



Wachiuri v Kaisugu Limited (Employment and Labour Relations Cause E010 of 2023) [2024] KEELRC 1949 (KLR) (23 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1949 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE E010 OF 2023**

HS WASILWA, J

JULY 23, 2024

BETWEEN

JENIFFER MUTHONI WACHIURI CLAIMANT

AND

KAISUGU LIMITED RESPONDENT

JUDGMENT

1. This suit was instituted by a Memorandum of claim dated 7th July,2023, seeking for the following reliefs; -
 - a. A declaration that the claimant’s termination was unfair, unlawful and lacked due process.
 - b. Compensation for unlawful termination at Kshs 967,704 tabulated as follows (Kshs. 80,642 net per month for 12 months).
 - c. Costs and interests of this suit.
 - d. Any other relief that this Honourable Court may deem fit and expedient to grant.

Claimant’s case

2. The claimant states that he was employed by the Respondent by a contract of Employment dated 9th January, 2022 as the Sales and Marketing manager, under Job Grade 4 earning a monthly basis salary of Kshs 100,000, together with car running, School fees and Airtime benefits.
3. She was placed on probation for a period of 6 months. That while serving in her probation period, she reported an incident of inappropriate sexual conduct by the Respondent’s Operation / Human Resource manager, but that the Respondent did not address her grievances and instead he was advised by the Respondent to resign to avoid disciplinary action being taken against her.



4. The Claimant states that she continued serving the Respondent and on 20th May, 2020, she received her termination letter, allegedly drawn under section 42 of the Employment Act as read with Clause 8.1 of the Employment contract but the particulars of the termination were not indicated.
5. It is averred that the termination was not done in accordance with due procedure under the Employment Act or for known reason, thus the termination was unfair under section 45 of the Employment Act.
6. The Respondent entered appearance on 15th August, 2023, through the firm of Kiplenge, Andama and Makau Advocates and filed a defence to claim on even date denying the entire claim and stating that the claimant was indeed employed by the Respondent and reported to work on 17th January, 2022, however, that she did not work with zeal and diligence as pleaded.
7. On the contrary, that while the claimant was still serving her probation period, her work ethic was marred with lack of professionalism and integrity leading to dismal performance, failing to meet the company's overall marketing objectives, in effect occasioning losses to the Respondent.
8. On the claim of sexual misconduct by one of the employees, the Respondent stated that the incident was reported and the issue dealt with as communicated by the letter of 2nd June, 2022 addressed to the Board of directors.
9. It is stated that contrary to the allegations that the claimant was forced to resign, the claimant was actually terminated by the letter of 20th May, 2022 following numerous written complaints and performance appraisal by the Respondents that showed her performance to be unsatisfactory during her probation period.
10. It is stated that by reason of her insubordination, poor performance, lapses in supervision, unprofessionalism and questionable integrity, her termination was justified.
11. Particulars of these breaches are that the claimant failed in her supervisory role, giving way to one of the sale representative, Mr. Anthony Ndunda, to defraud the respondent of a sum of Kshs 255,622.50, leading to the filing of criminal charges against him in Kipkelion Mobile Court under CR. No. E075 of 2022. Secondly that she insubordinate her superiors like the operations manager by talking rudely with outburst of anger. Thirdly that on 25th April, 2022, she provided false information to the Operations manager that one of the distributors had made a sale Order of 3 tones of processed tea when infact the sale was for 500kgs.

Fourthly, that she failed to account for the sum of Kshs 40,100 obtained from the Respondent through an imprest, a fact that she admitted wrongdoing and the money was recovered from her salary. Also that she asked to be given Kshs. 10,000 generated through sales at the Respondents shop and failed to repay on time and Further soliciting for money from her colleagues and failing to refund the said money. Lastly, that the Claimant at one point maligned the name of one of the colleagues so bad that the matter was reported to police station and the colleague issued with OB Number 15/23/05/2022.
12. The Respondent states that the main issue for concern was failing to meet the set target of sale of 45 tones for the entire period of her probation, while fully aware that it was one of the key performance indicators for her role.
13. It is stated that the claimant was made aware of all these allegations via emails and meetings, therefore that the allegations that she was not granted a hearing is not true. Accordingly, that the claim herein is without merit and should be dismissed with costs.



Evidence

14. The claimant testified as CW-1 and adopted her witness statement of 7/7/2023 and produced the list of documents of even date as her exhibits 1-7 respectively. She added that she is a mother of Three, currently living in Nairobi and not in any gainful employment.
15. Upon cross examination, she testified that she received emails of some complaints against her and responded to the same. She also admitted being called to the office to discuss some of the issues that arose in line of her duty. She stated that she was aware that she was on probation and her absorption depended on her satisfactory performance. In her testimony, she stated that she had been given a target of 45 tones per month but that she is not the one that set the said target.
16. Upon further cross examination, she testified that her complaint of sexual harassment was addressed by the Managing Director. she stated that the request for her resignation was made verbally.
17. On re-examination, she testified that the email correspondences cannot amount to disciplinary hearing. Also that she was threatened to termination if she did not resign and that all these threats were made verbally.
18. The Respondent on the other hand called severally witness in support of its case, the first witness was Leonard Kibet Korir, the Respondent's Operations Manager who testified as RW-1. He states that he is in charge of various department in the Respondent's company including Human Resource and Corporate affairs. He adopted his witness statement of 23/8/23 and produced document No. 5,10,14 and 18 in the Respondent's list of documents dated 5/9/2023.
19. Upon cross examination, he testified that the claimant used to report to him. He told this Court that the issue of reporting was normally done via email. He testified that they normally do weekly appraisal of their employees and the appraisal were communicated via email. Further that they had several meetings, however the Report of the Claimant's performance was not produced in Court. He nonetheless maintained that the claimant's performance, a fact that was communicated to her by the Managing Director of the Respondent, via Email and subsequently, she was issued with a letter terminating her probationary contract.
20. He stated that he raised the issue of performance with the claimant verbally and later the MD sent her an email on the same issue. He also stated that the claimant was given 30 days' Notice before the termination of her probation period.
21. The second witness was Mirella Chelangat Koskei, who testified as RW-2 and adopted her witness statement of 23/8/2023 denying knowledge of alleged sexual advances by the Operations manager on the Claimant.
22. The third witness was Betsy Cheronu who testified as RW-3 and also adopted her witness statement of 23/8/2023 and produced documents No. 16 and 20 in the Respondent's list of documents , being print out of WhatsApp correspondences between her and the claimant. upon cross examination, she testified that the matter on sexual advances by the Operations manager was reported to the MD and it was resolved and later the claimant was dismissed.
23. The Fourth witness was Richard Kirui, the Finance manager of the Respondent, who testified as RW-4 and adopted his witness statement of 23/8/2023. He produced the document No. 6, 8,11 and 19 of the list of documents.
24. Upon cross examination, he testified that he was not part of the appraisal team that appraised the Claimant's performance and that the claimant was appraised by the Managing Director and that he



- was not aware of the details of her performance. He however stated the claimant was usually appraised after three months. He testified that he was aware that her performance was unsatisfactory but did not know whether the claimant was informed of her performance.
25. The last witness was Philip Byegon, the Respondent's Managing Director who testified as RW-5 and adopted his witness statement of 23/8/2023 and produced documents No. 1,2,3,4,7,9,12,13,15 and 17 in the list of documents.
 26. Upon cross examination, he testified that the claimant reported to him directly as per the contract of employment. He testified that he put in place mechanisms for her improvement whenever she failed to meet her targets. That he also had a discussion with her on the dwindling performance and she requested to be given time and support staff to help. He testified that the tools for improvement included the several meeting, emails among other which have been produced in evidence before this Court. He told this Court that he is the one that conducted periodic appraisals of the claimant which was done on monthly basis and 3 months' basis. He stated that he claimant has been in their employment for only 4 months.
 27. Upon further cross examination, he testified that the performance of the claimant was below average causing the Respondent to make the decision to terminate her services and the reasons communicated orally. He confirmed that there was no substantive report. He also admitted that they did not issue any show cause letter to the Claimant, however that whenever an issue arose, she was given the platform to ventilate the issue which was made up of three people. He also confirmed that the termination letter did not have the reasons for termination. On Notice, he stated that the claimant must have been given notice of termination as per clause 8.1 of the Agreement.
 28. On re-examination, the witness testified that clause 8.1 of agreement gave the Respondent an alternative of one-month salary in lieu of notice, which they paid the claimant. He reiterated that the emails in court addresses all the allegations against her as such she was given a platform to address the issues which amounted to fair hearing.

Claimant's Submissions.

29. The claimant submitted on three issues; whether the Respondent had reasonable, sufficient and justifiable reasons for terminating the Claimant's employment, whether the Claimant's termination was procedurally fair and what remedies are available to the Claimant.
30. On the first issue, it was submitted that section 45(1) (2) of the *Employment Act* makes provisions on unfair termination thus: "No Employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove (a) that the reason for the termination is valid (b) that the reason for termination is a fair reason (i) related to the employee's conduct, capacity or compatibility or (ii) based on the operational requirements of the employer; and (c) that the employment is terminated in accordance with fair procedure."
31. On that basis, it was argued that the Respondent was in breach of Section 45 (1) and (2) of the *Employment Act* by terminating the Claimant unfairly for failing to give the reason(s) for terminating the Claimant. Moreover, that the Respondent purportedly terminated the Claimant under Section 42 of the *Act* which section has been declared unconstitutional by the Court in Petition No. 94 of 2016;



Monica Munira & Others v Mount Ken a University & The Attorney General [2021] eKLR, where a Three Judge bench held that;-

“To the extent that Section 42(1) of the Employment Act, 2007 excludes employees having probationary contracts from the provisions of Section 41, it is inconsistent with Articles 24, 41 and 47 of the Constitution.”

32. The Claimant also relied on the case of Zeddy Cheronu Sambu v National Oil Corporation Kenya [2022] eKLR where the Court relied on the above case in making its decision that the employer is obligated to take the employee through the procedural requirement contemplated under section 41 of the Employment Act and comply with the probationary contract.
33. It was submitted that even if the claimant indeed posted unsatisfactory performance, she was entitled to notice both under the Employment Act and the Clause 8.1 of the Employment contract that gave a minimum notice period of 30 days.
34. It was also argued that the Claimant was not put on any improvement plan as stated by the Respondent’s witnesses during hearing.
35. On the sexual harassment claim, it was submitted that the Claimant had narrated how she received sexual advances from the Operations Manager to the extent of escalating the same to the Managing Director and instead of addressing the issue, she was threatened with dismissal, while the Operation’s manager was reprimanded and advised to “stop drooling over women” and they were both dismissed and told to go back to work, the managing director adding that the claimant should not be angry for being appreciated.
36. It was submitted that section 6 of the Act defines sexual harassment as where an employer or a representative of the employer or a co-worker: directly or indirectly requests an employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express with a promise of preferential treatment or threat of detrimental treatment.
37. In addition, that the law requires an employer with 20 or more employees to consult with the employees or their representatives, if any, and to issue a policy statement on sexual harassment, which includes, among other matters, a definition of sexual harassment; a statement that every employee is entitled to employment that is free of sexual harassment; a statement that the employer should take steps to ensure that no employee is subjected to sexual harassment; and a statement that the employer shall take disciplinary measures as they deem appropriate against any person who subjects any employee to sexual harassment. In addition to having a sexual harassment policy, the employer must ensure that the policy is implemented.
38. Accordingly, that in this case, the Claimant testified that during her probation period, she was uncomfortable with the conduct of the Operations Manager, who kept making sexual advances and innuendos at her, including touching her hand inappropriately and taking offence when requested to stop. That, her attempts to resolve the discomfort with the Operations Manager bore no fruit and when she opted to escalate her complains to the Managing Director, her complaints were never addressed but instead were twisted around to suggest that she was being insubordinate.
39. Therefore, that having been sexually harassed as work, without any action taken against her perpetrator, the Respondent should be held responsible for the action of its Operation Manager and be forced to



pay the claimant damages, which is assessed at Kshs, 4000,0000 and in this, they relied on the case of *P O v Board of Trustees A F & 2 others* [2014] eKLR where the Court held:

“As stated by Adrienne Cruz and Sabine Klinger in their Working Paper discussed above, ending gender-based violence in the world of work is a critical step to decent work. Victims of sexual harassment merit monetary damages to compensate for financial loss as a result of dismissal from employment, and to compensate injury to their feelings, humiliation, human dignity, and impairment and nullification of equality of opportunity or treatment in employment. In this dispute, the 2nd Respondent's behaviour to the Claimant was appalling and left her humiliated, sexually violated and jobless. She merits an award of General Damages, whose measure should be commensurate with the physical, psychological and economic injury suffered...The Respondents shall pay to the Claimant general damages for sexual harassment, unfair and wrongful termination, at Kshs.3,000,000.”

40. It was argued that save for hearsays, the Respondent did not give any reason for terminating the services of the claimant and therefore that they violated the provisions of section 41 of the *Employment Act*. Moreover, that the allegations of poor performance were not demonstrated before this Court to warrant the dismissal.
41. On procedure, it was submitted that flowing from the decision of *Monica Munira & Others v Mount Kenya University & The Attorney General* [2021] eKLR , the Respondent failed in subjected the claimant to fair procedure as no Show cause letter was served on her and no disciplinary hearing was conducted on the basis that she was serving on probation period, when the law states otherwise as seen in the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR where the court had this to say;-

“From the very outset, the Respondent was on notice that part of the Claimant's complaints in the matter was that the procedure leading to his termination was flawed.... It was therefore surprising that the Respondent opted to withhold from the court the minutes of the disciplinary committee proceedings. In cross examination, the Respondent's witnesses confirmed that these minutes were not produced as exhibit. How was the Respondent to prove that the Claimant was afforded a chance to attend the proceedings with a witness of his choice or that he was allowed a chance to cross examine witnesses or that he was supplied with the documents he is complaining about without producing the minutes of the disciplinary session that would ordinarily contain a record addressing such issues? And on what basis would the court declare that the Respondent has discharged the burden under sections 43 and 45 of the *Employment Act* in the absence of this record? The failure by the Respondent to file these minutes certainly deprives the court of evidence that the Respondent complied with the procedural structures set out in law. Accordingly, I find that the Respondent has failed to prove that the procedure adopted to release the Claimant was fair”.

42. The claimant also relied on the case of *Francis Kibugi v Kenya Railways* [2024] where the Court was of the view that where an Employee Contract was terminated upon his completion of probation period due to unsatisfactory performance and no show cause letter was issue nor a disciplinary hearing conducted, the termination was unfair and the claim for unfair termination was merited.
43. Based on the foregoing, the claimant submitted that her Claim is merited and urged this Court to award her the claim together with general damages for sexual harassment.



Respondent's Submission

44. The Respondent submitted on two issues; whether or not the claimant's contract of employment was unfair and if so what quantum of her compensation should be paid and who should bear costs of these proceedings.
45. On the merit of the case, it was submitted that section 2 of the *Employment Act* 2007 provides that probationary contract to means a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period. That the purpose of probation is to give the employer an opportunity to assess and evaluate the performance of an employee before confirming the appointment to the particular position. Its termination therefore is provided for in the *Employment Act* as follows:

“Section 42, Termination of probationary contracts (1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract. (2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee. (3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2). (4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.”

46. Section 41 of the *Employment Act* on the other hand provides that;

“Notification and hearing before termination on grounds of misconduct (1) Subject to section 42(1), an employer shall, before terminating the employment of a employee, on the grounds of misconduct, poor performance or physical incapacity explain t the employee, in a language the employee understands, the reason for which the employer considering termination and the employee shall be entitled to have another employee, or shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within,subsection (1), make.”

47. On legality of section 42 of the *Employment Act*, the Respondent submitted that the issue has been subject of various varied decisions. He cited the case of *Monica Munira Kibucho & 6 Others (Supra)* and stated that as much as the three judge bench found section 42 unconstitutional, the same bench proceeded to state at paragraph 62 of the said decision that;-

“Having so found as above, this Court would add as obiter that Courts of the Commonwealth have the inherent power to issue common law declarations of unconstitutionality when Parliament legislates against constitutional norms. While it is conceded that declaration of incompatibility against an Act of Parliament does not impugn its legal validity until its repealed or amended by the Parliament it is necessary to emphasize the need for the Attorney General to review and where in concurrence, initiate necessary legislative repeal or amendment of the statute or sections thereof declared



unconstitutional. The Court is aware that several statutes or sections thereof have been declared unconstitutional by the Courts in our judicial hierarchy yet no corresponding legislative amendment or repeal has followed. They therefore remain booby traps to citizens who may not be aware that the Courts have pronounced them invalid.”

48. Similarly, that until Section 42 (1) of the *Employment Act* is not repealed and/or amended, it remains legally valid. The Respondent therefore cannot be faulted for relying on the same while terminating the Claimant’s contract of employment. Moreover, this is not the first instance where the said provisions have been found to be inconsistent with the *Constitution*. In fact, the court in the case of *Samuel G. Momanyi v SDV Transami Kenya Ltd* [2017] eKLR the court arrived at a similar finding. However in the case of *John Muthomi Matbiu v Mastermind Tobacco (K) Limited* [2018] eKLR, held that the declaration of the said section as unconstitutional is not binding. The court stated thus:-

“In various determinations of this court, there has been conflicting jurisprudence. On my part I am of the school of thought eloquently espoused by my learned brother Rika J. in the case of *Danish Jalang’o & Another v Amicabre Travel Services Limited* [2014] eKLR and *Carole Nyambura Thiga v Oxfam Nairobi* [2013] eKLR

He stated as follows: The correct interpretation is that Section 43 and 45 of the *Employment Act*, both in terms of procedural and substantive justification, have no application to termination of probationary employment contracts. Section. 42 would have no meaning and probation which is a period granted to the Employer and the Employee to get to know each other before making any firm commitments would itself be meaningless. Section 43 and 45 require Employers to prove fair and valid reason or reasons for termination. Assuming these laws are relevant in termination of probationary employment contracts: where an Employee is advised the reason for termination is because he/ she is on probation; and the contract and the law allows for termination while on probation, through the specific mode given under Section 42; is this not a substantive ground in itself? What more substantive justification would be needed, beyond the explanation that the contract has a probationary provision, based on a substantive law under Section 42? Substantive justification requires the Employer to show the correctness, validity or existence of the reason for termination. Should Employers be asked to show the validity, correctness or existence of Section 42 comprising the probation law, in justifying termination? An Employee, whose contract is terminated while on probation, has no reason to demand to be shown by the Employer, other reasons for termination, outside the probationary contract. It is completely illogical to expect the Employer to prove any substantive grounds relating to misconduct, poor performance, physical incapacity, or any of the offences listed under Section 44 [4] of the *Employment Act* 2007, in terminating contracts of Employees on probation. This is the one contract of employment, where the burden of persuasion, within the confines of the probationary contract, rests with the Employee. And should such an Employee succeed in establishing breach, the remedy is in contractual damage weighed against the contractual notice period or in the assessment of the court the contractual gravity of the breach...”

49. Based on the foregoing, the Respondent urged this Court to be persuaded by the decision above and find Section 42 of the *Employment Act* valid and thus, their reliance in terminating the services of the claimant was legally sound.
50. On procedure, it was submitted that the Court of Appeal has previously determined that fair hearing need not be oral and that the same can be achieved through correspondence. Case in point, is *Kenya*



Revenue Authority v Menginya Salim Murgani [2010] eKLR, where the learned Judges determined thus;

“However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.”

51. Further, that a Similar finding was arrived at in the case of *Kenya Ports Authority v Fadhil Juma Kisuwa* [2017] eKLR, where the court noted that;

“It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case.”

52. In view of that, it was argued that the Respondent in this case addressed the issues, subject of dismissal, with the claimant through email correspondences produced in evidence exhibit 2,3,4,5,6,7,9,10,11,12 and 14. Therefore that due procedure was followed before the claimant was relieved of her services.

53. It was submitted that it is not disputed that the claimant was aware of her set targets and that she never met the said target throughout her probation period and it being a key performance indicator, the claimant had to be dismissed.

54. On the claim for payment of general damages for sexual harassment, the Respondent submitted that the prayer herein has not been pleaded in the Claim and only introduced in submission stage and thus, this Court should ignore the claim. Moreover, that the allegations of sexual harassment were not only unsubstantiated but were categorically rebutted by the testimony of its witnesses and in particular RW2 Ms. Mirella Chelangat Koskei whom the claimant mentioned to have been aware of the said harassment.

55. On the reliefs sought, it was submitted that the Claimant is not entitled to any compensation for unfair termination. However, in the event this court finds otherwise, then considering that the claimant was serving her probation period and having worked for only four and a half months of her six-month probationary contract and being that there are no aggravating circumstances, they proposed payment of one-month net salary of Kshs 80,642 as compensation. To support this, they relied on the case of *D. K. Njagi Marete v Teachers Service Commission* [2020] eKLR, where the Court of Appeal stated as follows: -

“On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the Appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the Appellant would have continued to be employed until the age of 60 years...Compensation for wrongful and unlawful or unjustified termination is provided for under Section 49(1)(c) of the *Employment Act* and the Court is enjoined to take into account the circumstances set out in Section 49(4) of the *Act*. Considering that the Claimant was in employment for only 6 months and the attendant circumstances, the Court is satisfied that one (I) month's salary is sufficient.”

56. On costs, the Respondent submitted that costs follow the event and thus it is only fair that once the above issues are determined in favor of the Respondent, the Respondent be awarded costs given that it has had to expend resources in defending itself in this suit.



57. I have examined all the evidence and submissions of the parties before this court. The issues for this court's determination are as follows:
1. Whether the Respondents terminations of the Claimant's services was fair and justified.
 2. Whether the Claimant is entitled to remedies sought.

(1) Issue No1 – Fair and Justified termination

58. The Claimant has submitted that she was unfairly terminated by the Respondents when she was serving her probation period unfairly. She avers that the main reason for her termination was her reporting of sexual harassment by one of the employees of the Respondent.
59. The Respondent admitted that indeed the Claimant had reported sexual harassment claims against the Respondent's Operations Manager.
60. The sexual harassment claim was made by the Claimant vide her letter dated 28th March 2022 through an email addressed to pblegon@kaisugu.co.ke
61. The email was responded by Philip Biego, the Managing Director who noted that the allegations were serious and he would seek the explanation of the Operations Manager as well.
62. In their evidence the Respondents averred that the complaint of sexual harassment was acted upon by the Respondent and the issue resolved. The Respondents have not however demonstrated how the issue was resolved if at all.
58. That notwithstanding, the Respondents also averred that they decided to terminate the Claimant's probationary appointment due to poor performance.
59. RW1 indicated that the Claimant was being appraised weekly. No evidence of the weekly appraisal was presented to court. RW4 indicated that he was not part of the team that usually appraised the Claimant. He also indicated that the Claimant was appraised after 3 months, a departure from the evidence of the RW1. RW5 on the other hand who is the Managing Director and to whom the Claimant reported to directly indicated he put mechanisms of her improvement whenever she failed to meet her targets.
60. He said he appraised the Claimant monthly and on 3 months basis. The evidence of these appraisals was not produced in court as exhibit. The evidence of the appraisal also varies with that of RW1 and RW3 on the period within which the Claimant was appraised. No report was also produced on this matter.
61. There is also no indication that the Claimant was asked to respond to her poor performance or face the sack.
62. My reading of all this is that despite the Respondents insisting that the Claimant was terminated for poor performance, the Respondents have not demonstrated her expected output as against her actual performance and the plan for improvement she was put through and failed.
63. Section 41 of the *Employment Act* 2007 envisages that if an employee is considering termination of an employee due to poor performance amongst others, the employee is still entitled to be issued with an opportunity to defend himself or herself.
64. It matters not that the employee is on probation; procedural fairness is still a requirement before termination. This position of the law was exemplified in case law cited in this judgment vis;, *Francis S. Kibugi's* case and *Monica Munira & Others v MountKenya University & AG.*



65. The Respondents on their part agree that the 3-judge bench of this court declared section 42 of the [Employment Act](#) 2007 unconstitutional and therefore cannot be relied upon by the Respondents to dismiss the Claimant without adherence to procedural fairness.
66. The Respondents further submitted that the Court of Appeal held in the cited cases that a disciplinary hearing need not be in writing and can be oral and argued that the hearing was achieved whereas the Claimant's concerns were exhibited through email correspondences adduced in evidence.
67. I have looked at the email exchanges and notice that none asked the Claimant to exonerate herself for poor performance. It is also clear that the Claimant worked for the Respondents for only 4 months and the 1st email comes in during the 3rd month and then she is terminated.
68. None showed that she had been appraised and was found wanting. There is also contradictory evidence on the frequency of the appraisal as demonstrated in this judgment and therefore my verdict is that there was no fair hearing meted out for the Claimant.
69. I have also looked at the termination letter issued to the Claimant dated May 20, 2022. The Respondents have not assigned any reasons to the termination only choosing to indicate that it is in line with section 42 of the [Employment Act](#) 2007 and clause 8.1 of the appointment letter.
70. Section 43 of the [Employment Act](#) 2007 states as follows:

“ 43. Proof of reason for termination

1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

71. Indeed the law envisages that termination can only be clear after establishment of the existence of valid reasons. Without the Respondents expressly stating what reason led to the Claimant's termination, this court is denied a chance to determine the validity of reasons that led to the Claimant's termination.
72. Section 45 (2) of the [Employment Act](#) 2007 states as follows:

45

- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.



- (3) Given the lack of a fair hearing procedure for the Claimant and without demonstration that valid reasons existed to warrant the Claimant's termination, I find that the termination of the Claimant was unfair and unjustified.

(2) Issue No.2 Remedies

78. Having found as above and given the remedies sought for the Claimant, I find for her as follows in terms of the prayers in the claim.
1. Compensation for unlawful termination awarded for 8 months' salary = 8 x 224,482/= as per her pay slip = 1,795,856/= Less statutory deductions.
 2. The Respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

JUDGEMENT DELIVERED VIRTUALLY THIS 23RD DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Court Assistant.. Fred Nyakundi

N/A the claimant

Mutai for the Respondent

