

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. E726 OF 2023**

**JOEL MATHENGE.....CLAIMANT**

**-VS-**

**PATHFINDER INTERNATIONAL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By an employment contract dated 6<sup>th</sup> January 2022, the Claimant, Joel Mathenge was employed by the Respondent, Pathfinder International. The Claimant worked for the Respondent from 8<sup>th</sup> February 2022 until 19<sup>th</sup> June 2023, when he left the Respondent's employment. It is that exit which triggered this dispute.
2. The Claimant documents his case in a Memorandum of Claim dated 9<sup>th</sup> August 2023. The Respondent responded to the Claimant's claim by a Memorandum of Response dated 26<sup>th</sup> February 2024. The Claimant responded to the Respondent's Memorandum of Response on 13<sup>th</sup> May 2024.
3. The matter went to full trial, where the Claimant testified on his own behalf and thereafter called Henry Kurika. On its part, the Respondent called its Director for Grants and Contracts, Megan Quinn Mueller. The parties also filed written submissions.

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

4. The Claimant was employed by the Respondent in the position of Global Subaward Specialist in the Grants, Contracts and Procurement Funding Department. He was issued with a two-year contract commencing on 8<sup>th</sup> February 2022. He served a six months' probation period and was confirmed in his appointment on 8<sup>th</sup> August 2022.
5. The Claimant states that he was subjected to performance review on 20<sup>th</sup> September 2022, which returned a finding of satisfactory performance in competence and achievement of set goals.
6. The Claimant was granted a merit pay increment effective July 2022, and was subsequently promoted to the position of Senior Subaward Officer, Grade 8 effective 1<sup>st</sup> November 2022.
7. At meeting held on 4<sup>th</sup> October 2022 between the Claimant and his supervisor, Megan Quinn Mueller, the Claimant was informed that Mueller would gradually hand over the supervisory role over the Claimant, to Jessica Hemmer. This was followed by a virtual meeting convened by Hemmer on 5<sup>th</sup> October 2022.
8. The Claimant complains that upon the change of supervisor, he began to be subjected to unfair labour practices. He cited racial discrimination, exclusion from important activities, extreme micromanagement and trivial complaints.

9. The Claimant avers that constant harassment and demeaning actions against him had a negative impact on his physical health, which in turn had an adverse effect on his output, as he had to spend time off work to recuperate.
10. The Claimant further avers that he complained, both orally and in writing, about the incessant harassment by Jessica Hemmer but no action was taken. The Claimant claims to have scheduled a meeting with Megan Quinn Mueller to complain about the work environment.
11. On 20<sup>th</sup> April 2023, the Claimant was summoned to a meeting by Hemmer where he was accused of poor performance. The Claimant was informed that he would be placed on a Performance Improvement Plan (PIP) immediately, which was to run until 19<sup>th</sup> June 2023.
12. The Claimant states that he had been informed that during the PIP period, he would have weekly review meetings with his supervisor, but this did not happen. He adds that the only thing the supervisor seemed keen on was submission of daily timesheets, containing evidence of what he had done with every minute of his time during the day.
13. The Claimant terms this as an act of extreme micromanagement, aimed at frustrating him. He claims that he was the only one required to submit timesheets on a daily basis. The Claimant accuses his supervisor, Jessica Hemmer of failure to give timely response to project work submitted, while requiring him to submit a breakdown of tasks carried out per hour.

14. On 15<sup>th</sup> June 2023, the Claimant was invited to a meeting, ostensibly to review his performance. He was however presented with a Mutual Separation Agreement. He complains that he was not consulted on the terms of the Agreement nor was he given feedback on the PIP.

15. The Claimant states that he did not sign the Mutual Separation Agreement. However, after the meeting of 15<sup>th</sup> June 2023, he was not assigned any duties. He avers that he surrendered the Respondent's property under his care on 20<sup>th</sup> June 2023 but declined to sign a discharge.

16. The Claimant lays a claim of unlawful termination or in the alternative, constructive dismissal. He therefore seeks the following remedies:

- a) 12 months' salary in compensation.....Kshs. 8,400,000
- b) Payment for the remainder of the contract.....5,450,000
- c) Unpaid difference in salary for the period.....931,272
- d) 1 month's salary in lieu of notice.....700,000
- e) Unpaid leave days.....590,000
- f) Gratuity.....700,000
- g) General damages for emotional, mental anguish & racial discrimination
- h) Exit letter for pension processing
- i) Certificate of service
- j) Costs plus interest

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

17. In its Memorandum of Response dated 26<sup>th</sup> February 2024, the Respondent states that the Claimant was employed on a two-year contract, effective 8<sup>th</sup>

February 2022, in the position of Global Subaward Specialist in the Grants, Contracts and Procurement Funding Department.

18. The Respondent avers that the Claimant worked until 19<sup>th</sup> June 2023, when he inexplicably separated from the Respondent, in the midst of engagement regarding his work, which faced headwinds due to his intermittent absence and general indifference to his supervisor.
19. The Respondent states that by the end of July 2022, the Claimant had exhibited satisfactory on-boarding and was responding positively to the systems and procedures of the Respondent. The Respondent adds that by September 2022, the Claimant demonstrated positive feedback on the general systems and procedures.
20. The Respondent however accuses the Claimant of indifference to his job, after confirmation, by becoming inconsistent and making simple but costly errors in his work. The Claimant is also said to have failed to complete tasks on time and making common mistakes on timesheets.
21. According to the Respondent, the Claimant was not keen to go on with the contract as he was mostly out of the office, under the guise of illness, thus affecting his productivity.
22. The Respondent avers that the Claimant was put on a PIP in April and May 2023, with meetings being held on 24<sup>th</sup> April 2023, 27<sup>th</sup> April 2023, 4<sup>th</sup> May 2023, 24<sup>th</sup> May 2023 and 31<sup>st</sup> May 2023.

23. The Respondent blames the Claimant for inconsistency in the PIP, adding that he was either unwell or sought to postpone engagements as follows:

- a) On 9<sup>th</sup> May 2023, the Claimant stopped work early;
- b) On 10<sup>th</sup> May 2023, the Claimant was out on sick off;
- c) On 8<sup>th</sup> June 2023, the Claimant stopped work early and asked that the meeting be postponed;
- d) On 9<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> June 2023, the Claimant was unwell;
- e) On 15<sup>th</sup> June 2023, the Claimant had an emergency and was not able to participate in the meeting.

24. The Respondent claims that it became difficult to assess the Claimant's performance, and the parties agreed to mutually separate. The Respondent drafted a Mutual Separation Agreement, which was sent to the Claimant for his consideration.

25. The Claimant is said to have declined to comment on the draft Agreement, instead making unsustainable demands as a condition for release, including payment for the remainder of the contract period.

26. The Respondent denies the Claimant's claims of racial discrimination, harassment and demeaning treatment.

27. The Respondent states that the decision to terminate the Claimant's employment was triggered by the Claimant himself, in view of incompatibility and loss of trust created by him, by becoming inaccessible when issues of his performance were raised.

28. The Respondent further states that the separation was not unilateral but was initiated through a mutual process when it became clear that the working relationship between the Claimant and the Respondent was deteriorating.

### **Findings and Determination**

29. There are two (2) issues for determination in this case:

- a) Whether the Claimant has proved a case of unlawful termination against the Respondent;
- b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

30. There is no formal letter demonstrating the manner in which the Claimant left the Respondent's employment. There is however evidence on record that the Claimant's supervisor at the time, Jessica Hemmer, had taken issue with his performance. This led to the Claimant being put on a PIP, with an end date of 19<sup>th</sup> June 2023, which coincided with the Claimant's last day at work.

31. According to the Respondent, while the Claimant performed fairly well during the probation period, his performance began to deteriorate after confirmation. The Respondent further states that the parties had agreed to a mutual separation. It is however an undisputed fact that the Mutual Separation Agreement drafted by the Respondent, was not executed.

32. On his part, the Claimant complained of harassment by his supervisor, Jessica Hemmer. He testified that for the period he worked under the supervision of Megan Quinn Mueller, there were no issues raised regarding his performance, adding that his woes began when Hemmer took over from Mueller, as his supervisor.

33. Regarding the PIP, the Claimant told the Court that there were no review meetings, as required. Rather, he was put under unnecessary pressure to account for his time at work through timesheets, which he termed as a form of extreme micromanagement. The Claimant further complained that Hemmer did not give him timely feedback on submitted project work.

34. The Claimant termed the Mutual Separation Agreement presented to him by the Respondent, as a unilateral decision to release him upon payment of one month's salary only.

35. By its own Memorandum of Response dated 26<sup>th</sup> February 2024, the Respondent makes an express admission that the Claimant's employment was indeed terminated. At paragraph 23 (i) of the Response, the Respondent pleads:

*"The decision to terminate the services of the Claimant was triggered by the Claimant himself, in view of incompatibility and loss of trust created by the Claimant when he became inaccessible when issues of his performance was (sic) raised."*

36. It is therefore an undisputed fact that the Claimant's employment was terminated on account of poor performance. The Court was however

perturbed that the Respondent, a non- governmental organisation of international repute, did not to issue the Claimant with a formal termination letter.

37. Having reached the determination that the Claimant's employment was terminated on the ground of poor performance, I will now proceed to examine the process employed by the Respondent, in reaching the decision to terminate the employment relationship.

38. Poor performance is one of the grounds recognised by the provisions of the Employment Act and termination on this account must therefore be effected within the four corners of Section 41 of the Employment Act, which 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.*

39. There is firm jurisprudence on the procedure to be followed in terminating employment on account of poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR* my sister Mbaru J held that:

*“Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof...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. It is imperative on the part of the employer to show what measures were in place to enable them 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 put in place...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. In the event a decision is made to terminate an employee on the reason of 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.”*

40. In its decision in *Maghanga Newton Raphael v Panal Freighters Limited* [2021] eKLR this Court held as follows:

***“The procedure for terminating employment on the ground of poor performance is now clear and it is this; that the employee is first made aware of their shortcomings and allowed a reasonable time to improve. Further, any performance appraisal upon which the decision to terminate is made must have the input of the employee.”***

41. Further, an employee facing termination of employment on the ground of poor performance is entitled to a capability hearing as envisaged by Section 41 of the Employment Act.

42. The Claimant’s assertion that there were no performance review meetings during the PIP period was not dislodged. Additionally, there were no clear key result areas upon which the Claimant’s employment could be appraised.

43. Instead, it appears that there was an undefined dissatisfaction on the part of the Claimant’s supervisor, Jessica Hemmer. In this regard, the Court observed that the Claimant had a smooth work experience when he worked under the supervision of Megan Quinn Mueller. This was evidenced by his confirmation and a merit salary increment. The Court further took notice that the Claimant’s grievance about harassment by Hemmer was not given due consideration.

44. For the foregoing reasons, I find and hold that there was no valid reason for termination of the Claimant's employment. Additionally, the Claimant was not availed due process prior to the termination. As a consequence, the termination was substantively and procedurally unfair.

### **Remedies**

45. I therefore award the Claimant four (4) months' salary in compensation. In making this award, I have considered the Claimant's length of service, the finding that he did not contribute to the termination and the slim chances of him securing a similar employment.

46. I have further taken into account the Respondent's unlawful conduct; demonstrated by failure to follow through with the PIP, an aborted attempt to force the Claimant into a separation and failure to issue an official termination letter.

47. I further award the Claimant one (1) months' salary in lieu of notice.

48. In the absence of leave records to the contrary, the Claimant is entitled to leave pay for the period of service.

49. The claims for payment for the remainder of contract, salary difference, gratuity and general damages were not supported by any evidence and are declined.

50. Finally, I enter judgment in favour of the Claimant as follows:

- a) 4 months' salary in compensation.....Kshs. 2,200,000

- b) 1 month's salary in lieu of notice.....550,000
- c) Leave pay for 1 year (550,000/30\*25).....458,333
- d) Prorata leave pay for 4 months (550,000/30\*1.75\*4).....128,333
- Total.....3,336,666**

51. This amount will attract interest at court rates from the date of judgment until payment in full.

52. The Claimant is also entitled to a certificate of service plus costs of the case.

53. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY SEPTEMBER 2025**

**LINNET NDOLO**

**JUDGE**

Appearance:

Ms. Waya for the Claimant

Mr. Ouma for the Respondent