



**Sitati v Mcensal School of Fashion Design (Cause 2452 of 2017)  
[2022] KEELRC 13101 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13101 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2452 OF 2017  
AN MWAURE, J  
OCTOBER 31, 2022**

**BETWEEN**

**BRENDA SALLY SITATI ..... CLAIMANT**

**AND**

**MCENSAL SCHOOL OF FASHION DESIGN ..... RESPONDENT**

**JUDGMENT**

1. The Claimant by the memorandum of claim dated the 14<sup>th</sup> of December 2017 alleges that on the 4<sup>th</sup> of January 2016 she was employed on a contract by the Respondent as a tutor earning a basic salary of Kshss 35,969/= per month. That on or about the 3<sup>rd</sup> of May, 2017 at the instance of the Respondent the employment was renewed to run for a period of one year from the said date and the Claimant's salary was increased to Kshss 42,960.
2. The Claimant states that in breach of the employment contract dated the 4<sup>th</sup> of January 2016 and renewed on May 3, 2017 the Respondent consistently paid her on ground of salary way below the agreed basic salary in the contract despite the Claimant raising the issue verbally with the Respondent.
3. The Claimant avers that on or about the 4<sup>th</sup> of September, 2017, the Claimant received a letter from the Respondent's Manager asking that the Claimant returns the duly executed contract. The Claimant states that before she could act on the letter or respond thereto, she received another letter the following day the 5<sup>th</sup> of September 2017 effectively terminating her employment contract without notice purportedly laying her off on academic under qualification.
4. The Claimant contends that she was not accorded any or proper notice and/or deadline on which to achieve her qualifications in any event, the Respondent was fully aware of the Claimant's qualifications at the time the employment contract and renewal were executed.
5. It is the Claimant's case that the Respondent's actions to terminate her contract of employment is malicious and discriminatory as similar action was not applied across the board in relation to other



employees of the Respondent. The Claimant also states that the Respondent has failed to remit some of the statutory deductions from the Claimant's salary to the relevant statutory bodies.

6. The Claimant prays for the following:-
  - a. An order that the Respondent does pay the Claimant's dues of Kshs 353,937.50
  - b. An order that the Respondent do remit all the statutory dues deducted from the Claimant's salary but still unpaid to the relevant statutory bodies
  - c. Costs of the claim and interests thereon.
  - d. Any other orders that the Court may deem just and expedient.
7. The Respondent filed the memorandum of appearance on the January 26, 2018. It then filed the statement of response on the May 21, 2018. The Respondent says that the claim is unfounded and lacking in law. The Respondent denies the Claimant was employed in the year 2016 and says that the Claimant was in breach of the contract thus her services were terminated and all her terminal dues were paid in full.
8. The Respondent says the Claimant employment was terminated because of underperformance, failure to meet the minimum academic requirements and failure to comply with terms of contract.

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

9. The CW1 Brenda Sally Sitati gave sworn testimony and says that she used to work with the Respondent. She said she worked for the Respondent from 4/1/2016 for her contract was renewed on 3/1/2017 but she did not serve the full period as she got a termination letter dated the 5/9/2017. She testified that the reason given for termination was under qualification.
10. The Claimant says that they had a meeting and she was told that they needed to upgrade qualifications. She told Court she then applied to Kenyatta University but was not accepted. She says that her certificate was on diploma in Fashion Design from Buru Buru Institute of Finance. She says she was not given any notice period to upgrade her qualifications and was not told what to upgrade to. She says that the Respondent only said that according to the regulations they knew what they needed to do. The Claimant stated that it was not true she was underperforming as her contract was renewed and there was no warning letter that she was underperforming.
11. The Claimant says she was to be paid Kshs 35,969/= per month but she was being paid 35,130/= per month and so was being underpaid by Kshs 839/= per month. In the 2<sup>nd</sup> contract she was supposed to be paid an extras Kshs 7,830/= per month for 5 months being the amount of underpayment. The Claimant further testified that she had worked for 5 months and had 7 months to go. She maintained that she was unfairly terminated as she was not told how she was unqualified. She said that she is claiming Kshs 300,720 for the remaining months of the contract. She was paid one month in lieu of notice by cheque that was not honoured and was given another cheque. She stated that her whole claim was for Kshs 353,937/= as per her claim.

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

12. The Respondent did not give any evidence as they were absent without cause on the hearing date.



### Claimant's submissions

13. The Claimant submitted that they had produced as exhibits both the contract dated the January 4, 2016 executed by both the Claimant and the Respondent. That paragraph 5 of the said contract indicates that the salary was Kshs 35,969 payable per month subject to tax and other statutory deductions.
14. The Claimant further submits that upon executing the 2<sup>nd</sup> renewal contract in May 2017, she continued to earn the sum of Kshs 35,130/= as evidenced in the payslip of the month of May, 2017. The 2<sup>nd</sup> contract provided for a monthly salary of Kshs 42, 960/= therefore the Claimant was underpaid to the tune of Kshs 7,830/= per month. It is said that for the 5 months, the Claimant worked under this contract before its unlawful termination on or about September 5, 2017 and therefore the Claimant claims a total sum of Kshs 39,150/=.
15. The Claimant relied on the Case of *National Bank Kenya Limited versus Pipe plastic Samkolit Kenya Ltd and Another* 2001 eKLR for the proposition that the parties are bound by their contract, unless coercion, fraud or undue influence are pleaded and proved. The Claimant argues that there is no other contract that has been presented before Court that shows the terms of the contract were amended or varied and such variations signed by the parties and this leaves the two contracts as the only contracts in operation at the time of termination.
16. The Claimant also submits that the employment was terminated un procedurally, unfairly and thus unlawfully. The Claimant argues that she received a termination letter on the September 5, 2017 citing academic under qualifications as the reason for her dismissal with immediate effect. The Claimant submits that it discounted all the reasons the Respondent put forward for the dismissal. That the Claimant was not invited to any hearing session to defend herself over the charge of under qualifications. There was no indication in writing of the new qualifications required, the deadline if any to acquire the qualifications, the need for further qualification nor explanation as to how the Claimant got the job.
17. The Claimant thus argued that the response is a sham and does not meet the requirements of Section 43 (1) of the Employment Act, 2007 . That no notice or valid notice as required by the law was issued to the Claimant of the intended termination and the purported payment in lieu of notice fell short of the legally required notice as it was to issue for part of the month of September, 2017 which makes the termination unfair in the circumstances.
18. The Claimant has also submitted on the remedies prayed.

### Respondent's submissions

19. The Respondent in the submissions argues that the contract was renewed and terminated which it is suggested is in line with the contract being for a limited period of time. The Respondent relied on the case of *Omusamia versus Upper hill Springs Restaurant* Cause No 852 of 2017 (2021) KEELRC 3 KLR where it the court defined a contract of employment as one in which a person who is the employee undertakes for a time limited or indeterminate period of time to do the work for remuneration according to the instructions and under the direction or control of another person, the employer.
20. The Respondent further argued that the dismissal was fair and in accordance with the procedure. That the Respondent's failure to disclose material facts was the main ground for the termination of the contract of service. The Claimant according to the Respondent failed to disclose that she was



not qualified as a teacher/trainer as per the requirements of the Technical and Vocational Training Authority.

21. The Respondent argues further that there were demands and requests that were not heeded to and continued engagement with the Claimant would have jeopardized the Claimant's business. The Claimant relied on the case of *Maina Munyua versus Amref Health Africa* 2019 eKLR where the court said that

“it is clear that the Claimant had been given ample notification and was aware that his contract would be terminated should he fail to achieve the qualifications to enable him hold the job. The Respondent therefore had a valid reason to terminate the employment of the Claimant when he failed to achieve the qualification”

22. The Respondent further submitted that the Claimant accepted the alleged underpayment of the salary and is estopped from claiming that she was underpaid. Reliance has been placed on the case of *Air Services Limited versus Theuri Munyi* 2017 eKLR for the proposition that the variation of the salary by both parties was a new term which bound them. It was erroneous therefore for the trial Court to find and hold that the original contract was not capable of variation and was not varied in respect of the salary clause.

23. The Respondent also submitted on the reliefs which he has prayed.

Issues for Determination

- a. Whether there was unlawful/unfair termination
- b. Whether the Claimant is entitled to the reliefs sought

### **Determination**

24. The law as regards fair termination of an employment relationship is provided for under sections 41, 43, and 45 (2) of the Employment Act, 2007 .
25. The statutory burden of proof on a party making claim of unfair termination of employment is provided for under section 47(5) of the Employment Act, 2007 . It enacts 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”

26. Section 41(1) of the Employment Act, 2007 provides as follows:

“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.”

27. Section 43 provides as follows:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the



employer fails to do so, the termination shall be deemed to have been unfair within the meaning of the section.

28. Section 45 (1) and (2) of the Employment Act, 2007 provides that—

- “(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.”

29. The Claimant’s case is that she was unfairly terminated without being accorded a hearing. The Respondent having not defended the suit denied itself the opportunity of demonstrating that it complied with the provisions relating to fair procedure before making the decision to terminate.

30. What is transpiring from the evidence in form of pleadings, evidence adduced and submissions is that the Claimant’s employment was terminated for lacking academic qualification. There was a meeting held on January 11, 2017 for the Respondents teachers and issue of qualifications was discussed as it was a requirement from the ministry of higher education. The teachers agreed to look for colleges offering fashion degrees and report in March. Miriam, Linda and Irene were asked to keep a check on that and report in March. It is not clear what they were to keep a check on and the Claimant is not referred in particular and was not addressed specifically on her under qualification.

31. The letter of termination of the Claimant’s employment states the reason for termination is lack of relevant academic qualifications. The reason given for termination is very generalised as is not clear what academic qualification the Claimant was expected to have achieved. The Respondent had employed her with the same qualifications and he showed no justifications of terminating her employment on under qualification after she had worked for them for about 17 months.

32. In section 41(2) of Employment Act 2007 provides that an employer before terminating the employment of an employee or summarily dismissing an employee under section 44(3) & (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 sub section (1) may make.

33. The Respondent in his response says the reason for terminating the employment of the Claimant was under qualification, breach of contract and under performance.

34. That as it may the Respondent needed to inform the Claimant the parameters of her lack of qualifications and the parameters of her under performance. He was then to invite her for a disciplinary hearing and inform her to invite a fellow worker of her choice or a shop floor union representative to be present during her hearing as well provided in section 41 of Employment Act 2007.



35. There is no evidence that the Respondent followed the law clearly set out in the employment laws. In fact in the case of *Maina Mwangi vs Thika Coffee Mills Limited* (2012) eKLR it was held:

“Where the employee fails to meet the standards, the first duty of the employer is to let the employee know that his performance has fallen below the set standards. The employer should then propose training, guidance and fresh instructions to the employee. The employer is required to allow the employee time to improve. If no improvement is noted over a reasonable passage of time, the employer should issue a formal warning to the employee and advise employee that he may be separated from the employment on account of poor performance. The next phase involves investigations by the employer and consideration if the employee could fit better in another role within the organization. At the investigation, the employer should engage the employee, and if at the end of these steps, dismissal of the employee is the course that commends itself to the employer, then Section 41 of the *Employment Act, 2007* must come into play.

36. The case before this Court this day the Respondent failed to clearly show the extent of under performance by the Claimant and her under qualification and what she needed to achieve in order to comply.

37. The Court finds the Respondent failed to comply with the employment and labour laws to establish valid reasons for terminating the Claimant from her employment. He also failed to follow the mandatory procedure provided in Section 41 of the *Employment Act*. The Court finds the Respondent therefore terminated the Claimant unlawfully and unfairly and so enters judgment in favour of the Claimant.

## Remedies

38. Having found the Claimant has succeeded in her claim she is awarded the following remedies.

- i. Amount underpaid on contract @ Kshss 839/- for 16 months Kshss 13,424/- Contract shows her salary @ 35,969/- for two years from January 2016.
- ii. Amounts underpaid for 5 months @ 7830/- Kshss 39,150/- contract shows her salary @ 42,960/- for one year from 3<sup>rd</sup> May 2017.
- iii. Payment for the period of balance contract is denied but instead award general damages @ 3 months' salary considering she worked for the Respondent close out two years @ Kshss 42,960 x3 Kshss 128,880/-
- iv. Bank charges for dishonoured cheque Kshss 643.50
- v. An order to remit or account for any dues deducted but not remitted to the relevant authorities to be produced for Courts attention within 45 days from today's date i.e PAYE, NSSF and NHIF.
- vi. Total awarded Kshss 182,097/15
- vii. Interest also to be awarded from date of judgment till full payment.  
Mention on 24/1/2023 to receive the account for statutory deductions.
- viii. Costs to the claimant.

Orders accordingly.



**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 31<sup>ST</sup> OCTOBER, 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**

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