



**Makokha v Human Performance Dynamics Africa Limited (Cause
1593 of 2014) [2022] KEELRC 13269 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13269 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1593 OF 2014
L NDOLO, J
NOVEMBER 24, 2022**

BETWEEN

LINDA NASIKE MAKOKHA CLAIMANT

AND

HUMAN PERFORMANCE DYNAMICS AFRICA LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant had initially sued Bharti Airtel International (Netherlands) BV-Kenya Branch as the 1st respondent and Human Performance Dynamics Africa Limited as the 2nd respondent.
2. Bharti Airtel subsequently moved the court by notice of motion dated May 22, 2015, seeking to be removed from the proceedings, on the ground that it had no employment relationship with the claimant. In a ruling delivered by Abuodha J on September 2, 2016, Bharti Airtel was allowed to exit the proceedings leaving Human Performance Dynamics Africa Limited as the only respondent.
3. The claimant thereafter filed an amended memorandum of claim on October 24, 2019, seeking relief for unlawful and unfair termination of her employment.
4. The matter proceeded to full trial where the claimant testified on her own behalf. The respondent called one witness, Christine Njambi. Thereafter parties filed and exchanged their respective submissions.

The Claimant's Case

5. The claimant states that she was initially employed by Bharti Airtel International as a Secretary, in December 2000. She was later promoted to the position of personal assistant to the Technical Officer Africa and Director of Internal Assurance Africa.



6. The claimant claims that she was employed on permanent and pensionable terms until the year 2013 when all personal assistants were placed on one-year renewable contracts.
7. The claimant worked until April 17, 2014 when her services were terminated on allegations of her involvement in loss of property within Bharti Airtel premises. The claimant denies the said allegations and terms the termination of her employment as unlawful and unfair. She states that there was no valid reason for the termination and she was not accorded a fair hearing.
8. The claimant pleads that at the time of separation she earned a monthly salary of Kshs 177,867.
9. The claimant seeks the following remedies:
 - a. Damages for unfair termination.....Kshs 2, 134, 400.00
 - b. Bonus.....704, 352.00
 - c. Leave pay for 21 days.....124, 506.90
 - d. Airtime allowance.....68,000.00
 - e. Pension.....17, 786.70
 - f. Loss of reputation.....10,000,000.00
 - g. One month's salary *in lieu of* notice
 - h. Rewording of the termination letter
 - i. Costs plus interest

The Respondent's Case

10. In its statement of response dated September 15, 2017 and filed in court on the September 18, 2017, the respondent admits having engaged the claimant on a one-year term contract for the period running from October 1, 2013 to September 30, 2014.
11. The respondent avers that the claimant's contract was validly terminated on April 17, 2014, on grounds of gross misconduct. The respondent adds that the claimant was accorded a fair hearing in compliance with the mandatory provisions of the [Employment Act, 2007](#).

Findings and Determination

12. There are two (2) issues for determination in this case:
 - a. Whether the termination of the claimant's employment was lawful and fair;
 - b. Whether the claimant is entitled to the remedies sought.

The Termination

13. The claimant's employment was terminated by letter dated April 17, 2014 stating as follows:

“Dear Linda,

Termination Of Employment

Reference is made to the email communication dated April 11, 2014 from Bharti Airtel where you are deployed as a personal assistant.



Following investigation findings on the loss of property within Bharti Airtel premises and a disciplinary hearing held on Monday April 7, 2014, the management of Bharti Airtel has taken the decision to terminate your deployment on the grounds of gross misconduct which relates to matters of trust and integrity.

Given the reciprocal relationship between HPD Africa and Bharti Airtel, we are obliged and regret to inform you that we must hereby terminate your employment as follows:

1. Effective termination date

Your employment with Human Resource Dynamics Africa – HPD Africa will terminate effective 17 April 2014.

2. Salary & Dues up to Termination Date

You shall be paid your salary and all other dues applicable under your contract of employment up to and including the Termination Date as set out below:

- a. Salary for the month of April 2014
- b. One (1) month's pay *in lieu of* notice
- c. Outstanding accrued leave days – 21 days

Details of these payments are in the attached statement. Payment will be made by 25th of April 2014 by way of direct transfer into your designated bank account and will be subject to such deductions of tax (PAYE) and any other contributions as the employer is required to make under the law.

3. Outstanding expenses claims and debts owed to the company

Any outstanding expense claims and debts (including personal expenses) owed to Bharti Airtel will be deducted from your dues and you will be reimbursed any outstanding expense claims, subject to Bharti Airtel's normal expense policy.

4. Company Property

You will return to Bharti Airtel all property which was in your possession or custody or under your control, together with all property belonging to third parties which was in your possession or custody or under your control by virtue of your employment with Bharti Airtel. The property to which this paragraph applies extends to but is not limited to memoranda, notes, records, manuals, correspondence or other documents, lists of customers or clients, computer disks and data, including all copies or duplicates of such materials, all documentation prepared or produced in connection therewith, including those containing Trade Secrets or Confidential Information, whether compiled or made by you or furnished to you by virtue of your employment with the Company, and passes, keys, credit cards, business equipment, computer equipment and telephones (the "Company Property").

5. Shares Schemes and Pensions



Any shares, pension or provident or retirement benefits you have will be dealt with in accordance with the terms of the relevant plans/schemes and any relevant award letters. You are advised to contact the Provident Fund Administrator for further guidance and the processing of your benefits under that scheme.

6. Certificate of Service

HPD Africa will provide you with a certificate of service in accordance with the requirements of the [Employment Act](#). Trade Secrets, restrictions and duty of confidentiality you undertake to Bharti Airtel:

- a. To keep and continue to keep in confidence all trade secrets of the company that came into your knowledge during your employment by the company and that you have not and shall not disclose, publish or make use of at any time such trade secrets for as long as the information remains a trade secret;
- b. Not to make or issue or cause to be made or issued any statement reasonably likely to damage the business or reputation of the company and/or the affiliates; and
- c. Not to disclose, publish or communicate to any person or use for your own benefit or the benefit of any third party, but to hold in confidence any confidential information that you possess or that came into your knowledge during your employment by the company.

7. Definitions and Interpretation

In this letter, the term:

A. "Confidential information" shall include, without limitation, any data or information that is valuable and/or proprietary to the company or associated company, other than trade secrets relating to the business, personnel, affairs, products or processes, business plans, forecasts, research products, future business strategy, tenders and any inside information of the company or any associated company. This restriction shall not apply to any information that you can show by way of documentary evidence is in the public domain other than by reason of unauthorised disclosure by you;

B. "Trade Secret" shall mean any technical or non-technical data, formula, pattern, compilation, program, device, method, technique, drawing, process, financial plan, product plan, list of actual or potential customers or suppliers or other information similar to any of the foregoing, which (i) derives economic value, actual or potential from not being generally known to and not being readily ascertainable by proper means by, other persons who can derive economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Yours sincerely,

Signed for and on behalf of Human Performance Dynamics Africa – HPD Africa

Christine Njambi"



14. Reading from this letter, the reason for termination of the claimant's employment was her complicity in the loss of property at Bharti Airtel where the respondent had deployed her as a personal assistant.
15. According to the evidence on record, the claimant admitted having taken some items that were part of property being shifted within the premises of Bharti Airtel. The claimant was unable to demonstrate that she had been authorised to take the items away. This, in my view, constituted a valid reason for termination of her employment as contemplated under section 43 of the *Employment Act*. This satisfies the first limb of a fair termination.
16. Regarding the second limb, section 41 of the *Employment Act* requires an employer to allow an employee the opportunity to defend themselves against allegations levelled against them. The claimant herself told the court that she was invited to a disciplinary hearing at which Christine Njambi (representing the respondent), Rose Maruti (representing Bharti Airtel) and Carolyne Munyua were in attendance.
17. The claimant confirmed that the allegations against her were read out to her and she was availed an opportunity to respond. The court also notes that prior to the disciplinary hearing, the claimant had submitted a written response to the allegations.
18. In the final submissions filed on behalf of the respondent, reference was made to the decision in *Kenya Ports Authority v Fadhil Juma Kisuwa* [2017] eKLR where the Court of Appeal held that the right to be heard is satisfied when the employer has clearly explained to the employee the nature of accusations for which the employer contemplates to terminate employment and the employee has been accorded an opportunity to make their representations.
19. This is what happened in this case and I find no reason to fault the respondent in any way.
20. On the whole, the termination of the claimant's employment was substantively and procedurally fair. As a result, I find and hold that the claims for damages and loss of reputation are without basis. There is also no basis for the prayer for rewording of the termination letter.
21. The claims for bonus, airtime allowance and pension were not proved and are disallowed.
22. The termination letter confirms that the claimant is entitled to salary for the month of April 2014, one month's salary in lieu of notice and leave pay for 21 days. These claims are therefore payable and the respondent is directed to tabulate and settle the said claims within the next fourteen (14) days from the date of this judgment.
23. Save for the admitted claims, the claimant's claim fails and is dismissed.
24. Each party will bear their own costs.
25. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022

LINNET NDOLO

JUDGE

Appearance:

Miss Kitonga for the Claimant

Mrs. Okulo for the Respondent



