dues and compensatory damages in the amount of USD 40,000.00 on account of the unlawful and unfair termination of employment;
 - f. An order of payment of USD 20,000.00 on account of fundamental constitutional breaches by the respondent;
 - g. Costs of the suit and interest at court rates; and
 - h. Any other reliefs that this court may deem fit to grant.



2. The Claimant avers that she was employed by the Respondent effective September 16, 2013 in the position of Personal Assistant to the Chief Strategist and Development Officer earning an annual salary of USD 40,000.00.
3. She maintained that she performed her duties diligently and to the Respondent's satisfaction without receiving any form of warning and/or notice on her work during the subsistence of her employment contract with the Respondent until February 10, 2015 when she was unfairly and unlawfully verbally terminated from her employment with the Respondent.
4. The Claimant maintains that her termination was unfair, unjustifiable and without basis contrary to the provisions of the *Employment Act*, 2007.
5. She further stated that following her verbal dismissal, she was on February 11, 2015 issued with a letter of dismissal dated February 10, 2015 setting out grounds of her dismissal as poor performance, which grounds she maintained the grounds contained in the letter of termination are not grounds of gross misconduct to warrant her dismissal as provided under the *Employment Act*, 2007 as read with the Respondent's Employment Contract and the Respondent's Employee Handbook.
6. The Claimant further avers that the allegations of poor performance as alluded to in her letter of termination were unjustified and an aim by the Respondent to justify its illegal acts. She maintains no annual review was conducted by the Respondent to review her performance.
7. The Claimant holds that her termination was unlawful and unfair as the Respondent failed to comply with the mandatory provisions of Sections 41 and 45 of the *Employment Act*, 2007.
8. The claimant urged this court to find her claim with merit and to allow it in terms of the reliefs sought therein.
9. In response to the memorandum of claim, the respondent filed a statement of response dated and filed in court on May 4, 2015 in which it admits having engaged the Claimant as alleged. The Respondent however maintains that contrary to the Claimant's allegation, a written notice to terminate the Claimant's employment was duly served on her following a verbal and email communication on the same.
10. The Respondent denies that the Claimant's termination was unlawful, unfair and without basis insisting that the same was as a result of poor performance, a fact it maintains was within the Claimant's knowledge and is therefore not a ploy to justify the Claimant's dismissal.
11. The Respondent avers that upon her termination on February 10, 2015 the Claimant was issued with one month's notice which was to run from February 11, 2015 to March 9, 2015. However, owing to the sensitivity of her duties it elected to terminate her employment immediately and paid her one month's salary in lieu of notice.
12. The Respondent maintains that the Claimant was accorded a fair hearing through its appeal process but the Claimant elected not to lodge her appeal despite expressing her displeasure with her termination.
13. The Respondent maintained that it paid all the terminal dues due and owing to the Claimant and is therefore not indebted in any way to the Claimant herein.
14. In conclusion the Respondent urged this Court to find the claim as filed without basis and to dismiss it in its entirety with costs to the Respondent.



Evidence

15. The suit preceded for hearing on November 30, 2021 and February 23, 2022 with the Claimant testifying on her own behalf and Reuben Wambugu Mwangi, the Respondent's Managing Director testifying on behalf of the Respondent.

Claimant's Case

16. The Claimant, adopted her witness statement dated July 30, 2014 together with the list and bundle of documents dated May 3, 2014 as exhibits in this matter.
17. the Claimant testified that in addition to her official roles assigned to her as per the employment contract, the Respondent would direct that she takes care of the employer's children which would force her to work up to wee hours of the night. She maintained that she had no choice but to work as directed.
18. The Claimant testified that she was never issued with a performance evaluation despite requesting for the same on numerous occasions. She further averred that she sought a job review as she felt her duties were not in line with the job description but none was issued.
19. She testified that she was not accorded any hearing prior to the termination and that she was subjected to unfair treatment by the Respondent despite her protests.
20. The Claimant urged this Court find her claim with merit and to allow it in terms of the reliefs sought therein.
21. On cross examination, the Claimant denied any laxity in performance of her duties maintaining that her performance was good. She further stated that she did not receive any previous communication from the Respondent where her performance and role was discussed prior to her alleged termination.
22. On further cross examination, the Claimant stated she was aware of the appeal process. She however did not appeal because she believed that she would not get a fair hearing.
23. On re-examination, the Claimant stated many of the emails she presented to Court were on child care, which was not what she was hired to do. She maintained that upon her appointment her work was to make things easier for the Respondent.
24. The Claimant testified that she was never issued with any job description despite requesting for the same from the Respondent on several occasions.

Respondent's Case

25. RW1, Reuben Wambugu Mwangi adopted his witness statement July 7, 2021 as his evidence in chief together with the list and bundle of documents dated May 4, 2015.
26. RW1 testified that due process was followed and that the reason for termination of the Claimant's employment was failure to meet targets; a fact that was within the Claimant's knowledge as the Respondent had previously communicated the same to her.
27. RW1 further testified that the process of appeal is well articulated in the employee handbook. He further confirmed that the Claimant had unsuccessfully sought an alternative role with the Respondent.



28. RW1 maintained that the role of providing child care was aptly communicated to the Claimant by her supervisor.
29. On cross examination RW1 stated that although there is communication of child care there is no confirmation of acceptance of the additional role. RW1 further stated that he could not confirm whether the role was part of the Claimant's job description as an Executive Assistant.
30. On further cross examination RW1 stated that the employee annual review was scheduled to be handed over the week following the Claimant's termination and that she was given her annual review on the date of her termination. He however confirmed that at the time of the Claimant's termination the (Performance Improvement Plan) P.I.P tool was not availed to her and the same was also not filed in Court for inspection.
31. On re-examination RW1 stated that the formal P.I.P is discretionary and that once terminated an employee cannot be subjected to the same.
32. RW1 urged this Court to find the Claim without basis and to dismiss it with costs to the Respondent.
33. Parties were thereafter directed to file and exchange their written submissions.

Claimant's Submissions

34. It is the Claimant's submissions that the termination was unlawful, unfair and that fair procedure was not followed in contravention of the mandatory provisions of sections 41 and 45 of the *Employment Act*, 2007. To buttress this argument the Claimant relied on the Court findings in the cases of *David Gichana Omuya v Mombasa Maize Millers Limited* (2014) eKLR and *Anthony Makala Chitavi v Malindi Water & Sewerage Co. Limited* (2013) eKLR where the courts placed emphasis on compliance with the provisions of section 41 of the *Employment Act*, 2007 in order to ensure a termination is fair both procedurally and substantively.
35. The Claimant further submitted that the termination of her employment was unfair by dint of the provisions of section 45 of the *Employment Act*, 2007. For emphasis the Claimant relies on the findings in the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* (2014) eKLR.
36. The claimant further submits that no evidence has been adduced by the respondent during the hearing to rebut her contention that she did not receive any warning and/or notice of unsatisfactory performance.
37. The Claimant maintained that at all times while under the Respondent's employment her performance was exemplary.
38. That she was not accorded a fair hearing prior to her termination contrary to the Respondent's contention. To fortify this argument the Claimant cited the case of *Kanda v Government of the Federation of Malaya* (1962) AC 322 on the right to a fair hearing.
39. The Claimant further submits that owing to the ambiguity in her roles and the fact that the Respondent failed to give the Claimant a job description, she was exploited by the Respondent who assigned her roles and/or tasks such as taking care of her supervisor's children a role she was not hired to performance.
40. The Claimant submitted that having proved that her termination was unlawful and unfair she is entitled to the reliefs sought in her claim. For emphasis the Claimant relies on the provisions of section 49 of the *Employment Act*, 2007 and the court's decision in the cases of *Richard Ombwayo Mukwana*



v Bridge International Academies Ltd, Industrial Cause No 2226 of 2012 and *James Philip Sudhe v Bridge International Academies Limited* (2020) eKLR.

41. On the issue of costs, the Claimant submits that the same should be awarded to her as the successful litigant relying on the provisions of section 27 of the *Civil Procedure Act*.
42. In conclusion the claimant urged this court to find her claim with merit and to allow it as prayed.

Respondent's Submission

43. The respondent submitted that the claimant's summary dismissal was lawful and fair in line with the provisions of section 45 of the *Employment Act*, 2007. It further maintained that due notice was in fact served upon the Claimant prior to her termination.
44. It is further its contention that due process as provided under Section 41 of the *Employment Act*, 2007 was followed. The respondent maintains that it indeed had a valid and lawful reason, being the claimant's alleged poor performance as highlighted in the hearing thereby fulfilling its statutory duties under sections 41 and 43 of the *Employment Act*, 2007.
45. The Respondent further submits that fair procedure was followed as provided under section 41 of the *Employment Act*, 2007 prior to the Claimant's termination. It further submitted that the Claimant failed to exhaust all the appellate mechanisms prior to approaching this Court and thus the Court's jurisdiction was prematurely invoked. For emphasis the Respondent relied on the case of *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others* (2015) eKLR on the doctrine of exhaustion.
46. On the reliefs sought the Respondent maintains that the Claimant is not entitled to the reliefs sought in her Memorandum of Claim having paid the Claimant all her terminal dues at the time of her separation with it and is therefore not indebted to the Claimant.
47. It is on this basis that the Respondent submitted that the Claim against it is without merit and therefore urged this Court to dismiss it with costs to the Respondent.

Analysis and Determination

48. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, there is no dispute that the Claimant was employed by the Respondent between September 16, 2013 and February 10, 2015. The Issues for determination therefore are:
 - a. Whether the termination of the Claimant's employment was valid both procedurally and substantively;
 - b. Whether the Claimant is entitled to the reliefs sought.

Was the Claimants' employment unfairly terminated?

49. Section 45(1) and (2) of the *Employment Act* makes the following provisions regarding unfair termination of employment—
 1. No employer shall terminate the employment of an employee unfairly.
 2. A termination of employment by an employer is unfair if the employer fails to prove—
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—



- i. related to the employee’s conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
- c. That the employment was terminated in accordance with fair procedure.
50. Flowing from the above mandatory provision of the law, termination of an employee’s contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reasons(s) and upon following a fair procedure.

Reason for the termination

51. The reason cited for terminating claimants’ employment herein was poor performance. The termination letter dated February 10, 2015 stated that the Claimant’s termination was as a result of poor performance.
52. In her pleadings and evidence the claimant denied that her performance was contended by the Respondent maintaining that no warning letter was ever issued to her on the same.
53. The Claimant further maintained that the Respondent failed and/or refused to subject her to any performance appraisal or issue to her a job description despite several requests from her.
54. She maintains that due to the ambiguity of her roles she was forced by the Respondent to perform tasks such as watch over her supervisor’s children which she believed were not under her job description.
55. The Respondent on the other hand maintained that the Claimant’s performance was poor producing in evidence emails which stipulated instances when the Claimant failed to perform her tasks to its satisfaction.
56. The Respondent stated that the Claimant was issued with an annual review of her performance on the day of her termination and that the Respondent had a PIP which was never formally availed to the Claimant prior to her termination. RW1 further stated that the tool was not availed to this Court for scrutiny.
57. Section 41 of the *Employment Act* 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.”
58. In *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.”

59. Also in the case of *Pooroosotum Bheekhoo v Linksoft Group* (2015) eKLR, Mbaru J. held that:-

“...in the event an employee is of poor performance, and this is alleged by the employer, the duty is upon such an employer to prove such poor record of performance. It is not just enough to cite poor performance.”

60. In the instant case, the Respondent has not produced any proof of performance appraisal or poor performance that demonstrates the Claimant never met the set targets. Further no warning letter was ever issued to the Claimant during the subsistence of her employment contract on the alleged poor performance.

61. In fact the Claimant did not have a job description from which the Respondent would lay basis for her poor performance (if at all). How then did the Respondent come to a conclusion that her performance was dismal?

62. As stated in the above authorities the Respondent is expected to demonstrate what it portrays as poor performance and this can only be tested by a demonstration of what was expected of the Claimant and what she actually achieved. The scores of her performance was never produced in Court.

63. The onus of proving poor performance lies upon the Respondent. In this case, the Respondent failed to prove the same. In the circumstances, I find the termination of the Claimant was premised on invalid reasons and was therefore unfair.

64. The upshot is that the Respondent has not proved that there was a valid and fair reason to terminate the Claimant’s employment as required under Section 45 of the *Employment Act*.

Procedure followed

65. Section 41 of the *Employment Act* provides that before an employee is terminated on grounds of misconduct or poor performance, he ought to be given an opportunity to present his case.

66. No evidence was availed to this Court to prove that the Claimant had been accorded a fair hearing prior to the termination by way of disciplinary hearing minutes. In absence of this I find that the Respondent has failed to prove that a fair procedure was followed before termination the Claimant’s employment on account of poor performance contrary to the mandatory provisions of section 41 of the *Employment Act*, 2007.

67. Having found that the respondent has failed to prove a valid reason for terminating the Claimant’s employment contract, and further failed to prove that a fair procedure was followed, it is my finding that the termination was unfair and unlawful within the meaning of section 45 of the *Employment Act*, 2007.

What Reliefs is the Claimant entitled to

a) A declaration that the Claimant’s termination of employment was unlawful and unfair

68. Having found that the claimant’s termination was procedurally and substantively unfair this court makes a declaration to the effect that the said termination was indeed unlawful and unfair.



b) A declaration that the Claimant’s work environment was contrary to the dignity afforded to the Claimant by the Constitution of Kenya

69. The Claimant in her pleadings and evidence maintained that her work environment with the Respondent was contrary to the dignity as protected under the Constitution of Kenya, 2010. She however, did not avail evidence to prove the same.

In the circumstances this prayer fails.

c) An order the payment of USD 1,333.00 on account of the Claimant’s terminal dues for days worked up to and including February 12, 2015

70. The Respondent in its letter of termination dated February 10, 2015 provided inter alia as follows: -

“Given your employment has been terminated whilst on permanent employment, the company will be providing you with the following Termination payment: Payment of days worked up to and including February 10, 2015 Payment of days worked up to March 9, 2015 Payment of accrued leave days, if any Bonus payment, if any”

71. The respondent maintained that the claimant was paid all her terminal dues at the time of separation and that it is not indebted to the claimant. The claimant did not dispute this assertion.

72. In the circumstances I find that the Claimant was paid all her terminal dues as itemized above and therefore this prayer fails.

d) An order for payment of USD 3,333.00 on account of one month’s salary in lieu of notice

73. From the evidence before this court the claimant was paid one month’s salary in lieu of notice, a fact she did not dispute. She is therefore not entitled to this relief.

e) An order for payment of the Claimant’s terminal dues and compensatory damages in the amount of USD 40,000.00 on account of the unlawful and unfair termination of employment

74. Having found that the Claimant’s termination was unlawful and unfair it follows that she is entitled to compensatory damages by dint of section 49 of the Employment Act, 2007.

75. I have considered the length of the Claimant’s service and the circumstances surrounding the termination. It is my view that the Respondent’s treatment of the Claimant bordered on servitude which is the highest form of human indignity. It is for this reason that I find that she is entitled to maximum compensation for the unlawful and unfair termination.

76. The Claimant is therefore awarded USD 40,000.00 as damages for unlawful termination of her employment.

f) An order of payment of USD 20,000.00 on account of fundamental constitutional breaches by the Respondent

77. This prayer has been subsumed in the award of compensatory damages.

78. The claimant is awarded costs of the suit and interest at court rates from the date of this judgment until settlement in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF SEPTEMBER 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

