

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. ELRC /54/2020

CATHERINE LWANGU.....CLAIMANT

VS

BUSARA CENTRE FOR BEHAVIOURAL ECONOMICS.....RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 31st January 2020, the Claimant sued the Respondent, alleging that the termination of her employment was unfair and unlawful as it was actuated by ill motive and was driven by malice and sought the following reliefs:

- a. A declaration that her termination by the Respondent was unlawful
- b. Reinstatement to her previous employment with the Respondent with no loss of benefits or emoluments;
- c. Alternatively, 12 months' salary as compensation for wrongful and unfair termination;
- d. 9 months' salary for the duration of the remainder of the contract;
- e. Salary in lieu of notice;
- f. Exemplary and general damages;
- g. Interest on the sums claimed above from the date of filing this claim in court;
- h. Costs of the claim.

2. The Respondent filed its Memorandum of Response dated 24th February 2020, wherein it denied the allegations of unfair termination. The Respondent averred that the termination was both procedurally and substantively lawful and fair. The reason for the termination was that the Claimant's performance did not consistently meet the required standards despite the substantial assistance and support provided to her.
3. The suit was heard on its merits. The Claimant's case was heard on 2nd March 2023, when she testified, while the Respondent's case was heard on 2nd November 2023, when their sole witness, Stanley Ngugi, testified in support of their case.
4. After hearing the parties on their respective cases, this Court directed them to file their written submissions. The direction was obliged.

The Claimant's case

5. It was the Claimant's case that through an Employment Contract dated 7th August 2018, the Respondent offered her employment as a Senior Operations Manager for a term of two years. 6. The key terms of the employment contract included, among other things, that the contract duration was two years [from September 1, 2018, to August 30, 2020], confirmation into employment was subject to a successful three-month probationary period, and she was to receive a monthly gross salary of Kshs. 360,000 along with other benefits [transport allowance, KShs. 14,000 per month, USD 800 per year for personal travel, USD 500 per year for professional development, a 6% salary increment after one year of service, and bonuses].
7. Aware and cognizant of her obligations under the contract, she carried out her roles, duties, and responsibilities diligently and faithfully in accordance with the contract and Respondent's staff/employer-employee code of ethics and regulations.

8. She stated that, as part of her support to the Respondent organisation, her credentials were utilised as an understudy to obtain a Kenyan work permit for the period 2019-2021. This permit was for the Director of People and Operations from the Immigration Department under the Ministry of Interior, in collaboration with the Ministry of Foreign Affairs.
9. During her first three months of employment, the Respondent successfully revived some client business relations that had declined due to a lack of USAID-compliant policies. She achieved this primarily by working directly with clients and developing policies that secured project funding commitments, including but not limited to Travel Policy-Hastening, travel request and booking process, Asset Management Policy, Whistleblowing policies, Child Protection Policy, Conflict of Interest Policy, and Code of Conduct Policy.
10. On 26th July 2019, under an email of the same date, the Respondent served her with a letter dated 24th July 2019. The letter purported to place her under a three-month Performance Improvement Plan, followed by a two-week review period.
11. The decision to place her on the plan was made by her direct supervisor, the Director of Operations and People. The document was drafted for her to sign, and indeed, she signed it as required. The PIP period lasted three months, from August 1 to October 30, 2019.
12. The Performance Improvement Plan was not contemplated under her contract of service.
13. She stated that on 11th November 2019, she was invited to a meeting by the Respondent. She was informed that the purpose of the meeting was to review her performance as per the three-month Performance Improvement Plan. The meeting barely lasted for 30 minutes. To her surprise, the Human Resource Manager issued her a letter suspending her for two days, effectively cutting her off from access to official channels of communication. She was invited to a

meeting with the Director of Operations, the Director of Finance, and the HR Officer on November 14, 2019.

14. Without notice to her, the Respondent convened a disciplinary meeting on 14th November, 2019 and unilaterally decided to terminate her employment.
15. Through a letter dated 26th November 2019, sent via an email of the same date, the Respondent summarily dismissed her from employment, effective 25th November 2019. In her view, the summary dismissal was premeditated. The same was unfair. She was put under suspension without the necessary procedures being followed.
16. The dismissal was unfair, unlawful, and illegal as it did not comply with the stipulations of the Employment Act. To cover up the sham dismissal, the Respondent asked her to challenge the decision to terminate, surprisingly, to a person who was directly involved in the decision to dismiss. 17. She was never given a fair opportunity, as required by law, to be heard, and in any case, the Respondent did not explain to her the true reasons for the summary dismissal.
18. The psychological injuries and financial problems she has suffered as a result of the wrongful dismissal at the initiative of the Respondent must be redressed.
19. Cross-examined by Counsel for the Respondent, the Claimant testified that she took monthly snapshots from February 2019 until her employment was terminated. The snapshots required her input. Even after she was placed under the Performance Improvement Plan, the practice continued. 20. She received the PIP document. The document outlined the areas of concern, identifying three specific issues. The plan duration is three months and was explicitly stated.
21. Contrary to the documents presented by the Respondent, it isn't true that she refused to be collaborative during the Performance Improvement Plan. Further, she was given time to suggest goals.

22. The Performance Improvement Plan documents had specific goals set for her to achieve. During the PIP, she met with her supervisors to discuss the monthly snapshots.

23. She testified that, though she didn't formally complain about the programme, through several emails, she requested support from the Respondent. In October 2019, her supervisor notified her, via email, that she wasn't meeting her targets.

24. Contrary to the arrangement, there was no final review meeting. She was simply called, informed that she had not performed well during the plan period, and handed a preliminary letter of termination of employment.

25. She admitted that she did not attend the meeting on 14th November 2019. She was informed of the meeting's purpose, which was to discuss her performance and the preliminary decision to terminate her employment.

The Respondent's Case

26. The Respondent presented STANLEY NGUGI, their Director of People and Operations. He joined the Respondent sometime in April 2019 and was attached to the Human Resources department.

27. He stated that the Respondent's Human Resource Manager, as well as the Claimant's supervisor at the material time relevant to this suit, had since left the Respondent's employ; however, he was familiar with the facts surrounding this claim and was therefore a competent witness.

28. The Respondent is a research and advisory firm committed to advancing and applying behavioural science. The Respondent operates in Kenya, Uganda, Tanzania, Nigeria, Ethiopia, and India (the Global South). The Respondent's values include rigour, relevance, excellence, creativity, and teamwork.

29. By a contract of employment dated 7th August 2018, the Respondent offered and the Claimant accepted employment in the position of Senior Operations Manager for a period of 2 years, effective 1st September 2018.

30. The Claimant's employment was subject to the Respondent's policies in existence from time to time. At the time of her termination, her gross salary was Kes. 360,000/=.

31. The position of Senior Operations Manager is a senior management position. The job holder is expected to play a key role in managing the Respondent's day-to-day operations globally. The core responsibilities are: -

- a) To oversee the running of the Respondent's day-to-day management and global operations;
- b) Overseeing the day-to-day facilities planning and management, logistics and procurement, fleet management, security and operations risk management;
- c) To harmonize the Respondent's operational procedures and help to develop and implement procedures to be rolled out to all new offices;
- d) To support the Director of Operations by preparing, reviewing and editing documents including standard operating procedures, policies and staff communications;

32. According to the Job Description, the Claimant was required to be highly proactive, a good communicator - verbally and in writing - and to be able to manage and prioritise multiple tasks.

33. According to the Respondent's policy on performance management, in order to encourage continuous improvements in individual performance, every supervisor is required to fill in monthly snapshots for their direct reports. These are key points of reference for performance evaluation.

34. He further stated that monthly snapshots are the basis of the Respondent's performance management process because receiving regular feedback is vital for employees to understand how they are performing and to respond quickly. The

format of the snapshots promotes a balanced evaluation since the supervisor must first highlight what the employee is doing well and then identify areas for improvement.

35. The Respondent has developed and adopted a performance management system called “Small Improvements”, which is an online system for capturing and documenting the performance management process and which is used for documenting the monthly snapshots.

36. In addition, the Respondent has developed a performance improvement plan (PIP) template which aims to fulfil the following goals: -

- a) To improve and sustain the desired performance results of each staff member;
- b) To address performance discrepancies identified through the performance management process;
- c) To provide identification of expected performance results that do not meet performance expectations;
- d) To initiate action steps that a staff member might take to correct performance, including identification of training and other resources available;
- e) To provide a timetable outlining the dates by which improvement will be necessary;
- f) To provide a statement of consequences that will occur if the required improvement is not achieved; and
- g) To establish regular meetings for the supervisor and staff member and facilitate cooperation and ongoing communication.

37. It is the responsibility of a supervisor or direct manager to: -

- a) Hold one-on-one (“1:1”) meetings with their direct reports at least once per month, if not weekly or biweekly; and
- b) Recommend a PIP if they establish that an employee is struggling to attain set job goals and objectives.

38. During the course of the Claimant’s employment, specifically from February 2019, it became apparent that her performance was not up to the expected

standards. The results of the Claimant's monthly evaluations via snapshots were as follows: -

- a) January 2019 – rating of 3 (solid & stable). The Claimant recognized that she needed to improve her independent decision-making.
- b) February 2019 – rating of 2 (needs support). The Claimant's supervisor was concerned about the Claimant's lack of attention to detail in developing a well-thought-out travel policy. The Claimant agreed with this feedback.
- c) March 2019 – rating of 2 (needs support). The Claimant's supervisor was concerned that the Claimant had not stepped into the Senior Manager role and all that it entailed – demonstrating leadership, critical thinking, holding people accountable, being visible, and collaborating to co-create solutions with peers and directors.
- d) April 2019 – rating of 1 (recommended for PIP). The Claimant's supervisor remarked that she was confident in the Claimant's abilities and wanted to see her demonstrate strategic thinking, a deep understanding of detail, and high-level (and visible) communication that she believed the Claimant was capable of. The Claimant mentioned that she needed to embrace teamwork and improve her decision-making.

39. Considering the results shown in the snapshots and various discussions between the Claimant and her supervisor, the Claimant's supervisor decided that she should start the PIP by June 2019 at the latest.

40. The serious areas of concern that had been noted were: -

- a) Attention to detail with respect to Senior Manager-level tasks;
- b) Ability to own and carry out high-value projects from start to finish with minimal supervision; and
- c) Visibility within the organisation as a Senior Manager.

41. With this in mind, the Claimant's supervisor shared the PIP document with the Claimant on 29th May 2019 and asked her to propose at least three (3) objectives that she would want to be measured on. The supervisor took this step

to ensure that the PIP was fair and to allow the Claimant to be involved in designing the objectives.

42. By 4th June, however, no feedback had been received from the Claimant. Upon following up, on 11th June 2019, the Claimant informed her supervisor that she would not be making any proposals, leaving her supervisor with the sole responsibility of developing the PIP and proposing objectives/deliverables.
43. The PIP form was shared with the Claimant, and she was asked to raise any questions on it before the official commencement of the PIP.
44. The Claimant was placed on PIP effective 1st August 2019. The aim of the program was to: -
- a) Address serious areas of concern and gaps in her performance;
 - b) Reiterate performance expectations, and
 - c) The Claimant was encouraged to use the opportunity to overcome her performance challenges and grow professionally.
45. The witness further stated that the plan was presented to the Claimant, and she consented to it. She appended her signature thereon on 1st August 2019, thereby signifying her acceptance of the plans and timelines therein.
46. The Claimant was also informed that the three (3) month PIP would be followed by a two (2) week review period at the end, and that during the PIP, she would be expected to make steady progress on the plan. Additionally, she was informed that failure to meet or exceed these expectations, or any display of gross misconduct, would result in disciplinary action, including possible termination.
47. During the PIP period, the Respondent offered the Claimant support in the form of: -
- a) Lightening of workload by moving all major projects off her plate;

- b) Allocating a budget of USD 1,000 to cater for any training she considered necessary; and
- c) The opportunity to formally request any Director's time for assistance on the deliverables.

48. The areas of concern were discussed at regular one-on-one meetings with the Claimant's supervisor, which were also documented.

49. On 15th October 2019, the Claimant's supervisor emphasised the importance of achieving the PIP goals by sending the Claimant a brief assessment of her progress on the PIP and reiterated the need for her to act swiftly to complete all deliverables by the 31st October 2019 deadline.

50. Regrettably, despite all efforts and support from the Respondent, the Claimant did not raise her performance to an acceptable standard.

51. A final assessment was carried out on 1st November 2019; the results were conveyed to the Claimant vide 'Letter dated 11th November 2019.

52. The Claimant's supervisor's preliminary view was that the Claimant's employment should be terminated as the Claimant had failed to improve her performance to an acceptable standard and because there was no alternative role which she could be given.

53. The letter was clear that the Respondent had not yet made a final decision on the matter; consequently, and in accordance with Section 41 of the Employment Act, 2007, the Claimant was invited to respond to this preliminary view and to attend a disciplinary hearing on 14th November 2019. The Claimant was also informed of her right to be accompanied by a fellow employee to the hearing.

54. The Claimant responded via an email dated 13th November 2019,2019, where she put down her responses to the preliminary views about her performance. She also indicated that she would not be attending the hearing.

She did not give any reason for this, nor did she request an adjournment and/or postponement.

55. The hearing went on as planned on 14th November 2019, and the Claimant's written responses were considered and deliberated upon.

56. The minutes of the disciplinary hearing were shared with the Claimant via an email dated 15th November 2019, and she was asked to assist in the action that led to further deliberation if she had any questions or concerns. The Respondent even offered to hold a call with the Claimant to discuss any additional details.

57. It was further stated that the Respondent considered the matter fully and concluded that the allegations of poor performance against the Claimant were substantiated. The Claimant's behaviour was contrary to both the explicit and implicit terms of her employment. It amounted to poor performance, thus justifying the Respondent's decision to terminate the Claimant's contract of employment.

58. The Claimant was informed of her termination vide a letter dated 26th November 2019. The letter clearly indicated that the reason for termination was that the Claimant's performance did not consistently reach the required standards despite the substantial assistance and support provided to her.

59. The letter also indicated that the Claimant had five (5) working days to appeal the decision to the Chief Strategy Officer. The Claimant, however, chose not to avail herself of this avenue.

60. The allegations that the Claimant was unprocedurally suspended as alleged at Paragraph 12 of the Memorandum of Claim are unfounded. The suspension was ordered pending the outcome of the disciplinary process. During the period of suspension, the Claimant received her full salary instead of half pay as provided in the policy.

61. The Respondent had valid reasons for the termination, and the Claimant was accorded due process.
62. Cross-examined by the Claimant's Counsel, the witness testified that the Claimant was subjected to a fair process. He acknowledged the importance of a show-cause letter, as it serves the vital purpose of notifying the employee of the employer's intention and requiring them to explain why the intended action should not be taken against them. The Respondent didn't place forth a single show cause letter before the Court.
63. The letter to the Claimant indicated that the Respondent had made a preliminary decision to terminate her employment. This meant that the supervisor had considered several factors and concluded that the Claimant needed to be let go due to poor performance.
64. The Claimant was invited to a disciplinary meeting that was slated for 14th November 2019. The invitation letter didn't expressly indicate or implicitly suggest that the meeting was intended to be a disciplinary hearing.
65. Development of policies at the Respondent's was a collaborative activity.
- Analysis and Determination
66. I have carefully considered the pleadings and evidence of the parties, and the elaborate submissions by their respective Counsel, and the following broad issues emerge for determination; I. Whether performance evaluation and Performance Improvement Plan were contemplated in the Claimant's employment contract.
- II. Whether the termination of the Claimant's employment was unfair
- III. Is the Claimant entitled to the reliefs Sought?
67. The Claimant argued that her employment contract did not include a Performance Improvement Plan. Since such a plan would typically follow a

performance evaluation, she was essentially claiming that her contract did not provide for performance evaluations. It was undisputed that the Respondent employed the Claimant under the contract of employment dated 7th August 2018. Under Clause 15 of this contract, titled "Other Governing Documents", it was expressly stated that the Respondent's Human Resources Manual was part of her employment terms and that she was required at all times to adhere to the provisions of Busara's Human Resources Manual.

68. A careful examination of the Respondent's said manual reveals that it elaborately provides for performance management [at pages 63-64], continuous filling of monthly snapshots, performance evaluation, and Performance Improvement Plan. As such, the Claimant's assertion hereinabove mentioned is totally unfounded.

69. It is undisputed that the Claimant's employment was terminated by a letter dated 26th November 2019, which cited poor performance as the grounds for termination. The Claimant urges this Court to determine that the termination of employment was both procedurally and substantively unjust.

70. Tasked with determining whether the termination of an employee's employment satisfies the fairness test, the Court charged with this task must consider two statutory aspects: statutory and procedural fairness. Counsel for the parties herein correctly appreciate this.

71. How to gauge the presence or otherwise of procedural and substantive fairness in the termination of an employee's employment on account of poor performance is now well settled. In the case of *Jane Samba Mukula v OI Tukai Lodge Limited* [2013] eKLR, cited by both Counsel for the parties, the Court aptly stated;

".....where poor performance is shown to be a reason for termination, the employer is placed at a higher level of proof as outlined under section 8 of the Employment Act to show that, in arriving at this 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. Section 5 [8] further outlines the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.”

Therefore, it is imperative on the part of the employer to show what measures were in place to enable them to assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse.

Beyond having such an evaluation measure, and before termination on the grounds of poor performance, an employee must be called and an explanation of their poor performance shared, where they would, in essence, be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and explained to such an employee.” See also, *National Bank of Kenya v Samuel Ngure Mutonya* [2019]eKLR.

72. In my view, these requirements are necessary to ensure that both substantive and procedural fairness in the context of dismissals due to poor performance are upheld.

73. The duty to prove substantive and procedural fairness in a dispute regarding the termination of an employee’s employment lies with the employer, as was elaborately set out by the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017], thus;

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on the employer in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal [section 43; prove the reasons were valid and fair [section 45]; prove the grounds are justified [section 47[5], amongst other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and a hearing before termination”.

74. The Claimant argued that, contrary to the mandatory procedure outlined in section 41 of the Employment Act, the decision to dismiss her was not preceded by her being given an opportunity to make a representation on the alleged grounds of poor performance, a representation that the Respondent would then consider before making a final decision on the matter.
75. It is worth stating that the provisions of section 41 of the Employment Act, 2007, should, as much as possible, be read alongside the provisions of section 4[3] of the Fair Administrative Actions Act, and Articles 47 [right to fair administrative action] and 50 [right to a fair hearing].
76. The Respondent argued that, in an effort to enable the Claimant to respond to the charge of poor performance, they, through a letter dated 11th November 2019, invited the Claimant to a disciplinary hearing scheduled for 14th November 2019. The Claimant responded by writing that she would not attend the hearing. She did not provide any reasons for her non-attendance nor seek an adjournment. They were compelled to consider the available material, including her earlier correspondence on her performance and the monthly snapshots, to conclude that terminating the Claimant's employment was the best option.
77. The Claimant acknowledged receipt of the Respondent's letter dated 11th November 2019, replied, and stated that she would not attend the hearing; in fact, she did not attend the meeting scheduled for 14th November 2019.
78. When an employer claims they extended an invitation to the affected employee for a disciplinary hearing, it must be demonstrated that the invitation document clearly specified the purpose of the invitation. Ambiguity cannot be afforded.
79. I have carefully reviewed the Respondent's detailed letter dated 11th November 2019. It is clear to me that the Claimant was informed that her performance during the Performance Improvement Plan period was unsatisfactory, and that disciplinary action was intended against her, while also being given an

opportunity to defend or explain herself on the scheduled date regarding her poor performance.

80. I have also examined the Claimant's response dated 13th November 2019, which explains the allegations regarding her poor performance. But at this point, of importance and interest is the last paragraph where she states; "Contract termination process: According to our meeting on 11th November, and as per the letter handed to me, the sequence so far has been: issuance of termination letter; deactivation of channels of official communication by the employee-suspension with immediate effect- meeting with employee. To me, this seems absurd in consideration of the Ethics of Justice and procedural justice. However, given that Busara is a reputable organisation with professionals, my assumption is that this was a well-thought-out process, and I would say you may move on with the process if you deem it right, and if my response under item number one is beyond your consideration.

Meeting on Thursday, November 14, 2019: This response forms any feedback I have as regards the entire process, including to any questions to be raised on November 14th. Therefore, sorry, I will not be able to show up in person for the meeting"

81. This letter highlights two important points: The Claimant was aware that she was scheduled to defend herself during the meeting on 14th November 2019, regarding the findings of poor performance against her, and she explicitly waived her right to appear before the Panel constituted to hear her. She also explicitly authorised the Respondent to consider her written response as her defence to the allegation.

82. This Court observes that, despite her absence from the meeting on 14th November 2019, the Respondent, in their letter dated 15th November 2019, sent the meeting notes and requested her comment before making a final decision. During cross-examination, the Claimant testified that she did not respond to the letter, as she saw no need to do so.

83. Considering the foregoing premises, I come to the inevitable conclusion that it cannot be available to the Claimant to claim that she was not heard, and that the Respondent didn't adhere to the procedural principles set out in the Jane Samba Mukala case[*supra*].
84. This Court has carefully examined the detailed evidence presented by the Respondent's witness concerning the Respondent's performance management systems, their Human Resources Manual, particularly the provisions relating to performance management, and numerous documents regarding the Claimant's performance and how the matter was handled. It concludes that the Respondent had a comprehensive process well known to its employees for continuously monitoring and evaluating performance, identifying weaknesses by placing underperforming employees on a Performance Improvement Plan, and providing support, including facilitated training, as was done for the Claimant.
85. Apparently, the material placed before this Court does not discount the Respondent's evidence and position that it had such a system, and that, truly, pre-Performance Improvement Plan, and during the plan period, her performance was not up to standard. In my view, the evidence did not even demonstrate *prima facie* that the reason for termination [poor performance] was not a legitimate reason in the circumstances of the matter, for which a reasonable employer would terminate an employee's employment. She didn't discharge her legal burden under section 47[5] of the Employment Act, therefore.
86. In conclusion, I find that the termination of the Claimant's employment was both procedurally and substantively fair. All the remedies sought by the Claimant were connected to the claim of unfair dismissal. Therefore, none of them can be awarded in her favour.
87. The Claimant's claim is hereby dismissed.

Read, Signed and Delivered this 18th Day of September, 2025.

SIGNED:

HON. MR. JUSTICE OCHARO KEBIRA