



**Mutiso v Roto Moulders Limited (Cause 1751 of 2017)  
[2022] KEELRC 13525 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13525 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1751 OF 2017  
SC RUTTO, J  
DECEMBER 9, 2022**

**BETWEEN**

**PATRICK MUTUNGA MUTISO ..... CLAIMANT**

**AND**

**ROTO MOULDERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent as a production supervisor with effect from on 15<sup>th</sup> July, 2010. He avers that he served the respondent diligently until his dismissal on 8<sup>th</sup> November, 2016. That his termination took place shortly after he resumed from his annual leave. That he was informed that his termination was due to unsatisfactory performance. The claimant has termed his termination as unlawful and against the rules of natural justice and the tenets of good and fair labour practices. It is against this background that he seeks from the respondent, the sum of Kshs 333,359.00, being one month's salary in lieu of notice and compensatory damages.
2. The respondent challenged the claim through its Statement of Response filed on 22<sup>nd</sup> November, 2016, through which it avers that the claimant's termination was on grounds of absenteeism from work without permission, absconding duty and poor performance. The respondent thus deny that the claimant's termination was unlawful and or illegal. Consequently, the respondent has called for the dismissal of the claim with costs.
3. The matter proceeded for part hearing on 30<sup>th</sup> March, 2022 and later on 23<sup>rd</sup> June, 2022, when the respondent closed its case. During the trial, each side presented oral evidence through one witness respectively.



### **Claimant's Case**

4. The claimant testified in support of his case and at the outset, sought to adopt his witness statement and bundle of documents to constitute his evidence in chief. He further produced the said documents as his exhibits before Court.
5. In his evidence, the claimant stated that he proceeded on leave for 24 days in the month of October, 2016. That he reported back on 7<sup>th</sup> November, 2016 and sought to see the respondent's Human Resource Manager by the name Ms. Regina Mutua, for assignment of duties. That the said Ms. Regina informed him that there were no duties available for him. That he was therefore asked to report back on 8<sup>th</sup> November, 2016.
6. It was his further testimony that he reported back to work on 8<sup>th</sup> November, 2016, as instructed only to be served with his letter of termination, through which he was accused of non-performance.
7. He further stated that the respondent used to undertake end year performance appraisals and or evaluation but this was not the case in 2016. That he was not taken for training to improve his performance.
8. He further denied being absent without permission and added that he had proceeded on leave which had been approved by the respondent's Human Resource Manager.
9. The claimant further told Court that he was neither issued with a letter asking him to show cause nor was he taken through a disciplinary hearing. Closing his testimony, the claimant asked the Court to allow his claim.

### **Respondent's case**

10. The respondent called oral evidence through Mr. Akule John Mutabari, who testified as RW1. He identified himself as a supervisor in the respondent company. Similarly, he proceeded to adopt his witness statement to constitute his evidence in chief.
11. He told Court that the claimant was terminated on grounds of poor performance. That this was pursuant to a performance evaluation. That the claimant was not meeting the expectations of the respondent. That prior to being terminated, the claimant held several meetings in that regard with the respondent's Human Resource Manager.

### **Submissions**

12. The claimant contends that there was no evidence that he was served with a warning letter or show cause indicating that his work was poor. Citing the case of Jane Samba Mukala vs Oltukai Lodge Limited (2010) eKLR, the claimant argued that there was no evidence that the respondent had in place a policy or practice on how to measure good performance.
13. It was the claimant's further submission that he was not called to explain his poor performance. That the respondent did not substantiate the reason for his dismissal and did not give him an opportunity to defend himself. That his termination was therefore unfair and unlawful.
14. The respondent did not file submissions as the same were not on the Court's physical record and could not be traced on the online portal.

### **Analysis and determination**

15. From the record, it is clear that the Court is being called to resolve the following questions:



- i. Was there a justifiable reason to terminate the employment of the claimant?
- ii. Was the claimant afforded procedural fairness prior to termination?
- iii. Is the claimant entitled to the reliefs sought?

### **Justifiable reason for termination?**

16. The determination of this issue turns on section 43(1) of the *Employment Act* which requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. Closely tied to the aforesaid provision is section 45 (2) (a) and (b), which provides that a termination of employment 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 employees conduct, capacity or compatibility; or
    - ii. based on the operational requirements of the employer; ...
17. The import of section 45 (2) (a) and (b), is that the reason for termination must be both fair and valid. What this means is that over and above proving existence of reasons to justify termination, an employer is required to prove the substance of the said reasons.
18. In the instant case, it is not in doubt that the reason for which the claimant was terminated was in respect to his performance which the respondent termed as unsatisfactory. The letter of termination reads in part:
 

“...The reason for your termination is as follows:

Performance not satisfactory to the management as per your job description as a factory supervisor...”
19. Therefore, the reason for the claimant’s performance related to his capacity and in light of section 45(2) (a) and (b) (i), the respondent had the onus to prove that the said reason was fair and valid. As stated herein, the fairness and validity of a reason lies in its substance.
20. In this case, the respondent did not adduce evidence to prove that indeed, the claimant’s performance was not satisfactory. Here is why. To start with, there was no evidence that the respondent had issued the claimant with targets which he was required to meet within specified timelines. Such targets if set, ought to have been measurable. Further, the respondent did not prove that it had put in place measures to evaluate the claimant’s performance against any set targets. More importantly, there was no report or such other document constituting the claimant’s overall performance evaluation.
21. Indeed, one wonders how the respondent was able to conclude that the claimant’s performance was not satisfactory without any targets in place, measures to assess his performance and evaluation of his overall performance against such targets. These gaps lead me to conclude that the claimant’s performance was not measured at all hence the reason for his termination on grounds of underperformance, was not justified.
22. It bears to note the respondent did little to justify the reason for the claimant’s termination. This is on account of the fact beyond the testimony of RW1, it did not exhibit any evidence to support its case.
23. In the circumstances, the claimant’s termination cannot be determined to have been fair and valid.



24. The total sum of the foregoing is that the respondent has failed to discharge its evidential burden by proving that it had a fair and valid reason to terminate the claimant's employment based on his performance as required under sections 43(1) and 45(2) (a) and (b) of the Employment Act. To this end, his termination was not substantively fair.

### **Fair process?**

25. Sections 45 (2) (c) and 41 of the Employment Act, are key with regards to procedural fairness. To put it succinctly, the spirit of the said statutory provisions is that an employer is required to prove that it accorded an employee a fair hearing prior to terminating his employment.

26. The specific requirements of a fair hearing entail explaining to the employee, in a language he or she understands, the reason for which the employer is considering termination. Such an employee is entitled to have another employee or a shop floor union representative of his choice present during such an explanation.

27. Having accused the claimant of poor performance, the respondent was bound to accord him an opportunity to give an explanation in that regard.

28. It is notable that the claimant's letter of termination alluded to a hearing that had taken place on 8<sup>th</sup> November, 2016. Be that as it may, there was no evidence of such a hearing. The respondent did not exhibit proceedings of such a meeting to prove that the claimant was subjected to a hearing as indicated in his letter of termination.

29. More importantly, the respondent did not adduce evidence that prior to such a hearing if at all, the claimant was notified of the allegations with regards to his poor performance and that he was given an opportunity to answer to the same in the presence of another employee or a shop floor union representative of his own choice.

30. If at all the claimant's performance was wanting, then it was mandatory to require him to defend the same either in writing or verbally in a disciplinary hearing. This was not done hence the respondent is at fault.

31. Concluding on this issue, I find useful guidance from the determination by the Court of Appeal in the case of National Bank of Kenya vs Samuel Nguru Mutonya [2019] eKLR held where the learned Judges reckoned thus:

“The reason advanced by the Bank for terminating the respondent's employment was poor performance. In Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;

“c. 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.

d. In the event a decision is made to terminate an employee on the reasons for 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.”  
Underlined for emphasis

32. In light of the foregoing, and noting the gaps in the respondent's case, I can only conclude that the respondent did not comply with the requirements of section 41 of the Employment Act. This rendered



the claimant's termination procedurally unfair within the meaning of Section 45 (2) (c) and 41 of the Act.

33. The bottom line is that the claimant's termination was neither fair nor lawful hence was unjustified.

**Is the Claimant entitled to the reliefs sought?**

34. As the Court has found that the claimant's termination was substantively and procedurally unfair, the Court awards him compensatory damages equivalent to six (6) months of his salary. This award further takes into account the length of the employment relationship.

35. The claimant is also entitled to one (1) months' salary in lieu of notice as there is no evidence that the same was paid despite his letter of termination stating as much.

**Orders**

36. In the final analysis, I enter Judgment in favour of the claimant against the respondent and he is awarded: -

- a. Compensatory damages in the sum of Kshs 153,859.56 being equivalent to six (6) months of his gross salary.
- b. One month's salary in lieu of notice being Kshs 25,643.26.00.
- c. The total award is Kshs 179,502.82.
- d. Interest on the amount in (c) at court rates from the date of Judgement until payment in full.
- e. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

**For the Claimant Ms. Alividsa**

**For the Respondent Ms. Otieno**

**Court Assistant Abdimalik Hussein**

**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.



STELLA RUTTO

JUDGE

6

