



**Otiende v Penda Health (K) Limited (Cause E425 of 2023)
[2024] KEELRC 2078 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2078 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E425 OF 2023
NZIOKI WA MAKAU, J
AUGUST 2, 2024**

BETWEEN

MITCHELLE SALOME OTIENDE CLAIMANT

AND

PENDA HEALTH (K) LIMITED RESPONDENT

JUDGMENT

1. In the Statement of Claim dated 10th May 2023, the Claimant prays for judgment against the Respondent for:
 - a) A declaration that the Respondent's acts of terminating the Claimant's employment was unfair and unlawful.
 - b) Kshs. 1,099,020/- as particularised in paragraph 12 of the Statement of Claim.
 - c) Costs of the suit.
 - d) Interest on (b) and (c) above.
 - e) Any other relief as this Honourable Court may deem fit.
2. The Claimant averred that the Respondent employed her on 29th March 2018 first as a Clinical Officer and later on by a letter dated 7th May 2021, it promoted her to Branch Manager earning a gross salary of Kshs. 84,564/-. The Claimant's case is that on 10th March 2023, she was served with a Notice to Show Cause and/or Invitation to a Disciplinary Hearing on the performance of her role as Branch Manager. The disciplinary hearing took place on 15th March 2023, she did not have a representative at the said meeting and she was subsequently issued with a Termination Letter on the same day. She noted that as per the termination letter, the reason for the termination of her services was poor performance in various facets yet there was no performance appraisal to justify the same. It was the Claimant's averment that the termination of her employment was therefore unfair and unlawful for want of substantive



justification and procedural fairness, and that she was a victim of unfair labour practices. The Claimant further averred that after her dismissal, the Respondent only paid her March salary and pending leave days as her terminal dues and she thus claims notice pay and 12 months' salary compensation for the unfair termination of her employment.

3. The Respondent filed a Statement of Response wherein it averred that the Claimant was the Branch Manager in the Company's Umoja II Branch. That however, it transferred the Claimant to its Githurai 45 Branch in July 2021, barely two months into her role, after complaints regarding the ineffective execution of her duties arose. It explained that the Claimant's transfer was informed by the fact that the Githurai 45 Branch had fewer staff and would therefore have afforded her a new environment with a lighter workload for her to adapt to her new role as a Branch Manager. The Respondent's case is that the reasons leading to the transfer of the Claimant are the same that led to termination of her employment contract. It noted that the Claimant had previously been the subject of disciplinary action in November and December of 2022 culminating in a Verbal Warning on 24th November 2022 and a 1st Written Warning Letter on 30th December 2022. That in summary, the Claimant had consistently executed her duties in a negligent and discriminatory manner leading to her subordinates raising complaints regarding her conduct and causing the work environment untenable.
4. It was the Respondent's averment that the Claimant's employment was not terminated for poor performance but for gross negligence of duty, which reason was also stated in her Termination Letter. It averred that it not only adhered to fair procedure in terminating the Claimant's employment contract but it also afforded her every opportunity to remedy her conduct, which she however failed and/or refused to do. It stated that the Claimant was made aware of her right to have a representative of her choice at the disciplinary hearing but she elected not to have one and that she was made aware of the reasons for the disciplinary action taken against her and for the termination of her employment contract. It further averred that it was justified in terminating the Claimant's employment contract as she admitted culpability for her negligent conduct during the disciplinary hearing. It affirmed that the Claimant's prayer for notice pay is frivolous and vexatious because upon termination of her employment, it paid her Kshs. 154,145.79, which amount, included one month's salary in lieu of notice of termination of employment contract. The Respondent prays that the Court dismisses the Claim against it in its entirety and awards its legal costs for defending the same.
5. The Claimant, in her Reply to Defence dated 2nd October 2023, maintained that she was subjected to a disciplinary hearing on account of poor performance in her role as a Branch Manager, as seen in the two letters dated 10th March 2023 that were issued to her. The Claimant averred that after the Respondent promoted her, it neither trained nor conducted an induction for her to appraise herself of the new role. She noted that the disciplinary process was unfair also, because the Respondent did not have a policy in place on how to handle cases of poor performance and that it did not allow her time to improve. Further, that the Respondent did not consider another role in the organization for her after noting there was no improvement.

Claimant's Submissions

6. The Claimant submitted that the case in Court is that she was dismissed on account of poor performance and that in the eyes of the Respondent, her performance in select areas in her role was so poor that it had to term it as gross misconduct. She cited the decision of the Court of Appeal in the case of *National Bank of Kenya v Samuel Nauru Mutonya* [2019] eKLR wherein the issue of poor performance as a reason for termination of employment was analysed. It was the Claimant's submission that notification and hearing before termination of employment is provided under section 41 of the *Employment Act*. That further flowing from section 45 of the *Act*, she had demonstrated that



the Respondent did not comply with the law when it terminated her employment and that this Court must thus return a finding that she was unfairly and unlawfully terminated from employment. As regards the reliefs sought, the Claimant submitted that she is thus entitled to maximum compensation for unfair termination pursuant to section 49(1)(c) of the *Act*. She further submitted that pursuant to section 27 of the *Civil Procedure Act*, costs follow event and that the Claim ought to be allowed with costs plus interests as provided for under section 26 of the *Civil Procedure Act*.

Respondent's Submissions

7. The Respondent submitted that section 44(4)(c) of the *Employment Act* provides that an employee's wilful neglect to perform any work, which is his duty to perform, or his careless and improper performance of any work which from its nature is his duty under his contract to perform, amounts to gross misconduct for which such employee may be summarily dismissed. It maintained that the Claimant acknowledged she neglected her duty despite being aware of what was expected of her in her contract of service and that she had not provided any evidence in support of the allegation that the reason for terminating her employment contract was poor performance. It was the Respondent's submission that therefore, it terminated the Claimant's employment for gross misconduct, which is a valid and fair reason as required under section 45(2) of the *Employment Act*.
8. The Respondent further submitted that the procedure to be adhered to by an employer prior to terminating the employment contract of any employee for misconduct is set out under section 41 of the *Employment Act*. It relied on the observations of the Court in the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited* [2013] eKLR on the ingredients of procedural fairness as under section 41 of the *Employment Act*. It was the Respondent's submission that it has a policy for monitoring the performance of its employees as was confirmed by its witness during cross-examination and evidenced by the ENPS Analysis carried out every month by the Respondent. It posited that despite the Claimant being notified of her right to appeal the decision of the Disciplinary Committee, she did not prefer any appeal, which is further evidence that she had no grievance regarding the disciplinary procedure. The Respondent maintained that it is evident it accorded the Claimant a just, fair and equitable disciplinary hearing.
9. It was submitted by the Respondent that the Claimant has the legal burden of proving that an unfair termination of employment or wrongful dismissal occurred. On this submission, the Respondent relied on the case of *Galgalo Jarso Jillo v Argiculture Finance Corporation* [2021] eKLR. It opined that once this Court considers the procedure adhered to by the Respondent against the parameters set out in section 45(5) of the *Employment Act* it will be evident that the Respondent was just, fair and equitable throughout the disciplinary process and in reaching the disciplinary decision. It posited that it has proved on a balance of probabilities that the Claimant was aware of what was expected of her under her contract of service but refused/neglected to execute her duties as per those expectations, and that the Claimant's actions and omissions resulted in discord that made her continued employment as branch manager unviable. That it follows therefore that the Claimant is not entitled to any damages for the alleged unlawful termination of employment.
10. The Claimant's services were terminated for alleged poor performance. The Claimant was subject to a process she terms unfair. Poor performance is a recognised reason for termination. However, before an employer terminates for this reason, the employer has an obligation to satisfy the requirements of sections 41, 43 and 45 of the *Employment Act*. In order to successfully mount poor performance as a ground for termination of employment, the following should be satisfied:-
 - a. The employer bears the overall obligation of establishing poor performance as a ground for terminating an employee's contract of service.



- b. Evaluation of an employee's performance can only be conducted against pre-set goals that had been discussed and agreed upon between the employer and the employee.
 - c. The pre-set goals must be capable of objective evaluation using agreed instruments of measurement and the goals must be reasonably attainable.
 - d. The employer is only entitled to hold an employee as having underperformed if the employee has failed to meet the pre-set goals.
 - e. There must be evidence that before the employer took the decision to terminate the employee, the employer had allowed the employee the opportunity to improve to no avail.
 - f. The employee must be notified of the accusation of poor performance levelled against her and given an opportunity to respond to it.
11. Although the Respondent in this case accused the Claimant of poor performance, there was no evidence indicating that there were performance targets agreed upon. There also was no evidence adduced before me, of the performance measuring instruments agreed on between the parties. If any such instruments existed, there was no evidence that they were developed in consultation with the Claimant or that such tools mutually agreed to, were used to evaluate her. In the premises, I find and hold that the Respondent failed to justify poor performance as a ground for terminating the Claimant's employment. This is contrary to the requirements of sections 43 and 45 of the Employment Act and I do so find. In terms of section 49, I have to consider whether the Claimant is entitled to recover 12 months' salary as compensation. One of the factors to consider is the contribution of the employee, if any, to the termination as well as the circumstance surrounding the termination. In this case, poor performance was alleged and the Claimant was not given sufficient room to improve. The Claimant had her career at the Respondent brought to a grinding halt. It had prospects of growth for her as well as advancement. However, the Claimant is capable of attaining alternative employment and a compensation of 5 months' salary would suffice in the circumstances. The Claimant thus entitled to recover the following remedies:-
- a. Notice pay – Kshs. 84,564/-
 - b. Compensation for unfair termination – Kshs. 422,820/-
 - c. Costs of the suit.
 - d. Interest at court rates on (a) and (b) above from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST 2024.

NZIOKI WA MAKAU

JUDGE

