



REPUBLIC OF KENYA



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**Mwaura v Safaricom Limited (Cause E496 of 2021)
[2025] KEELRC 2431 (KLR) (15 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2431 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E496 OF 2021
BOM MANANI, J
SEPTEMBER 15, 2025**

BETWEEN

FRANCIS MWAURA CLAIMANT

AND

SAFARICOM LIMITED RESPONDENT

JUDGMENT

Introduction

1. The dispute between the parties relates to whether the Respondent's decision to terminate the Claimant's contract of service on account of poor performance was justified. Whilst the Claimant contends that the decision was unfair and unlawful, the Respondent avers that it had valid reasons to terminate the contract between the parties and that the contract was terminated in accordance with fair procedure.

Claimant's Case

2. The Claimant avers that the Respondent engaged his services as a senior manager from 2nd February 2015 (2nd January 2015 as per his witness statement). He contends that his starting salary was Ksh. 723,421.62 per month. However, he avers that the amount had risen to Ksh. 811,069.18 by the time his contract of service was terminated on 17th March 2021 (19th March 2021 as per his witness statement).
3. The Claimant avers that the Respondent terminated his services on account of poor performance. He contests the validity of the decision.
4. The Claimant avers that at the time his contract was terminated, his self-appraisal showed that he had a score of 131.55%. Yet, he avers that his line manager arbitrarily assessed him at 65%.



5. The Claimant contends that the Respondent ought to have assessed his performance based on his work for 2020 in order to ascertain whether he had improved before his contract could be terminated. However, he contends that this was not done.
6. The Claimant avers that instead of the Respondent undertaking the performance appraisal based on his overall performance in the year 2020, it gave him a fresh set of objectives in October 2020 which were different from the objectives that had been set earlier on in the year. He avers that the new objectives were given to him by his new line manager on 30th October 2020 after his previous line manager was moved to another department.
7. The Claimant further avers that the new line manager set 31st December 2020 as the date for review of his performance in respect of the new objectives despite the fact that he was notified of the objectives in late October 2020 thus leaving him limited time to deliver on them. He contends that despite these constraints, he successfully delivered on the objectives.
8. The Claimant contends that although his new line manager gave him new objectives, he (the line manager) insisted on assessing him based on the budget and targets that had been set by his previous line manager at the beginning of the year. He further avers that the line manager scheduled the performance review hardly two months after he had placed him on an extended Performance Improvement Plan (PIP) in contravention of the Respondent's Performance Management Policy. He avers that whilst the policy provides that an employee on PIP should be reviewed after three months from the start of the PIP, the new line manager sought to assess him hardly six weeks after he was placed on the PIP.
9. The Claimant further contends that the push to assess him on the new targets was despite the fact that the Respondent's management had changed some values that undergirded his targets. He further avers that the rollout of some sites which were critical to his performance was delayed by up to seven months thus imparting negatively on his overall performance.
10. The Claimant also contends that the members of staff who were assigned to his department were inadequate thus affecting his performance. He contends that although he raised the matter with the Respondent and sought additional staff, the issue was not promptly addressed resulting in staff burnout by members of his team due to work overload.
11. The Claimant avers that despite these challenges, his output remained good. For instance, he contends that the self-assessment he conducted in January 2021 showed that he had met all the qualitative and quantitative targets except for Capital Works in Progress (CWIP) on account of late signing of the site rollout contract on 3rd November 2020. It is his case that at the time his contract of service was terminated, he had completed 204 sites leaving only 94 outstanding.
12. The Claimant avers that his performance evaluation ought to have taken into account factors such as sufficient job output, acceptable quality and compliance with employer operating procedures. He further contends that the Respondent ought to have taken into account the circumstances under which he was operating as the assessment cycle fell in the pandemic period.
13. The Claimant avers that although his previous line manager had placed him on PIP on 1st June 2020, the process was successfully closed on 30th September 2020. He contends that despite this, the incoming line manager, working in cahoots with the Respondent's Chief Finance Officer (CFO), revisited the matter and extended the PIP for a further three months from October 2020 allegedly because he had failed to meet the targets of the first PIP. He avers that the action by the two officers was without justification.



14. The Claimant contends that the new line manager presented to the performance hearing committee which handled his (the Claimant's) case inaccurate performance results which did not have his (the Claimant's) input. He further contends that the Respondent unfairly accused him of insubordination before the said committee allegedly because he had refused to input his PIP data into its (the Respondent's) portal as directed by his line manager.
15. The Claimant avers that the Respondent's performance hearing and appeal committees did not prove the reasons why his contract was terminated. It is his case that the two committees did not demonstrate that the decision to terminate his services was informed by his conduct or capacity or compatibility. He contends that the decision was contrary to the dictates of justice and equity.
16. The Claimant contends that the Respondent's actions violated his rights to fair labour practice and fair administrative action protected under articles 41 and 47 of the *Constitution* respectively. He further contends that the Respondent breached sections 41, 43, 45 and 46 of the *Employment Act*, section 4(3) and (4) of the *Fair Administrative Action Act*, and clauses 36 and 44 of its Staff Manual.
17. The Claimant avers that the Respondent's decision to terminate his services on account of poor performance injured his reputation. He contends that the decision made it impossible for him to secure another job. As a consequence, he avers that he suffered loss which impacted on various aspects of his life including his capacity to service his outstanding bank loans and insurance covers. He further contends that the Respondent prevented him from accessing 100% of his pension.
18. Consequently, he claims from the Respondent a total of Ksh. 210,160,833.34 to cover the loss and damage he alleges flowed from the unfair closure of his contract. He also prays for costs of the suit.

Respondent's Case

19. The Respondent does not admit the claim. It has filed a Statement of Defense dated 30th October 2021, witness statements by its two witnesses and a set of documents to anchor its case.
20. The Respondent admits that it hired the Claimant to the position of Senior Manager-Strategy Analysis through a letter of appointment dated 2nd February 2015. However, it contends that his role was changed from time to time until his contract was terminated.
21. The Respondent contends that the Claimant's employment was terminated on 17th March 2021 on account of poor performance. It affirms that at the time, his monthly salary had risen from Ksh. 723,421.62 to Ksh. 811,069.18.
22. The Respondent contends that the Claimant's performance objectives for the year 2019/2020 were set through an automated performance management process. It contends that his appraisal for the period ending March 2020 showed that he had performed below average on most objectives.
23. The Respondent avers that following this development, the Claimant was placed on a PIP for a period of three months from 1st June 2020 up to 30th September 2020 in accordance with its Disciplinary and Performance Management Policies. It avers that this period was subject to review after the close of the three months.
24. The Respondent avers that when the Claimant's performance was reviewed at the close of September 2020, it was noted that he still had not met the set objectives. As such, it avers that his immediate supervisor at the time recommended that his PIP be extended by a further three months to the end of December 2020.



25. The Respondent contends that the Claimant was consulted about the proposal to extend his PIP and he consented to it. Consequently, it contends that the PIP was extended with his concurrence.
26. The Respondent further contends that the objectives for the extended PIP were discussed and agreed between the parties. It contends that regular review sessions were held to monitor the Claimant's performance during the PIP period and that he was given the necessary support, including additional staff, to improve on his performance.
27. The Respondent asserts that at the end of the PIP period, the Claimant's performance was still wanting. It avers that although he was expected to attain 100% on the targets which had been set for the extended PIP, he only managed an overall 60% with significantly low scores of 20%, 30% and 10% on business deliverables, shaping the future and people and capacity respectively. It further contends that the Claimant's line manager and responsible business partner held discussions with him regarding the areas in which he had exhibited weakness.
28. The Respondent avers that as a result of the Claimant's poor performance, it invited him to a performance hearing on 24th February 2021. However, it contends that the hearing did not take off as scheduled and was rescheduled to 9th March 2021.
29. The Respondent avers that the letter inviting the Claimant to the performance hearing notified him of his right to be accompanied by a fellow employee of his choice. It further avers that the letter warned the Claimant that the process could result in his release from employment and that he was therefore required to adequately prepare for the session.
30. The Respondent avers that the Claimant attended the hearing on 9th March 2021 and stated his case. It contends that he did not give a satisfactory account for his poor performance despite being given a chance and the necessary support to improve. It further contends that the Claimant was found guilty of insubordination after he defied his immediate line manager's instructions to upload his performance data on its portal. As a result, it contends that the Claimant's employment was terminated and the decision communicated to him through its letter dated 17th March 2021.
31. The Respondent avers that it notified the Claimant of his right of appeal against the decision and that he indeed utilized the right by lodging an appeal. It contends that the appeal was however dismissed for want of merit. As such, the Respondent posits that the decision to terminate the Claimant's services was undertaken procedurally and for valid reasons.
32. The Respondent avers that it satisfied the criteria set by section 43 of the *Employment Act* whilst processing the Claimant's release from employment. It contends that it genuinely believed that the Claimant's performance was wanting hence the decision to terminate his services.
33. The Respondent contends that there is no basis for the reliefs which the Claimant seeks in the suit. It avers that he was paid his terminal dues in accordance with the letter of termination. As such, it avers that there is no benefit that is owing from it to him.

Issues of Determination

34. After evaluating the pleadings, evidence and submissions by the parties, the following issues emerge for determination:-
 - a. Whether the Claimant's contract of service was terminated for valid reasons and in accordance with fair procedure.
 - b. Whether the Claimant is entitled to the reliefs which he seeks through these proceedings.



Analysis

35. Although the Respondent framed two accusations against the Claimant to wit poor performance and insubordination, the letter of termination of the latter's contract of service shows that his employment was terminated on account of poor performance. As such, the court takes it that the decision to sever the employment relation between the parties was informed by the alleged poor performance of the Claimant and not the accusation of insubordination.
36. Poor performance is recognized as a ground for termination of a contract of service (see sections 41 and 45 of the *Employment Act*). However, before an employer can invoke it as a basis for terminating a contract of service, he must satisfy certain conditions which have largely been developed through case law.
37. It is expected that the parties to the employment relationship must have agreed on certain deliverables by the employee. It is further expected that the parties must have developed a mechanism for measuring the employee's performance in respect of the deliverables. In addition, there must be evidence that the employee did not meet the agreed targets and was offered a chance to improve without success.
38. The law further requires that before an employer releases an employee from service on account of poor performance, he (the employer) should afford the employee a chance to be heard (see section 41 of the *Employment Act*). If the employee fails to account for his poor performance during the hearing, the employer may proceed to terminate the employment relation.
39. In the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] KEELRC 794 (KLR), the court observed that for an employer to terminate an employee's contract of service on the ground of poor performance, he must have put in place a policy to discern good performance from poor performance. The court further observed that the policy must provide for mechanisms for assisting the employee to improve on his performance before his contract can be terminated on this account. Finally, the court stated that the employer must hear the employee on the accusation of poor performance before he can release him from employment.
40. In the instant suit, the Respondent accuses the Claimant of poor performance. It contends that the parties set the Claimant's performance targets for the year 2019/2020 but he was not able to meet them as agreed.
41. The Respondent further contends that as a consequence of the Claimant's failure to meet the agreed performance objectives, he was placed on a PIP twice but still failed to perform satisfactorily. As a result, it (the Respondent) avers that it subjected him to a performance hearing and eventually terminated his contract of service.
42. On the other hand, the Claimant vehemently disputes the assertion that his performance was wanting. He avers that despite the challenges he experienced relating to limited staff and the late rolling out of some projects that fell under his docket, his performance was excellent.
43. The Claimant avers that his previous line manager (Wangepi Kanjama) placed him on the first PIP in June 2020. He contends that he performed satisfactorily and the PIP was eventually closed in September 2020. He contends that despite this, his new line manager and the Respondent's CFO reopened the matter and extended the PIP from October 2020 to December 2020. It is his case that this decision by the two officers was unjustified.
44. The Claimant further asserts that the new line manager's assessment of his performance at 60% under the second PIP program did not incorporate his (the Claimant's) input. As such, he contends that the



assessment was arbitrary. It is his case that his performance exceeded the Respondent's expectations as per his self-assessment report which showed that he had scored 132%.

45. Although the Claimant asserts that his previous line manager gave him a clean bill of health after the first PIP of June 2020, the evidence on record shows the contrary. The email by Ilanna Darcy dated 7th October 2020 shows that she questioned the propriety of the initial PIP process and proposed that it be extended for a further three months. As such, it is inaccurate for the Claimant to assert that the PIP was successfully completed and that his performance was considered satisfactory after the process.
46. According to the evidence of Emmanuel Koech, Ilanna Darcy temporarily assumed the position of the Claimant's line manager after Wangeci Kanjama was moved from this position sometime around September 2020 (see par 13 of Emmanuel Koech's witness statement dated 5th December 2023 and his oral testimony in court). This fact was reiterated by Odhiambo Ooko, the Respondent's second witness during his oral testimony in court. As such, the court is convinced that at the time Ilanna wrote her email dated 7th October 2020, she was serving as the Claimant's temporary line manager before Emmanuel Koech assumed the position.
47. Importantly, the court notes that Respondent's Performance Management Policy has provisions which guide the closing of a successful PIP. The policy requires that once the performance of an employee who has been on PIP improves to the satisfaction of the employee's line manager, the line manager should issue him/her with a letter to confirm this fact. As such, it is only after the line manager does this that the employee can assert that the PIP process has been successfully closed (see page 10 of the policy or page 32 of the Respondent's trial bundle).
48. The Claimant asserts that Wangeci Kanjama was satisfied with his performance at the end of the first PIP session and that she recommended that the session be closed. However, he did not produce a letter by Wangeci Kanjama to confirm that she had found his performance satisfactory after the first PIP.
49. The evidence on record shows that after the Claimant's first PIP process failed to sort out his performance challenges, a decision was taken to extend it (the PIP) to December 2020. It appears from the email correspondence on record that the extension was intended to infuse fairness and clarity in the process and mobilize resources to assist the Claimant to attain his targets.
50. The record shows that the Claimant was not only informed of the decision to extend the PIP but was also involved in the process that resulted in its extension to December 2020. His email to the Respondent dated 14th October 2020 speaks to this reality. Through the email, he expressed himself on the subject as follows:-

I take this opportunity to thank you for the discussion and the proposed process which is agreeable (despite the double jeopardy) especially with proper safeguards as above."

51. The email demonstrates that although the Claimant considered the proposed extension of the PIP as double punishment, he nevertheless accepted it. As such, it is apparent that he conceded to the extension.
52. The Respondent has tendered data to show that after extension of the PIP to December 2020, the Claimant's performance did not hit the expected 100% mark. The data at pages 66 and 86 of the Respondent's trial bundle shows that the second PIP targets on business deliverables, shaping the future and people and capacity were agreed at 30%, 50% and 20% respectively totaling 100%. However, at the close of the process, the Claimant managed to achieve 20%, 30% and 10% respectively on the set targets totaling 60%. From this data, it is evident that the Claimant did not meet the agreed target for the second PIP.



53. The Claimant asserts that contrary to the Respondent's assertions, he attained upwards of 131% during the second PIP. He relies on his own self-appraisal of 132% to anchor this argument (see par 13 of the Statement of Claim, the Claimant's witness statement dated 17th June 2021 which he adopted on oath as part of his evidence and page 84 of the Claimant's trial bundle). However, there is no evidence that the self-appraisal was affirmed by his line manager in accordance with the Respondent's policy. Although the Claimant gave himself a rating of 132%, the line manager reviewed it downwards to 60%.
54. I agree with the testimony of Emmanuel Koech and Odhiambo Ooko, the Respondent's witnesses, that an employee's self-assessment is not conclusive proof of the quality of his/her performance. The self-assessment must be validated by the employee's line manager or immediate supervisor for it to be conclusive (see par 11 of Emmanuel's witness statement dated 5th December 2023 and the oral testimony of the two witnesses).
55. Indeed, the Claimant spoke to this reality during his oral testimony in court when he stated that whilst he had assessed his performance for the year 2019/2020 at 102%, the Respondent revised it (the assessment) to below bar and placed him on PIP. This testimony affirms the fact that for an employee's self-assessment to be relied on as evidence of his/her performance, it must receive the validation of the employer. As such, the court cannot rely on the Claimant's self-assessment of 132% at the close of the second PIP period to find that he had achieved the targets for the second PIP.
56. The evidence on record shows that after the Claimant scored 60% in the second PIP, the Respondent invited him to a performance hearing session which was initially scheduled for 24th February 2021 but was moved forward to 9th March 2021. The Claimant confirms that he attended the hearing.
57. The record shows that after the hearing, the Respondent was not satisfied with the Claimant's explanation for his poor performance. Consequently, it issued him with a letter dated 17th March 2021 terminating his services on account of poor performance.
58. The record further shows that the Claimant appealed the decision to terminate his contract of service. However and by the Respondent's letter dated 23rd April 2021, the appeal was dismissed for want of merit.
59. The Claimant contends that the first and second PIPs were irregular because they violated the timelines which are set in the Respondent's Performance Management Policy. He avers that the policy requires a PIP program to last for three months. Yet, the first PIP lasted for four months and the second one lasted for less than three months.
60. The provision which the Claimant relies on to advance the above contention is at page five (5) of the Respondent's Performance Management Policy. It reads, in part, as follows:-
"PIP is designed to facilitate constructive discussion between an employee and his or her line manager so as to clarify the specific aspects of work performance or record of attendance and behavior to be improved. It is supportive and positive activity whilst setting out a formal framework allowing the manager to take formal steps where informal action to improve performance has not been successful. A PIP period is usually three calendar months." Emphasis added by underlining.
61. I do not understand the aforesaid provision to have cast the PIP period in stone. It only suggests that the period should ordinarily be three months. However, this does not mean that it (the period) cannot be expanded or reduced. The use of the phrase "usually" in the clause means that the period could be expanded or constricted to accommodate the circumstances of individual cases.



62. RW2 spoke to this reality during his oral testimony. He averred that the clause ought to be construed liberally in order to accommodate unforeseen events such as sickness of employees on the PIP program. Such employees may be prevented from completing the program within the proposed timeframe of three months thus requiring its extension.
63. The Claimant further contends that the Respondent's policy does not provide for a second or subsequent PIP after the lapse of the first one. As such, he avers that the Respondent's decision to place him on the second PIP was irregular.
64. It is true that the policy does not expressly speak to extension of the PIP period. However, a purposive reading of it (the policy) does not yield the interpretation that the PIP period cannot be extended. On the contrary, it implies that the period could be extended depending on the circumstances of individual cases. This reality is apparent from the text at page 11 of the policy which reads as follows:-

Where the employee has not achieved the required standard of performance during the performance improvement period, the employee's line manager in collaboration with the HR Business Partner will reach out to the Employee Relations Manager. The Employee Relations Manager shall constitute a meeting with the line manager, the functional HR Business Partner and the employee to determine and discuss the reasons for non-performance and an agreement reached. In extreme case, this may include separation from the business."

65. My understanding of the statement is that where an employee has failed to achieve the targets set during a PIP program, the employee's line manager, in consultation with the affected employee, the Employment Relations Manager and the HR Business Partner, is empowered to decide on a further action plan. This may include extending the PIP period as long as the employee is in agreement.
66. In the instant case, the Respondent's management proposed to extend the Claimant's first PIP after it became apparent that it had not achieved the intended purpose (see Ilanna Darcy's email dated 7th October 2020 and Letoya Mbuthia's email dated 13th October 2020 at pages 45, 46 and 47 of the Respondent's trial bundle). The Claimant accepted this proposal (see the Claimant's email dated 14th October 2020 at page 48 of the Respondent's trial bundle). When the parties agreed on the aforesaid action plan after the first PIP failed to deliver the expected results, they validated the second PIP.
67. The Claimant also contends that the Respondent did not give him sufficient time to deliver on the targets set for the second PIP. He contends that although the program was to have begun in early October 2020, it kicked off around 5th November 2020. He asserts that despite this delay, the program closed on 31st December 2020.
68. The Claimant further avers that the Respondent declared a network freeze for two weeks from 14th December 2020. He contends that this further ate into his time to deliver on the PIP targets. He contends that this left him only six weeks to deliver on targets he was supposed to have attained in three months.
69. In response, the Respondent's witnesses stated that although the second PIP was intended to commence in early October 2020, it was delayed in order to accommodate the Claimant's views on the proposed targets. They indicated that the program eventually kicked off in early November 2020 but was extended to February 2021.
70. The defense further stated that the network freeze which the Claimant alluded to was not a new phenomenon as it happens every December in the Respondent's business calendar. The defense



explained that the freeze for the year 2020 was announced in October 2020 and the Claimant had sufficient notice of it to enable him to plan his operations. Further, the defense contended the Claimant's PIP was extended to February 2021 which gave him adequate time to deliver on the targets.

71. The position expressed by the Respondent on the subject is supported by the evidence on record. It is apparent from the email trail between the Claimant and the Respondent's management dated 30th October 2020 to 5th November 2020 that the parties engaged in consultations on the targets for the second PIP for some while resulting in delay in the kick off date for the program. As a result, it is apparent the program kick off date was pushed from October 2020 to early November 2020 (see page 91 of the Respondent's trial bundle).
72. Further, the appraisal form for the second PIP shows that although the program was intended to run from October 2020 to December 2020, the data that was collected in respect thereof runs up to early 2021. This implies that the PIP ran beyond the initial closing date of December 2020 (see page 86 of the Respondent's trial bundle).
73. During re-examination of the Claimant, he confirmed that appraisal of the PIP was conducted in February 2021. A similar position was expressed by RW2 who stated that the second PIP program ran from early November 2020 to February 2021. As such, I find that the Claimant was granted slightly more than the three months that is contemplated in the Respondent's Performance Management Policy to deliver on the targets that were set for the second PIP.
74. The Claimant further asserted that his new line manager (Emmanuel Koech) did not consult him on setting the targets for the second PIP. However, this contention is not supported by the evidence on record. The email trail dated 30th October 2020 to 5th November 2020 at page 91 of the Respondent's trial bundle demonstrates that the Claimant was involved in discussions regarding setting of the objectives for the program.
75. The parties expressed themselves on the subject as here-below:-

4th November 2020 at 20.11

(From Letoya to Francis and copied to Emmanuel Koech)

Re: Performance Discussion-follow Up

Hi Francis,

Please share the completed document as below requested.

I also take it that your feedback is that the objectives are agreed and the review period kicked off on 3rd November.

Thanks,

Letoya

4th November 2020 at 8.50 PM

(From Francis to Letoya and copied to Emmanuel Koech)

Re: Performance Discussion-follow Up

Hi Letoya,

We are hoping to close on the expectations tomorrow.

Best regards,



Francis Mwaura

5th November 2020 at 10.05 AM

(From Emmanuel Koech to Francis and copied to Letoya Mbuthia)

Re: Performance Discussion-follow-up

Francis, this is done....let's agree now complete the document.”

76. The Respondent's witness (Emmanuel Koech) testified that he assumed the position of the Claimant's line manager in October 2020 and that he was involved in the process of setting his (the Claimant's) targets for the second PIP. The witness stated on oath that he was in the team which sat with the Claimant to agree on the targets. This evidence is corroborated by the email trail that has been alluded to above.
77. In the Claimant's email of 4th November 2020, he asserted that the parties hoped to close on the expectations the following day (5th November 2020). This can only be understood to mean that there were ongoing consultations between him and the Respondent's management on the expectations for the second PIP. It is therefore incredible for him to claim that his line manager did not consult him on the expectations and that he unilaterally imposed them on 5th November 2020.
78. In view of this evidence, I am convinced that the Claimant was involved in setting the objectives for the second PIP. The fact that he expressed reluctance in endorsing the objectives does not mean that he did not participate in discussions on them.
79. The Claimant made some other claims in his oral testimony which are not anchored on his pleadings. For instance, during his re-examination, he contended that his line manager set for him objectives that exceeded the number of objectives that ought to be set for an employee on PIP. He contended that this contravened the Respondent's Performance Management Policy which requires that objectives be manageable.
80. The Claimant further averred that the Respondent's performance policy does not set the threshold for good performance. Yet, the Respondent purported to penalize him for a performance score of 60%.
81. As indicated earlier, these assertions are not founded on the Claimant pleadings. As such, they cannot found a basis for upsetting the Respondent's decision.
82. However, assuming that the Claimant is entitled to anchor his case on the claims, should the court rely on them to dislodge the Respondent's decision to terminate his employment? The answer to the question is in the negative.
83. It is noteworthy that the assertion by the Claimant that the targets that were set by his new line manager exceeded the acceptable limits was not raised by him as a ground of appeal against the decision of the panel that conducted the performance hearing (see the grounds of appeal at pages 32 to 35 of the Claimant's trial bundle). As such, it is not open to him to raise it as a ground for attack in these proceedings as to do so will be tantamount to introducing a new matter which the employer did not have an opportunity to consider whilst making the decision to terminate the contract of service.
84. The assertion that the Respondent's decision should be set aside because its (the Respondent's) Performance Management Policy does not set a pass mark for good performance is equally misguided. The document at page 66 of the Respondent's trial bundle sets out the targets which the parties agreed on for the second PIP. The Claimant was to score 30% in respect of business deliverables, 50% in respect of shaping the future and 20% in respect of people/capacity. The cumulative score was to be 100%.



85. The document at page 86 of the same bundle shows what the Claimant eventually achieved in respect of the aforesaid items at the close of the PIP period. He scored 20% on business deliverables, 30% on shaping the future and 10% on people/capacity totaling 60%.
86. I understand the above data to demonstrate that the parties set a cumulative target score of 100% on the various items set out above. However, the Claimant attained a cumulative score of 60%.
87. It is therefore apparent from the data that whilst the Respondent had set a pass mark of 100% for the second PIP, the Claimant only attained 60%. As such, he did not achieve the agreed pass mark.
88. From the evidence that was presented to court, I am satisfied that the Respondent met the criteria for terminating the Claimant's contract of service on account of poor performance. This is apparent from the oral and documentary evidence that was tendered in the proceedings.
89. The Performance Management Policy which the Respondent produced in evidence provides for a performance management cycle which has three stages to wit the following:
 - a. Setting of performance objectives.
 - b. Tracking delivery on the objectives.
 - c. Appraisal of employees on the set objectives.
90. Evidence was tendered to demonstrate that the Claimant and the Respondent set objectives for the year 2019/2020. The Claimant confirms that he was to deliver on the said objectives under the guidance of his then line manager, one Wangeci Kanjama. He in fact insists that he attained 102% in respect of the said objectives. This affirms the reality that indeed the parties had set performance objectives for the period under review.
91. There is evidence that the Respondent had put in place a mechanism for monitoring and measuring the Claimant's delivery on the set objectives. This is evident from the Respondent's Performance Management Policy which requires the Respondent to ensure continuous tracking and coaching of employees to enable them deliver on the set goals.
92. To comply with the aforesaid requirement, the parties confirm that the Claimant was assigned a line manager (Wangeci Kanjama) to monitor and evaluate his performance. Indeed the parties agree that the said line manager evaluated the Claimant's performance initially before she was moved to another department.
93. There is evidence that after Wangeci Kanjama ceased serving as the Claimant's line manager, Ilanna Darcy stepped in as the Claimant's new line manager, albeit temporarily. There is also evidence that Ilanna Darcy monitored the Claimant's performance from the point where Wangeci Kanjama left the exercise.
94. Further, there is evidence that Wangeci Kanjama did not affirm the Claimant's performance for the year 2019/2020 as satisfactory. In her final assessment report on the Claimant appearing at page 34 of the Respondent's trial bundle, she observed that the Claimant required to improve on certain aspects including management of Capex and his relations with his line manager and peers in his department. Hence, she categorized him as a "Mover" denoting that his performance was unsatisfactory. As such, the Claimant was placed on the first PIP.
95. There is evidence that at the close of the first PIP, Ilanna Darcy, who was acting as the Claimant's line manager, was not satisfied with his performance. She, inter alia, observed that the changes she had



- requested on Capex took excessive time to be actioned. Hence, she recommended that the Claimant's PIP be extended by three months.
96. There is evidence that Emmanuel Koech subsequently came on board as the Claimant's line manager as from October 2020. There is further evidence that Emmanuel set the Claimant's objectives for the second PIP in consultation with him.
 97. The email trail dated 12th February 2021 to 17th February 2021 at page 88 of the Respondent's trial bundle demonstrates that the Respondent's officers monitored the Claimant's performance after he was placed on the second PIP. This is evident from the fact that the said officers were pushing him to upload his performance data on the Respondent's portal.
 98. There is evidence that the Claimant was offered assistance and support to deliver on his targets during the second PIP. At paragraph 21 of Emmanuel Koech's witness statement, he states that he deployed one Zakayo to work with the Claimant but the Claimant raised issues about his (Zakayo's) suitability. The witness states that Zakayo was subsequently replaced by one Kate Musyioka in a bid to address the Claimant's reservations about him. The witness further states that one Fred Otuoma was deployed to the Claimant's department to handle Capex since he was good at it.
 99. This evidence demonstrates that besides the Respondent setting performance targets for the Claimant, it evaluated his delivery on the targets. The evidence further shows that when it became apparent that the Claimant had not met the targets, he was given an opportunity to improve on his performance by being placed on a performance improvement plan. Further, it is apparent that he was given support to deliver on the targets by being given additional staff.
 100. There is evidence that despite this efforts, the Claimant did not improve on his performance. This is evident from the fact that at the close of the second PIP, he scored 60% against the expected 100%.
 101. There is evidence that when the Claimant failed to meet the expected performance threshold, the Respondent subjected him to a performance hearing before his contract of service was terminated. Similarly, there is evidence that he was given the opportunity to appeal the decision but the appeal was lost.
 102. The foregoing demonstrates that the Respondent: set performance targets for the Claimant; had mechanisms for evaluating the targets; evaluated the targets; found the Claimant's performance wanting; offered the Claimant a chance to improve without success; and eventually subjected him to a performance hearing before terminating his contract of service. In effect, the Respondent complied with the legal requirements relating to the release of an employee from employment on account of poor performance.
 103. Section 43 of the *Employment Act* entitles an employer to terminate the services of an employee if he has sufficient grounds to genuinely believe that the reasons which anchor the decision exist (see Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR). In the instant case, the data which was in the Respondent's possession regarding the Claimant's performance was sufficient to stir a genuine belief in its management that his performance was wanting.
 104. The court is alive to the fact that the standard of proof in the instant dispute is one of a balance of probabilities. From the evidence on record, the court arrives at the conclusion that it is more probable than it is not that the Claimant had performance challenges.
 105. The court is further satisfied that the Respondent substantially adhered to the requirements of fair procedure in releasing the Claimant from employment. Consequently, it declares that the Claimant's contract of service was lawfully terminated.



106. Besides the Claimant seeking an order to declare the Respondent's decision to terminate his contract of service as unlawful, he also seeks a number of other reliefs. These include: a prayer for the award of damages for unfair termination of the contract of service; six months' pay for every year worked; three months' pay in lieu of notice; salary for days worked; accrued leave pay; ESOPS for four years based on performance; bonus FY21 based on performance; general damages for defamation; nine months instalments for insured loans; earnings lost due to defamation at current rate for 96 months; pension contribution loss for 96 months; club subscription for eight years; airtime allowance for 96 months; NSSF employer contributions for 96 months; medical insurance for eight years; life insurance for eight years; unconditional 100% release of all pension dues; re-issue of the employment termination letter in line with the actual employee performance and the employee contract; and costs of the suit.
107. In the letter of termination dated 17th March 2021, the Respondent indicated that it was going to pay the Claimant the following benefits in terms of the employment contract between the parties:-
- a. Three months' salary in lieu of notice.
 - b. Salary for days worked in the month of termination.
 - c. Any accrued leave days not commuted.
 - d. Any accrued allowance approved by his line manager before his last day at work.
108. According to the aforesaid letter, the Respondent was to make the above payments less the applicable statutory deductions and taxes. It was to also recover any monies that the Claimant may have been owing it at the time.
109. The Respondent avers that it made the payments. To support this contention, it tendered in evidence bank transfer documents showing that Ksh. 1,612,970.95 was transferred from its account into the Claimant's account on 8th October 2021. It further produced the Claimant's pay slip for April 2021 to demonstrate that he was paid leave encashment and pay in lieu of notice.
110. When the Claimant was cross examined on the matter, he confirmed that the April 2021 pay slip showed that he had been paid for accrued leave days and for notice pay. When shown the remittance slip by the Respondent's bankers for the other benefits, he affirmed that it showed that some money was transmitted to his account. However, he asserted that he could not tell whether the amount covered notice pay, accrued leave and even salary for days worked in March 2021.
111. Having regard to the evidence which was tendered by the Respondent, the court is convinced that the Claimant was paid: salary in lieu of notice; salary for days worked in March 2021; pay in lieu of accrued leave days; and all outstanding allowances which had been approved by his line manager at the time he exited employment. As such, his claims for salary in lieu of notice; leave pay; and salary for days worked are declined.
112. The Claimant has prayed for compensation for unfair termination of his contract of service. However, since the court has arrived at the conclusion that his contract was lawfully terminated, this prayer fails.
113. The Claimant has claimed for six (6) months' pay for every year worked. However, this benefit is neither provided for in his contract of service dated 2nd January 2015 nor under section 49 of the [Employment Act](#).
114. In presenting the claim, perhaps the Claimant had on his mind the benefit of service pay which is provided for under section 35 of the [Employment Act](#). However, this benefit does not accrue to



employees who are, inter alia, members of a registered Pension Fund and the National Social Security Fund (see section 35(6) (a) & (d) of the Act).

115. The evidence on record shows that the Claimant was both a member of a Pension Fund and a registered contributor to the National Social Security Fund (see the pay slips that were tendered in evidence). As such, he is excluded from pursuing service pay. Consequently, the claim for six months' pay for every year worked is declined.
116. The Claimant has also prayed for damages for defamation of character and for compensation for the loss of earnings that is associated with the defamation of his name. He contends that by the Respondent dismissing him from employment on account of poor performance, it defamed him and caused him to lose job opportunities. However and as was indicated earlier, the Respondent's decision to terminate the Claimant's employment on account of poor performance was legitimate. As such, his prayers for damages for defamation of character and for loss of income on this account are declined.
117. The Claimant has also prayed for bonus pay for the year 2021. The court notes that this benefit is anchored on the contract of service between the parties. However, it is payable based on the achievement of the agreed performance objectives. In effect, the benefit is performance based.
118. No evidence was tendered on the Claimant's performance except for the year 2019/2020. In any event, his performance for this period was rated poor resulting in the closure of his contract of service. The Claimant's performance for the year 2021 was not rated since his contract of service was closed early that year. Consequently, the claim for bonus fails.
119. The Claimant has claimed for: airtime allowance; medical insurance for eight years; life insurance for eight years; and club membership for eight years. However, these benefits were attached to his status as an employee of the Respondent. Absent this relationship, the benefits cannot continue accruing to him. As such, the benefits terminated the moment the employment relationship between the parties was terminated on 17th March 2021. Consequently, the prayers relating to the benefits are declined.
120. The Claimant has further claimed for ESOPS. This is a benefit which accrued to him under the Respondent's share plan. Under the scheme, the Claimant was entitled to an outright grant of shares in the Respondent's Safaricom Plans Scheme. However, the grant was pegged on his salary and performance. The shares were to be granted in September of every year with a vesting period of three years.
121. As was pointed out by the Respondent's witnesses and as is apparent from the Claimant's letter of appointment, the ESOPS benefit did not accrue automatically. Rather, it was dependent on the Claimant's performance. It was therefore necessary for the Claimant to present evidence of performance over the years to enable him claim the benefit.
122. Except for the year 2019/2020, the Claimant did not present evidence of his performance over the years. He did not also provide any other evidence such as letters by the Respondent allocating him shares for specific years on account of his good performance. Absent this evidence, the court has no basis for ascertaining whether and when the ESOPS benefit accrued to the Claimant. Consequently, the court declines to grant the relief.
123. The Claimant has also claimed for pay of nine months' instalments for his insured loans. However the evidence presented to court shows that this benefit only accrues in instances where one suffers loss of employment through redundancy and not poor performance (see pages 143 and 144 of the Claimant's trial bundle).



124. The Claimant lost his employment on account of poor performance. Consequently, he is not eligible to claim the insurance pay. As such, the claim in this respect is declined.
125. The Claimant has claimed for NSSF contributions by the Respondent for 96 months. I understand this prayer to be premised on the presupposition that his contract of service was unfairly terminated and that but for the unfair dismissal, he would have continued in the Respondent's service and continued to draw the benefit. However, as was demonstrated earlier, his contract of service was legitimately terminated with the consequence that the Respondent's duty to continue remitting NSSF dues on his behalf came to an end. As such, the prayer is declined.
126. The Claimant has prayed that the Respondent be compelled to re-issue him with the letter of termination of his contract of service showing his actual performance. However, the prayer cannot issue since the letter that was issued to him communicated the accurate reason why his contract of service was terminated. As such, the prayer is declined.
127. The Claimant has prayed for the payment of his accrued pension benefits. In addition, he prays that the Respondent remit pension instalments that cover 96 months.
128. In his oral testimony in court, RW2 stated that the Respondent is not opposed to the Claimant accessing his accrued pension funds. Consequently, the court permits the Claimant to access his pension benefits which had accrued and crystalized as at 17th March 2021 in accordance with the regulations that govern the pension scheme in which the funds are held.
129. However, the Claimant is not entitled to recover future pension instalments from the Respondent since this benefit was tied to the employment relationship between the parties. The moment the relationship terminated on 17th March 2021, the Respondent's obligation to continue remitting monthly instalments towards the Claimant's pension ceased. As such, the prayer for the Respondent to pay the Claimant 96 instalments towards his future pension instalments is declined.
130. Each party to bear own costs of the suit.

Summary of the Findings and Attendant Orders

131. After evaluating the evidence on record and the applicable law, the court makes the following findings and orders:-
 - a. The court finds that the Respondent lawfully terminated the contract of service between the parties.
 - b. The court declines to grant the Claimant all the reliefs sought in the suit except for the relief which relates to payment of pension benefits which had accrued and crystalized as at 17th March 2021. In this respect, the court allows the Claimant's suit only to the extent that he is permitted to access his pension benefits which had accrued as at 17th March 2021 in accordance with the regulations that govern the pension scheme in which the funds are held. Save for this relief, the rest of the claim is dismissed.
 - c. For the avoidance of doubt, the pension benefit that has been granted relates and is limited to the accrued pension benefits as at 17th March 2021. The claim for 96 instalments of pension, being futuristic in nature, has been declined.
 - d. Each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED ON THE 15TH SEPTEMBER, 2025



B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

..... for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

