



**Kaugi v Absa Bank Kenya PLC (Cause E144 of 2022)
[2024] KEELRC 1732 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1732 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E144 OF 2022**

JK GAKERI, J

JULY 9, 2024

BETWEEN

RITA WANDIA KAUGI CLAIMANT

AND

ABSA BANK KENYA PLC RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim dated 24th February, 2022 alleging wrongful and unlawful termination of employment.
2. It is the Claimant's case that she was employed by the Respondent effective 11th April, 1988 as a Bank Clerk, rose to the position of Branch Manager and served the Respondent for 33 years and 6 months.
3. That on 26th September, 2020, she was issued with notice to show cause, responded and a warning letter was issued.
4. The Claimant avers that she was placed on a Performance Accelerator Plan (P.A.D) in 2020 and 2021 which she faults for non-adherence to policy, lack of headcount, non-adherence to disciplinary and grievance policy, delayed action on cases and impact of the COVID-19 Pandemic on specific business areas.
5. That her appeal was not considered.
6. That her ratings on performance for 10 years showed that she meet expectations upto 2013 after which it was either strong and good except in 2018 when she underperformed.
7. The Claimant denies that her performance was poor.
8. The Claimant prays for;
 - a. Reinstatement to her previous position without loss of benefits.



- b. Declaration that the Claimant was discriminated against.
- c. Damages for violation of constitutional rights.
- d. Exemplary damages.
- e. Damages for wrongful or unfair treatment.
- f. Payment of Kshs.33,037,664.00 comprising;
 - i. Three months' notice pay.
 - ii. Accrued leave days.
 - iii. 12 months compensation.
 - iv. Short fall in payment of salary for 7 years and 2.5 months till retirement.
- g. Costs of this suit with interest thereon.

Respondent's case

- 9. By a statement of response dated 5th May, 2022, the Respondent admits that the Claimant was its employee as alleged and adds that the termination of employment was occasioned by the Claimant's continued underperformance and failure to improve while under a Performance Accelerator Plan.
- 10. It is the Respondent's case that the Claimant underperformed in 2018, was taken through a performance rating appeal, notice to show cause, response capability, hearing and a first warning letter was issued dated 27th February, 2019.
- 11. That performance did improve and the Claimant was placed on a PAP in August 2020 which culminated in a final warning dated 30th October, 2020 and the Performance Rating Appeal Panel upheld the appeal vide letter dated 30th November, 2020.
- 12. It is the Respondent's case that the Claimant's performance did not improve and was placed on another PAP in 2021 which culminated in the termination letter dated 14th October, 2021 and the same was upheld by the Appeal Panel and the Claimant was paid one month's salary in lieu of notice and all final dues including 14 leave days for 2021.
- 13. The Respondent avers that it treated the Claimant fairly and denies having violated the Claimant's constitutional rights or discriminated her.
- 14. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

- 15. On cross-examination, the Claimant confirmed that the document dated 3rd November, 2008 was her employment contract whose clause 6 provided for agreements on Performance Development Plan and Annual Performance Targets with the Line Manager and that continued employment was subject to good performance and was liable to termination if performance was wanting.
- 16. The witness admitted that the Respondent bank had a performance rating system every year and she underperformed in 2018, was issued with a notice to show cause on 20th February, 2019, responded, attended a capability hearing on the 26th February, 2019, could be accompanied by a witness and received a warning letter dated 27th February, 2019.



17. The Claimant testified that after the warning, her performance was not poor but admitted that she was placed on a PAP in August 2019 for 4 months to 30th November, 2019 and the targets were agreed at 80% by the end of August and could contact the Regional Manager and signed the performance appraisal.
18. The witness admitted that the Respondent was unhappy with her performance in September 2020 as none of the scores met the target and a notice to show cause was issued, responded, a capability hearing held, attended and was given a final warning, appealed but the warning was upheld.
19. It is the Claimant's testimony that she was placed on another PAP on 10th August, 2021 but the Respondent had challenges with her performance and a notice to show cause was issued on 20th August, 2021 and she did not deny the poor performance in her response dated 24th August, 2021 and requested for more time to meet the targets, attended a capability hearing on 14th September, 2021 unaccompanied and targets had not been met as agreed and a letter of termination dated 14th October, 2021 followed.
20. The witness admitted that she was paid one (1) month's salary in lieu of notice as well accrued leave days and was notified of the right of appeal and appealed on 19th October, 2021 and appeared for the appeal hearing and was notified of the outcome vide letter dated 16th November, 2021.
21. The Claimant admitted that the contract of employment provided for 30 days' notice of termination or pay in lieu of notice and the demand letter dated 10th December, 2021 made no allegation of malice.
22. Similarly, the Claimant confirmed that the Respondent informed her the reason for termination, received a notice to show cause, responded, attended a hearing, had an opportunity to appeal and was informed of the outcome thereby discounting the particulars of malice in paragraph 6 of the Claimant.
23. Relatedly, the Claimant admitted that she did not use the term discrimination in any of her documents save for the claim at paragraph 7 and further that although her initial underperformance was in 2008, her employment was terminated in October 2021.
24. On re-examination, the Claimant testified that in 2019 her performance was strong and received a bonus award and salary increment but admitted that half one of 2020 was not good and by October 2020 it was 80.4% rated as good.
25. According to the Claimant, the PAP is dated 16th August, 2021 and the notice to show cause dated 19th August, 2021 and its duration was 16th August, 2021 to 13th September, 2021 hence the notice to show cause was issued during the pendency of the PAP as reviews were scheduled for 16th August, 2021, 16th September, 2021 and 16th October, 2021 but did not take place as employment was terminated on 14th October, 2021 before the 2nd review.
26. That there was review under the PAP 2021.
27. That the targets were met in October 2020 and no further review took place.
28. Finally, the witness admitted that she had no claim for salary in lieu of notice and untaken leave days.

Respondent's evidence

29. Mr. Vaslas Odhiambo confirmed that ratings were categorised as 120% outstanding, 110-119% very strong, 100-109% strong, 80-99.9 good, underperformance – below 70% and the Claimant's branch posting was 65.4% in 2021 and was thus not meeting expectations.



30. RWI admitted that the PAP was for the period 16th August, 2021 to 13th September, 2021 and the Claimant agreed that she would improve by September but did not.
31. According to the witness, the PAP is a continuous process.
32. On cross-examination, RWI confirmed that the Claimant was on a PAP from February 2019 and may have improved on and off if all objectives were met, the PAP would have been discontinued.
33. That in 2019, the Claimant's performance rating was rated as strong and a bonus was paid at Kshs.345,000.00.
34. It was Mr. Odhiambo's testimony that the warning letter issued in 2018 had lapsed by the date of issue of the notice to show cause in 2020.
35. The witness admitted that the Claimant was given a bonus of Kshs.66,960/= for her good performance as at the end of the year.
36. The witness confirmed that a PAP was for a minimum of 3 months as per the policy but hastened to add that some may require a shorter period of time and a time frame is given.
37. That in the Claimant's case, the agreed duration of the PAP was from August 2021 to 13th September, 2021.
38. That although the Human Resource Manual had no performance ratings, the Dashboard had and the final warning was valid for one (1) year.
39. That the review scheduled for 16th October, 2021 could not take place as the PAP had lapsed as it was for one month and reviews were outside the PAP.
40. The witness confirmed that the 1st warning is issued if there is no improvement or there is deterioration of performance.

Claimant's submissions

41. As to whether the Respondent had performance rating scores in its policies, the Claimant's counsel submits that the Respondent had none as the scores were not provided and the Line Managers were tasked with the roles of rating employees.
42. Counsel urges in the interest of fair labour practise the Respondent ought to have informed the employee of the rating scores criteria every final year.
43. As to whether termination of the Claimant's employment was substantively unfair, counsel submits that the 1st warning lapsed on 27th February, 2020 and the Claimant responded and rating for 2019 was strong and a cash bonus given.
44. Counsel urges that as the Claimant was at the Jomo Kenyatta International Airport (JKIA) Branch in 2018 and was at the Kikuyu Branch in January 2019 and the warning letter was issued while at the Kikuyu Branch, for underperformance at the JKIA, the same was malicious.
45. That the notice to show cause dated 26th September, 2020 made reference to an expired warning letter dated 27th February, 2019 and the PAP provided for 3 reviews in September, October and November and the notice to show cause was issued on 26th September, 2020.
46. Counsel submits that the Claimant was unaware of how the rating scores were arrived at and urges the court to find that the termination of employment was substantively unfair.



47. Concerning procedural fairness, counsel urges that since the first warning had expired, the Respondent acted unfairly as the performance in 2019 was strong and the three reviews were not conducted and termination took place earlier.
48. On discrimination, counsel submits that the Claimant was discriminated because termination of employment took place before the three planned reviews took place and the Respondent did not expunge the Claimant's first warning letter.
49. Counsel urges the court to find that the Claimant was discriminated citing the Court of Appeal decision in *Oi Pejeta Ranching Ltd V David Wanjau Muhoro (2017) eKLR*.
50. On the reliefs sought, counsel urges that the Claimant is entitled to 3 months' salary in lieu of notice, 14 leave days, 12 months compensation and exemplary damages.
51. Finally, reliance was made on the decision in *National Bank of Kenya V Samuel Nguru Mutonya (2019) eKLR* to reinforce the submission.

Respondent's submissions

52. On whether the Respondent had a fair reason to terminate the Claimant's employment, counsel for the Respondent relies on the Court of Appeal decision in *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (2019) eKLR* to urge that the test applicable is partly subjective under Section 43(2) of the [Employment Act, 2007](#).
53. Counsel submits that the Claimant was well aware of the performance ratings as provided in the score cards and dashboard which she had access to and RWI testified on the rates and performance reviews.
54. Counsel further submits that the validity of the Respondent's ratings score is not a pleaded issue and the Respondent cannot tender evidence at this stage.
55. Counsel further submits that the Respondent treated the Claimant fairly and celebrated her contribution as evidenced by bonus payments in 2019 and there was no malicious attempts to terminate her employment as the performance improvement process was continuous and progressive.
56. Counsel urges that the Claimant's poor performance by the end of the first half of 2020 is evidenced by the PAP of 1st August, 2020 and commitment to improve her performance.
57. Reliance was made on *Jane Wairimu Machira V Mugo Waweru and Associates (2012) eKLR* to urge that 2 – 3 months is reasonable time for an employee to improve performance. That the Claimant was aware of her performance and the areas of improvement and by end month, only 3 targets had been met as per the PAP and a notice to show cause was issued in September and was accorded an opportunity to explain her weak points and a chance to improve and the PAP was intended to ensure sustained performance improvement.
58. Counsel submits that the termination of employment was for a fair reason in accordance with the [Employment Act, 2007](#).
59. As regards the procedure employed by the Respondent, counsel relies on the sentiments of the court in *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR*, *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (Supra)* and *Alois Makau Maluvu V Citi Trust Kenya Ltd & 6 others (2018) eKLR* to urge that an employee must be accorded an opportunity to be heard in compliance with the provisions of Section 41 of the [Employment Act, 2007](#).



60. That under the Respondent's Disciplinary, Capability and Grievance Policy, the capability process comprised managing underperformance through the PAP, capability hearing, decision and sanction, communication and review process.
61. Counsel further submits that the termination of the Claimant's employment was consistent with the Respondent's policies and procedures and the *Employment Act*, 2007.
62. Concerning discrimination, counsel submits that reference to the 1st warning in the notice to show cause was merely intended to demonstrate the Claimant's continued underperformance not its applicability to the subsequent processes.
63. That the Claimant had been afforded opportunities to improve her performance and according to the Respondent's policy, the Respondent could terminate the Claimant's employment at any time after the final warning if no improvement in performance had been achieved.
64. Counsel urges that for discrimination to arise, there must be a distinction exclusion or preference on any basis whose effect is to impair or nullify opportunity or treatment of a person, citing the decision in *Ol Pejeta Ranching Ltd V David Wanjau Muhoro* (Supra).
65. Counsel submits that the Claimant adduced no evidence of any distinction between her and other employees of the Respondent and as such no discrimination took place and the allegation had not been brought to the Respondent's attention.
66. As regards the reinstatement, counsel submits that considering the circumstances in which the Claimant left employment, reinstatement was impracticable and the Claimant had not demonstrated exceptional circumstances to justify the remedy.
67. That the Claimant had not demonstrated violation of a constitutional right to quality for an award in damages and the same applied to the alleged discrimination.
68. Counsel submits that the claim for 3 months' salary in lieu of notice, 12 months compensation, accrued leave and salary shortfall till retirement had no basis and the Claimant was not entitled to damages for wrongful and unfair termination as the Claimant's employment was terminated for poor performance and was accorded due process. Counsel, further urges that if the court held otherwise, Section 49(1) (c) of the *Employment Act*, 2007 was applicable and an award for 12 months would amount to unjust enrichment and advocated for 2 months' salary if the court found that termination was unfair as held in *Isdor Rachuonyo V Brava Food Industries Ltd* (2021) eKLR.
69. Finally, on exemplary damages, counsel cited the decision in *D. K. Njagi Marete V Teachers Service Commission* (2020) eKLR to urge that the Claimant had not proved malice or bad faith on the part of the Respondent.

Analysis and determination

70. It is common ground that the Claimant was an employee of the Respondent for over 30 years and risen to the level of Branch Manager. Under her terms of employment, the Claimant agreed to be subject to the Respondent's Performance Management System whereby annual performance targets and objectives would be agreed upon with the Line Manager at the beginning of each year and performance would be measured against those targets and objectives.
71. It was also a term of the employment contract that continued employment with the Respondent was dependent on good performance.



72. The Claimant confirmed on cross-examination that the Respondent had a Performance Rating System and employees were rated every year.
73. From the evidence on record, it is clear that the Claimant's performance was good until 2018 when she was rated as underperforming which appear to have been the harbinger of her separation with the Respondent bank.
74. However, in her response to the first warning, the Claimant explained what may have influenced the performance of the branch from 2013 when a fire gutted part of the airport.
75. The explanation, however, failed to explain the underperformance as her performance had been good, strong or met expectations from 2013 – 2017.
76. Contrary to the Claimant's counsel's submissions that evaluation of underperformance was served on the Claimant while at the Kikuyu Branch and it related to another branch, it is common ground that the Claimant was transferred from the JKIA Branch to Kikuyu in early 2019 and the ratings could only relate to her performance at the last Branch served.
77. It is not in contest that the Claimant was taken through the processes as provided by the Respondent's policies and procedures which culminated in the first warning letter dated 27th February, 2019 received by the Claimant on 1st March, 2019.
78. The warning was valid for 12 months effective 27th February, 2019.
79. Documents on record reveal that the Claimant had no performance challenges in 2019 and received a salary increment and performance bonus of Kshs.345,000/=.
80. Equally, the Claimant's improved performance was reflected in the overall performance for 2020 which was rated as good at 80.4% and a significantly lower bonus of Kshs.66,960/= was awarded and RWI confirmed as much on cross-examination.
81. However, the Claimant admitted on re-examination that her performance in the 1st half of 2020 was not good.
82. Evidently, the Claimant was placed on a PAP in August 2020 for a period of 4 months and the targets were set at 80% and the Claimant committed herself to attain the targets and would be facilitated as appropriate.
83. The Claimant admitted that the branch had performance challenges in September 2020 as none of the targets had been met.
84. The Respondent took the Claimant through the attendant processes of a notice to show cause, response capability hearing which culminated in a final warning letter dated 20th October, 2020.
85. The Claimant exercised the right of appeal and was heard but the appeal was unsuccessful as evidenced by letter dated 30th November, 2020 received by the Claimant on 8th December, 2020.
86. Finally, the Claimant was placed on another PAP on 16th August, 2021. The Claimant committed to attain the targets by end of September 2021.
87. The Respondent issued a notice to show cause dated 19th August, 2021 received by the Claimant on 20th August, 2021 and all other processes were complied with and culminated in a termination letter dated 14th October, 2015, received by the Claimant under protest on even date.
88. The issues that commend themselves for determination are;



- i. Whether the Respondent had a performance management and scores rating system.
 - ii. Whether the Claimant was discriminated against by the Respondent.
 - iii. Whether termination of the Claimant's employment was fair within the meaning of Section 45 of the *Employment Act*, 2007.
 - iv. Whether the Claimant was entitled to the reliefs sought.
89. On performance management and scores rating, the Claimant's counsel submitted that the Respondent had none, while counsel for the Respondent submitted otherwise.
90. Documents availed by the Claimant, which the Respondent did not contest reveal that the Respondent has an Employee Benefit Policy, Employee Relations Policy, Performance Management Policy and a Disciplinary, Capability and Grievance Policy and Procedure among others.
91. The Performance Management Policy on record was approved on 1st July, 2019 and applied to employees and workers of ABSA Group and all its Subsidiaries and provides for half and end year performance reviews.
92. Under the policy, if underperformance is not resolved, the grievance policy and procedure is triggered.
93. The Respondent's Disciplinary, Capability and Grievance Policy and Procedure approved on 22nd September, 2020 provides for investigation, disciplinary hearing, decision and sanction, notification of the employee and appeal.
94. According to the Claimant's counsel, since the documents on record had no specific rating scores, the Respondent had no known rating system which in the court's view begs the question as the Claimant admitted on cross-examination that the Respondent rated the performance of its employees every year based on agreed targets and her first underperformance was in 2018.
95. Similarly, RWI, the Respondent's Head of Employment Relations and Wellness explained the Respondent's rating system as;
- Outstanding 120% or more
 - Very strong 110% to 119%
 - Strong 100% to 109%
 - Good 80% to 99%
 - Improvement need 70% to 79%
 - Underperforming Below 70%
96. The Claimant did not controvert this evidence or contest her outstanding, very strong, strong and good ratings tabulated in her witness statement from 2010 to 2020 on the basis of which the Claimant received bonuses and salary increment as provided by the letter of Appointment.
97. From the evidence on record, it is discernible that the Respondent used the Balanced Score Card as the evaluation tool.
98. Having served the Respondent bank diligently and risen from the position of Bank Clerk in 1988 to Branch Manager in 2007, the Claimant cannot be presumed not to have been aware of the existence of the Respondent's performance rating scores, 33 years and 6 months later.



99. Finally, the Respondent’s witness confirmed on cross-examination that the scores were available on the Dashboard, accessible to all employees of the Respondent.
100. To the question whether the Respondent had a Performance Management and Scores Rating System, the court returns that it had.
101. Concerning discrimination, counsels have adopted contrasting positions with the Claimant’s counsel contending that the fact that the Claimant was not accorded reasonable timelines to demonstrate sustained performance improvement and in particular planned reviews on 16th October, 2021 and 16th November, 2021, amounted to discrimination as was the reference to an expired first warning.
102. Reliance was made on the provisions of Section 5(2) and (3) of the *Employment Act*, 2007.
103. Analogous to Article 27(4) of *the Constitution* of Kenya, 2010, Section 5(3) of the *Employment Act* outlaws discrimination whether directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
104. Similarly, Section 5(3)(b) of the Act includes recruitment, training, promotion, terms and conditions of employment or other matters arising out of employment.
105. In *Nyarangi & others V Attorney General* (2008) KLR 688, the court stated as follows;
- “Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances.”
106. Similarly, in *Peter K. Waweru V Republic* (2006) KLR, the court stated thus;
- “. . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subjected to . . . restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description . . .
- Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex . . . a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”
107. Wilson J. expressed similar sentiments in *Andrews V Law Society of British Columbia* (1989) 1 SCR 321.
108. In her statement of claim, the Claimant avers that her termination from employment was without basis or justification, replacement by another person, before retirement, no other employment was offered, among others were the particulars of discrimination.
109. In her written statement, the Claimant is reticent on discrimination or alleged particulars or any reference of having been treated differently in comparison to another or other colleagues in the same circumstances.
110. In a nutshell, the Claimant adduced no evidence of the alleged discrimination, as there was neither a distinction, exclusion nor preference that impacted on the Claimant as submitted by the Respondent’s counsel.



111. From the foregoing, it is the finding of the court that the Claimant has failed to demonstrate on a balance of probabilities that she was discriminated against by the Respondent.
112. A similar finding applies to the alleged violation of constitutional rights which were never particularised nor the manner of violation demonstrated.
113. As regards termination, while the Claimant’s counsel maintains that it was unfair, the Respondent’s counsel submitted that due process was followed and the Claimant was accorded sufficient opportunity to improve her performance.
114. It requires no belabouring that for a termination of employment to pass the fairness test, it must be proved that the employer;
 - i. had a valid and fair reason to terminate the employee’s employment, relating to the employee’s conduct, capacity, compatibility or operational requirement of the employer and
 - ii. the termination was conducted in accordance with a fair procedure.
115. Put in the alternative and as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, there must be a substantive justification and procedural fairness.
116. in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR, the Court of Appeal expressed similar sentiments as follows;

“ . . . From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”
117. Was the termination of the Claimant’s employment by the Respondent substantively fair or justifiable?

Reason for termination

118. It is not in contest that the Claimant was placed on a PAP from 16th August, 2021 to 13th September, 2021 with planned review sessions on 16th October, 2021 and 16th November, 2021, rating at 80% by the end of August 2021.
119. The PAP was occasioned by the Claimant’s underperformance of 64% in June 2021.
120. The Claimant undertook to continue pushing for conclusion of delayed SMEs cases by end of September.
121. The Claimant and the Line Manager signed the PAP on 16th August, 2021.
122. It is common ground that the Respondent issued a notice to show cause on the Claimant on 20th August, 2021, three days after the commencement of the PAP on the premise that her overall performance for half year 2021 was 65.4% against a target of 100%
123. From the evidence on record, it is clear that the Respondent was aware of the Claimant’s performance rating when it placed the Claimant on the PAP in mid-August 2021.



124. In determining this issue, the court is guided by the sentiments of Mbaru J. in *Jane Samba Mukala V Ol Tukai Lodge Ltd (2013) eKLR* as follows;

“This is important to note as where poor performance is shown to be the reasons 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)(c) further outline 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 assess the performance of each employee and further what measures they had 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 an evaluation measure, and before termination on the ground 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 in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee.”

125. As found elsewhere in this judgment, the Respondent has a Performance Management Policy, Score Rating System, Annual and Mid-year Appraisals and the Performance Accelerator Plan to improve performance of employees who were rated as underperforming.
126. As adverted to elsewhere in this judgment, the Claimant’s rating for 2018 was underperforming and was issued with the first warning letter and her performance improved in 2019, though performance in the 1st half 2020 was not and was placed on a PAP in the second half of 2020 but the overall performance for the year was 69.9% as only one target was fully met and exceeded and the Final warning was issued.
127. Similarly, the score card rating and Dashboard for June 2021 was 65.4 and 64% respectively and precipitated the last PAP which culminated in the termination of employment in October 2021.
128. As RWI confirmed on cross-examination, the PAP is a continuous process and could only be discontinued if all objectives and targets are met.
129. Evidently, although the Claimant’s performance improved in the 2nd half of 2020 for the overall annual performance to be rated as good and a bonus paid which was far much less than 2019, it did not tremendously improve as evidenced by the developments in the first half of 2021 which was rated as underperforming.
130. The fact that the Claimant’s performance improved in the 2nd half of 2020 would appear to suggest that there was room for improvement as businesses were slowly recovering from the vagaries of the COVID-19 Pandemic, but does not appear to have sustained the performance improvement in the first half of 2021.



131. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
132. Case law is consistent that Section 43(2) of the *Employment Act* requires the employer to prove that it had a reasonable basis for the genuine believe that it could terminate the employee’s employment, a test the Court of Appeal has described a partly subjective.
133. (See Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (Supra) and Bamburi Cement Ltd V William Kilonzi (2016) eKLR).
134. Relatedly, the standard of proof is on a balance of probabilities which is consistent with the band or range of reasonable responses test in Halsbury’s Laws of England, 4th Edition, Vol. 16 (1B) Paragraph 642 as follows;
- “ . . . In adjudicating on the reasonableness of employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another. The function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.
135. In the instant suit, it is not in contest that the Respondent issued a final warning dated 30th October, 2020 to the Claimant on 3rd November, 2020 and considered the Claimant’s appeal against the letter and the Claimant attended the hearing but it was unsuccessful and although performance improved towards the end of the year, the improvement appear to have fizzled out by June 2021 and gave way to another PAP.
136. Did the Respondent have a reason to terminate the Claimant’s employment in 2021?
137. Flowing from the foregoing, the court is satisfied and finds that the Respondent has demonstrated, on a preponderance of probabilities that it had a valid and fair reason to terminate the Claimant’s employment.
138. The Claimant was accorded several opportunities from 2019 through 2021 but failed to achieve sustained performance improvement save for 2019.
139. The Respondent had a reasonable basis to genuinely believe that the Claimant’s performance would not improve.

Procedure

140. As held in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR, the elaborate procedural requirements in Section 41 are mandatory for a termination of employment to pass muster.



141. In *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal itemised the procedural tenets of Section 41 of the *Employment Act* to include notice of the reason(s) why termination of employment is being considered, explanation of the grounds of termination in a language understood by the employee, entitlement of the employee to the presence of another employee of his choice or a shop floor representative when the explanation is made and hearing and considering the employee's representations or those of the representative.
142. In the instant suit, while the Claimant's counsel argues that termination of the Claimant's employment was procedurally flawed, the Respondent's counsel urges that due process was followed.
143. Counsel for the Claimant faults the procedure in that, the Respondent relied on an expired warning letter, having lapsed in February 2020 by virtue of Clause 5.3.3 of the Respondent's Disciplinary, Capability and Grievance Policy and Procedure as another warning was necessary in September 2020 when the notice to show cause was issued.
144. Contrary to the Respondent's Counsel's submission that it was a mere mention as opposed to its applicability by the Respondent, the Respondent's letter is emphatic that a first warning had already been issued notwithstanding the fact that it had lapsed.
145. This is exemplified by the final warning dated 30th October, 2020, which ought to have been the first warning.
146. According to the Claimant, the Respondent did not honour its policy which amounted to procedural unfairness.
147. Secondly, the Respondent is faulted for not having accorded the Claimant reasonable timescales to achieve sustained performance improvement in accordance with Clause 6.2.1 of the Disciplinary, Capability and Grievance Policy and Procedure which provides inter alia;
- “A reasonable timescale for the individual to achieve and demonstrate a sustained performance improvement. Normally, a minimum period of three (3) months should be allowed . . .
- Flexibility is needed where the role is more complex or performance improvement may take longer to demonstrate . . .”
148. Although RWI testified that a PAP is continuous, he could not explain why the Claimant was placed on a PAP of one (1) month with two reviews after the one month.
149. The policy is clear that the normal duration of a PAP is three months.
150. The fact that the PAP provided for a total of 3 reviews would appear to suggest that it was programmed for more than one (1) month to delude the Claimant. Clearly, the one (1) month PAP violated the Respondent's policy and procedure manual.
151. Closely related to the foregoing is the fact that the PAP was signed on 16th August, 2021 and the notice to show cause was issued on 19th August, 2021, three (3) days after the PAP was concluded and RWI confirmed as much on examination-in-chief.
152. In a nutshell, the parties concluded a PAP and the Respondent rescinded it 3 days later before any of the agreed reviews had taken place which the court finds procedurally unfair to the Claimant.



153. For the foregoing reasons, it is the finding of the court that the Claimant has established on a balance of probabilities that termination of her employment by the Respondent was procedurally flawed and thus unfair.

Whether the Claimant is entitled to the reliefs sought.

a. Reinstatement

154. The remedy of reinstatement is provided for by Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 read with Section 49(3)(a) of the *Employment Act* and as held by the Court of Appeal in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 2 others* the remedy is discretionary.
155. The court exercises its discretion on the basis of the parameters under Section 49(4) of the *Employment Act*, 2007 among others. One of which is practicability of reinstatement.
156. Although the Claimant expressed her wish to continue working for the Respondent and had no recorded case of misconduct or underperformance prior to 2018 and had served the Respondent for over 33 years which is a long time, the circumstances in which she left employment, show that the Respondent had lost confidence in her ability to sustain performance improvement and reinstatement would not be an appropriate remedy as submitted by the Respondent's counsel.
157. The court is not persuaded that the Claimant has demonstrated any exceptional circumstances for the remedy of reinstatement to issue.
- It is declined.

b. Declaration

158. Having found that the Claimant has failed to prove particulars of the alleged discrimination by the Respondent, the declaration sought is unmerited and it is declined.

c. Damages for violation of constitutional rights

159. Having found that the Claimant failed to prove that any of her constitutionally guaranteed rights was violated, the prayer for damages is unmerited and it is accordingly dismissed.

d. Exemplary damages

160. The Claimant adduced no shred of evidence to prove entitlement to exemplary or punitive damages.
161. Clearly, the Claimant has not demonstrated that her case falls within the ambit of any of the circumstances outlined in *Rookes V Barnard* (1964) A.C. 1129.
162. In *Obonyo V Municipal Council of Kisumu* (1971) EA 91 at 94, Spry VP held;

“The decision in *Rookes V Barnard* 1964 A.C. 1129 so far as it related to exemplary damages is of outstanding importance in English law both because it defines the circumstances in which such damages may be awarded, overruling certain earlier decisions and because it indicates the correct approach to assessment of such damages. It was a decision of the House of Lords and the opinion of Lord Devlin who dealt with this aspect of the case, was endorsed by all the other members of the house. It is a decision therefore, which must commend the highest respect in any country which adopted the English law of Tort . . .



It will be convenient to begin summarizing very briefly the effect of *Rookes V Barnard*. In the first place, it was held that exemplary damages may only be awarded in two classes of cases (a part from any case when it is authorised by statute), these are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial at the expense of the Claimant . . .”

163. Since exemplary damages are awarded as punitive not consolatory, (see *Grinyamwaya V Nairobi City Commission* (1985) eKLR), the Claimant must demonstrate that the Respondent's conduct is deserving of punishment. The Claimant has not so demonstrated.

The prayer is dismissed.

e. Damages for wrongful and unfair treatment

164. The Respondent terminated the Claimant's employment after subjecting her to three (3) PAP in 2019, 2020 and 2021 and did nothing more.
165. The Claimant adduced no evidence to prove that she was unfairly treated by the Respondent beyond the termination of employment.
166. The prayer lacks particulars and is declined.

f. Payment of Kshs.33,037,664/=

i. Three months' notice pay

167. On cross-examination, the Claimant admitted that he was paid in lieu of notice and on re-examination testified that she was longer claiming salary in lieu of notice.
168. Notably, the letter of appointment provided for a one (1) month's salary not three.
- The prayer lacks merit and is dismissed.

ii. Accrued leave

169. On re-examination, the Claimant admitted that she was paid for accrued leave and had no claim against the Respondent.
- The prayer is dismissed.

iii. 12 months compensation

170. Having found that termination of the Claimant's employment by the Respondent was procedurally unfair, the Claimant is entitled to compensation under Section 49(1)(c) of the [Employment Act, 2007](#).
171. The court has considered that the Claimant was an employee of the Respondent for over 33 years and served diligently until 2018 when her performance fell below the threshold, had no record of misconduct, wished to continue in employment of the Respondent, and substantially contributed to the termination of employment.
172. In the circumstances, the equivalent of 3 months gross salary is fair.



iv. Salary short fall for 7 years and 2.5 months till retirement

173. Strangely, neither the Claimant’s witness statement nor the claim itself sets out the particulars of this claim. However, from the description, this is a claim for the salary the Claimant would have earned till retirement.

174. The Claimant demonstrated neither a factual nor a legal basis of the claim as it involves anticipatory earnings.

175. In *D.K. Njagi Marete V Teachers Service Commission (2020) eKLR*, where the appellant had a similar claim, the Court of Appeal expressed itself as follows;

“ Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.”

176. (See also *Elizabeth Wakanyi Kibe V Telkom Kenya Ltd (2014) eKLR*).

177. The prayer is unsustainable and it is dismissed.

178. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;

- a. Equivalent of 3 months’ gross salary.
- b. Parties shall bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

