



Sang & 2 others v Kenya Orient Insurance Limited (Cause 332 & 330 of 2019 (Consolidated)) [2024] KEELRC 2169 (KLR) (27 August 2024) (Judgment)

Neutral citation: [2024] KEELRC 2169 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 332 & 330 OF 2019 (CONSOLIDATED)**

J RIKA, J

AUGUST 27, 2024

BETWEEN

PAUL KIBET ROP SANG 1ST CLAIMANT

TERRY WANGUI MAINA 2ND CLAIMANT

JOE NGIGI GATUNE 3RD CLAIMANT

AND

KENYA ORIENT INSURANCE LIMITED RESPONDENT

JUDGMENT

Representation:

Okatch & Partners, Advocates for the Claimant

Coulson Harney LLP Advocates for the Respondent

Claimant No. 1, Peter Kibet Rop Sang.

1. The 1st Claimant filed Statement of Claim [Cause 332] on 22nd May 2019. He states that he was employed by the Respondent Insurance Company, on 16th April 2018, as an Assistant Claims Manager-Legal.
2. He avers that the Respondent experienced financial difficulties, characterized by extreme delays, in settlement of Court decrees and failure to pay essential service providers, such as Garages, Assessors, Investigators, Loss Adjusters, Doctors and Lawyers.
3. In March 2018, the Respondent undertook restructuring exercise, which resulted in many Employees exiting. The 1st Claimant was not affected in this way.



4. Restructuring did not resolve the financial position, and delays in paying service providers continued. The remaining Employees had difficulty in managing unpaid service providers.
5. The 1st Claimant furnished the Respondent financial reports, clearly communicating the difficulties he and the remaining Employees, were facing.
6. At the beginning of the year, the 1st Claimant and a colleague [2nd Claimant], made a presentation to the Executive Director, on the current status of outstanding claims.
7. On 6th March 2019, the 1st Claimant was taken aback to receive a letter from the Respondent, asking him to attend a disciplinary hearing on 11th March 2019. The charge against him, related to closure of the Respondent's Mombasa Branch on 12th February 2019 and 14th February 2019. Equipment and furniture belonging to the Branch had been attached by Auctioneers.
8. No investigations preceded the disciplinary hearing. The 1st Claimant attended hearing and explained his position.
9. On the same date he was heard, the 1st Claimant was surprised to receive a letter terminating his contract [the Statement of Claim repeatedly interchanges the 1st Claimant's gender, from he, to she, and his, to her].
10. It was alleged in the letter of termination, that there was clear omission on the part of the 1st Claimant, resulting in negligence in performance of his role, resulting in the attachment and closure of office at Mombasa Branch.
11. He was not issued a letter to show cause; the Head of Human Resource who lead the process, was not qualified to hold the position; the 1st Claimant was denied the opportunity to peruse the evidence against him; a recording made during the hearing was not availed to the 1st Claimant; and decision to terminate the 1st Claimant's contract was made the same date of the hearing.
12. On 11th March 2019, the Respondent, through its Managing Director, circulated defamatory communication to its business partners in the industry, against the 1st Claimant.
13. The specific words were that: -

“Ms. Terry Maina who has been the Claims Manager, and Mr. Paul Kibet Rop previously the Assistant Claims Manager –Legal, ceased to be Employees of Kenya Orient Insurance with effect from 11th March 2019.

Ms. Maina and Mr. Rop are therefore not authorized to transact any business on behalf of the company.

As we continue to streamline the Claims department, kindly contact us on claims@orient.co.ke or call our number 0202962000 for assistance...”
14. In their ordinary meaning, the words were understood to mean that: the 1st Claimant did not part ways with the Respondent honourably; the 1st Claimant intended to engage in competition with the Respondent's business; and he left employment due to some fraudulent conduct.
15. The circular was widely circulated to all business partners. It was malicious and injured the 1st Claimant's reputation as a Legal and Insurance Professional.
16. The 1st Claimant prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair and unlawful.



- b. Declaration that the actions by the Respondent amounted to unfair labour practice.
 - c. Declaration that the circular issued by the Respondent was defamatory to the Claimant.
 - d. The Respondent is compelled to recall the defamatory communication and tender an apology to the 1st Claimant.
 - e. A permanent injunction restraining the Respondent from publishing further or similar defamatory material against the 1st Claimant.
 - f. Compensation equivalent of 12 months' salary at Kshs. 200,000 x 12 = Kshs. 2,400,000.
 - g. Compensation for loss of future expected income.
 - h. General damages for unlawful and wrongful termination.
 - i. General damages for libel.
 - j. Exemplary damages for malicious and libellous defamation.
 - k. Costs.
 - l. Interest.
 - m. Any other suitable award.
17. The Respondent filed its Statement of Response, on 25th October 2019. It describes itself as a General Insurance Company.
18. It is conceded that the 1st Claimant was employed by the Respondent as pleaded. His performance initially, was satisfactory. It is true that the Respondent undertook a restructuring exercise, informed by: need to merge some branches; split some departments; convert branches from sales points to service centres; create a centralized branch network; expand strategy function to include various support units; and consolidate various business and administrative units under the operations function.
19. It was the 1st Claimant's duty to verify that submitted claims, were genuine, before authorization of settlement. His presentation on outstanding claims to the Managing Director was routine. The claims report informed the budgetary process in the claims department.
20. It is correct that the 1st Claimant was invited for disciplinary hearing as pleaded. Under his watch, 2 separate default Judgments were obtained against the Respondent. The Mombasa Branch was raided and attached by Auctioneers in execution of Judgments. The Regional Manager Mombasa, kept asking for a copy of stay of execution order, which the 1st Claimant had told him, was obtained to protect the Branch. It turned out, that no order for stay of execution had been obtained.
21. The 1st Claimant was notified of the time and venue of the disciplinary hearing; he was advised of his right to be accompanied to the hearing; the disciplinary committee was properly constituted; the 1st Claimant was heard fairly on 11th March 2019; and he was found guilty of the allegations levelled against him.
22. He was aware of the magnitude of claims lodged against the Respondent; he appointed Advocates who failed to enter appearance and file defence on time; he failed to follow up stay of execution orders; he was lax and shifted blame to the Advocates he had appointed; and failed to supply a copy of the stay of execution order, despite receiving repeated requests from the Mombasa Branch.



23. Termination was fair, and on account of gross misconduct. It was conducted in accordance with the [Employment Act](#) and the Respondent's Human Resource Manual. The Manual does not require the Respondent to issue letters to show cause, before disciplinary hearing. The qualifications of the Head of Human Resources had no bearing on the disciplinary process.
24. It is standard practice in the insurance industry to inform partners and regulatory authority, that senior staff has left employment. The communication was not malicious and defamatory.
25. It is true as communicated by the Respondent, that the 1st Claimant was an Employee of the Respondent; he left employment; and was no longer authorized to transact business on behalf of the 1st Claimant. The notice was factual and did not damage the 1st Claimant's reputation.
26. The 1st Claimant is not entitled to the prayers sought. The Respondent urges the Court to dismiss the Claim with costs.
27. Cause No. 332 of 2015 was consolidated with Cause No. 330 of 2019. The second Cause involves Terry Wangui Maina as the Claimant.
28. A third Claim, Cause No. 331 of 2019, involving Joel Ngigi Gatune against the Respondent herein, was to be heard separately, but simultaneously with the consolidated Causes.
29. All evidence appears however, to have been recorded in Cause Number 332 of 2019.
30. Procedural orders on this mode of hearing, were recorded on 10th June 2021, upon the request of the Parties' Advocates.
31. For clarity of the record, and for purposes of this Judgment, and in light of all evidence having been recorded in Cause Number 332 of 2019, it is ordered that Cause Number 331 of 2019, between Joel Ngigi Gatune and the Respondent herein, is consolidated with the other 2 Claims.

Claimant No. 2, Terry Wangui Maina

32. She filed her Statement of Claim on 22nd May 2019. She was the Claims Manager. She was the 1st Claimant's boss. Like the 1st Claimant, she is an Advocate of the High Court of Kenya. She was employed on 5th April 2016. She was diligent, and was awarded certificate of appreciation for exemplary service, on 7th October 2016. She was employed as Claims Manager, on 24th October 2017, having emerged top at the interviews conducted to fill up the position. She had previously served as Assistant Claims Manager.
33. Her pleadings on the financial difficulties experienced by the Respondent; the failure to satisfy insurance claims; the allegations that she failed to discharge her role properly leading to attachment and closure of the Mombasa Branch; and the disciplinary process and outcome against her, are same as those of the 1st Claimant.
34. She similarly claims that the notice to business partners issued by the Respondent's Managing Director, was defamatory to her.
35. The 2nd Claimant's prayers are the same as for the 1st Claimant, except that her prayer for equivalent of 12 months' salary in compensation for unfair termination, amounts to Kshs. 4,500,000, her monthly salary having been Kshs. 375,000.
36. The Respondent filed its Statement of Response to the 2nd Claim, on 25th October 2019. The contents are the same as in the 1st Claim. The Respondent prays the Court to dismiss the 2nd Claim with costs.



3rd Claimant Joe Ngigi Gatune.

37. The 3rd Claimant filed his Statement of Claim on 22nd May 2019. He was employed by the Respondent as Sales and Business Development Manager, on 29th May 2017. His work entailed handling new businesses and renewals from other Branches. A large percentage of business was sourced from agents and brokers. The Respondent failed to pay them. Business was lost to competitors.
38. The Respondent suffered financial difficulties and failed to pay service providers. These service providers are identified by the other Claimants above.
39. The 3rd Claimant pleads, like the other Claimants, that the Respondent undertook restructuring around March 2018.
40. The 3rd Claimant's role was reduced to handling new business with a reduced team of 12 Employees. 8 of them were probationary Employees. 1 Employee was assigned Rift Valley, Nyanza and Western Regions. The tasks assigned to them could not be completed as fast as had been intended.
41. The Respondent's financial woes deepened. It could not satisfy claims. It was reported to Insurance Regulatory Authority [IRA].
42. Around July 2018, the Respondent cut the 3rd Claimant's department travel budget by half. Performance was affected.
43. The claims in arrear rose to Kshs. 568 million. The Respondent requested its chairman for capital injection of Kshs. 200 million and appointed a Claims Allocation Committee, to address the arrears. The situation could not be salvaged, because the claims superseded available funds.
44. On 21st November 2018, the Respondent terminated the 3rd Claimant's contract, with immediate effect. Proper Performance Improvement Plan was not followed. No review meeting was held, while the 3rd Claimant was alleged to be on PIP, starting 1st May 2018 to 31st July 2018. Even after the period ended, there was no communication from the Managing Director to the 3rd Claimant.
45. The 3rd Claimant avers that he was not heard fairly. He was never summoned by the issuer of the letter of termination.
46. He prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. Declaration that the actions of the Respondent against him, amounted to unfair labour practice.
 - c. Compensation equivalent of 12 months' salary at Kshs. 400,000 x 12 = Kshs. 4,800,000.
 - d. Compensation for loss of future expected income.
 - e. General damages for unlawful and wrongful termination.
 - f. Costs.
 - g. Interest.
 - h. Any other suitable remedy.
47. The Respondent filed its Statement of Response to the 3rd Claim, on 25th October 2019. It is conceded that the 3rd Claimant was employed by the Respondent as pleaded.



48. The Respondent had good relationships with its agents and brokers. All claims however had to be validated. Delay on validation did not signify financial distress on the part of the Respondent. The Respondent concedes it undertook restructuring of its business, for reasons explained in the other Statements of Response above.
49. The Claimant was given a freehand, in the setup of his team. He was given targets and necessary support. It is conceded that the Respondent created a Claims Allocation Committee, to expedite settlement of claims, detect fraud, and manage the costs of the claims.
50. Outstanding claims were settled, as and when they arose.
51. The 3rd Claimant's performance was unsatisfactory from the date of his appointment. Performance plummeted, warranting the 3rd Claimant, to be placed on PIP, beginning 1st May 2018 to 31st July 2018. Performance gaps were highlighted.
52. He asked the Respondent for recruitment of 15 additional unit managers by June 2018; fuel and entertainment allowance for his sales team; and special allocation to pay off pending claims.
53. The nature of the request compelled the Respondent to postpone PIP. The 3rd Claimant was permitted to recruit 20 additional unit managers between May 2018 and July 2018, and a further 10 unit managers in September 2018 and October 2018; and his sales associates were facilitated with telephone and fuel allowance at Kshs. 5,000 and 15,000 respectively.
54. His performance did not improve even after this support, in August and September 2018. The performance targets were revised downwards for the year 2018. The 3rd Claimant still, did not meet the revised targets.
55. As a result, the Respondent was compelled to terminate the 3rd Claimant's contract for poor performance.
56. Termination was fair. The 3rd Claimant is not entitled to the prayers sought. The Respondent prays that his Claim is dismissed with costs.

1st Claimant's evidence.

57. The 1st Claimant told the Court that he is currently a farmer. He relied on his documents [1-13] and witness statement filed on 28th November 2019, in his evidence-in-chief. The witness statement reflects the contents of the Statement of Claim, as summarized above. He could not secure alternative or comparable job, after termination.
58. Cross-examined, he told the Court that termination was on account of his handling of the matters at the Mombasa Branch. One matter was in issue.
59. Judgment was entered against the Respondent at Mombasa Court. The 1st Claimant instructed Okello Advocates on 7th November 2018. Auctioneers proclaimed in February 2018. Defence needed to be filed on time. It is not true that no defence was filed. Okello Advocates were instructed a day after the Respondent received summons to enter appearance. The Advocates had asked for payment of their legal fees.
60. The 1st Claimant followed up the matter with Okello. Okello said they would forward copies of the Pleadings, after they received their fees. They asked for Kshs. 25,000 on 21st January 2019. They stated further on 8th February 2019, that by the time they filed defence, interlocutory Judgment had been obtained by the Plaintiff, in the Claim at Mombasa.



61. On numerous occasions, the 1st Claimant asked for copies of Pleadings from Okello. They were not availed, because the Advocates' bill had not been satisfied. The Advocates were owed in excess of Kshs. 3 million by the Respondent. In the disciplinary hearing minutes, the amount owed to Okello was quoted at Kshs. 64,800. They said they had obtained orders for stay of execution. The Respondent was surprised to receive execution proceedings.
62. The Respondent had a panel of Advocates. 2 firms were based at Mombasa. Both declined instructions on account of pending bills. The Claimant instructed an Advocate outside the panel, who obtained stay of execution orders. He was however reprimanded by the Respondent for doing so.
63. Auctioneers descended upon the Mombasa Branch. The Respondent paid the decree amount, and auctioneer costs. Only 1 matter, not 2, were in issue at Mombasa.
64. The 1st Claimant confirmed on cross-examination, that he received notice of disciplinary hearing. The charges were stated. The date and venue was stated. He was advised he could take along a colleague to the hearing. He stated that he had 2 witness who were locked out. He did not include this aspect of exclusion of his witnesses, in his witness statement. He was given the opportunity to defend. He challenged the composition of the disciplinary committee orally. Before he could say much, he was handed the letter of termination. He had 5 days to prepare for the hearing. He asked for the files from Mombasa from the Respondent, which were not availed. He was denied access to his office, leading to the disciplinary hearing. He worked from the reception.
65. The reasons for termination were stated in the letter of termination. He was paid terminal dues, which went to redress his loan obligation.
66. The circular issued by the Respondent led to the impression that the 1st claimant was involved in fraud. It implied he could not be trusted.
67. Redirected, the 1st Claimant told the Court that the Respondent was attached, for failure to satisfy a decree of the Court. The 1st Claimant instructed Advocates to represent the Respondent. The instructed Advocates obtained orders for stay of execution.

2nd Claimant's evidence.

68. The 2nd Claimant adopted her witness statement and documents [1-15] as her evidence-in-chief. She confirmed her employment details, history, and circumstances leading to termination of her contract, as shown in her Statement of Claim.
69. She was told that half of staff in her department would leave on redundancy, around February 2018. She was left with a skeleton staff. She was overworked and left office always after 5.00 p.m. The Respondent had outstanding claims. It acknowledged it had problems paying claims, in a letter it addressed to IRA on 21st February 2017. The Claimant discharged her role, advising the Respondent about penalties imposed by IRA for not settling claims. She advised the Respondent, on the risk of non-renewal of its operational licence. The risk department similarly, compiled reports, reiterating what the 2nd Claimant and her department were advising.
70. Service providers were not being paid. Crystal Motors was owed Kshs. 20 million.
71. On 11th May 2018, the 2nd Claimant was placed on PIP for alleged poor performance. All Managers were placed on PIP. A second PIP followed in November 2018. The Managing Director was not happy with their performance. He had become erratic, in addressing issues of alleged poor performance.



72. The Respondent's Advocates refused to attend to Court matters involving the Respondent at Mombasa, for lack of fees. Most suits filed against the Respondent were declaratory, the Respondent having failed to meet the claims against its clients. The Respondent owed Jengo & Company Advocates Kshs. 18 million. The Advocates declined the Respondent's briefs. The second firm of Advocates Okello Kinyanjui, similarly declined instructions. All service providers were affected.
73. On 6th March 2019, she was invited for disciplinary hearing. Hearing was on 11th March 2019. There was no letter to show cause. She was heard and dismissed on the same date.
74. She was informed about the circular issued by the Respondent, by the Respondent's business stakeholders. Her image was tainted. She was an Associate of Insurance Association of Kenya. Only 2 Associates worked for the Respondent. She was portrayed as someone who stole from the Respondent. She was not responsible for the matters she was accused of. She went her way out, in instructing unhappy Advocates, to defend the Respondent. Termination was malicious.
75. Cross-examined, the 2nd Claimant told the Court that she retained her position as Claims Manager, after restructuring. In her view, restructuring was a flop. It was part of her duties to prepare reports for the Respondent. They guided budget-making.
76. Mombasa Branch was attached, because of default Judgments. The Branch was closed down for 2 days. This affected business. The 2nd Claimant negotiated settlement. She instructed Kinyanjui Okello Advocates. She had no reason to doubt that the firm entered appearance and filed defence. The 2nd Claimant did not receive copies of their Pleadings. She did a follow-up, but it was during Xmas when most Advocates had closed office. The 2nd Claimant and her colleague made a decision, to appoint another firm of Advocates. The Auctioneers invaded the Respondent's office, shortly before the instructed Advocates obtained stay of execution orders. The 2nd Claimant did not drop the ball. She paid the Advocates through M-pesa.
77. She conceded that if the Advocates had been paid on time, all the controversy would have been avoided. There was no issue concerning the Claimant's leadership. There were e-mails exchanged between her and the Managing Director, stating that leadership was required. She was told that she should delegate more, but she was operating with a skeleton staff.
78. She was invited for disciplinary hearing. The charges were communicated. She was advised of her right to be accompanied. Her Assistant Manager attended the same proceedings. She asked for necessary documents and was advised that they were in the custody of the Managing Director. Hearing took place on 11th March 2019. She was heard. She had adequate time to prepare. She received the decision to terminate her contract. She was paid terminal dues.
79. The details of the circular issued out to esteemed partners by the Respondent, were correct. Perception however, was that the 2nd Claimant was involved in shoddy deals.
80. Redirected, the 2nd Claimant emphasized that the Respondent failed to pay insurance claims, and its Advocates failed to represent the Respondent, because the Respondent did not pay their legal fees.
81. The 1st Claimant gave evidence for the 2nd Claimant on 23rd February 2022. He basically identified the 2nd Claimant as his immediate supervisor, and repeated most statements on oath, which he made before the Court at his own hearing, as captured above. He assisted the 2nd Claimant, in liaising with the Respondent's Advocates and external Advocates. He confirmed that the Respondent experienced financial difficulties, and that there was a restructuring exercise from March 2018, where a number of Employees left employment. He confirmed further that the Respondent instructed Okello Kinyanjui Advocates, in claims filed at Mombasa.



3rd Claimant.

82. He told the Court that he is presently a businessman, based at Syokimau, Machakos County. He relied on his statement of witness on record. He was aware that there were 2 Judgments obtained against the Respondent at Mombasa, leading to attachment. The Respondent was struggling financially, and having difficulties balancing competing claims.

Respondent's evidence.

83. Company Secretary and Legal Manager, Marian Kiilu, gave evidence on 16th November 2023. She relied on her witness statement and documents filed by the Respondent, in the 3 files, as her evidence-in-chief.
84. Cross-examined, she told the Court that she is the Company Secretary, not the Managing Director of the Respondent. She was not in employment in 2018-2019. She did not interact with the Claimants. She did not know the circumstances of the Claimants' PIP. All Managers, including the General Manager, were placed on PIP.
85. There was a letter exchanged between the Respondent and Insurance Regulatory Authority, establishing that the Respondent delayed settlement of claims. There was an ad hoc report, confirming delay. There was a risk report to the same effect. The report highlighted the risk faced by the Respondent, in failing to meet its legal obligations. Unpaid claims were analysed. There was a recommendation in the report, that legal claims should be settled.
86. Marian agreed that it was not right, to blame Employees, for financial problems encountered by the Respondent.
87. She was not aware of any letter to show cause, issued to any of the Claimants, preceding termination.
88. The Claimants failed to follow through the cases filed against the Respondent at Mombasa, to protect the Respondent from the actions taken by Auctioneers. The Respondent instructed Advocates to act for it in the matters, upon receiving the summons. The Advocates confirmed they would enter appearance and file defence. They confirmed they did so.
89. The Respondent learnt later that default Judgment had been obtained. Proclamation took place, while the Respondent had been advised there was an order of stay of execution. Advocates take indemnity insurance cover against professional negligence. If there was negligence by the Respondent's Advocates, the Respondent could have pursued remedy under this indemnity.
90. The 1st and 2nd Claimants were found guilty of gross negligence. The Respondent did not exhibit any forensic report, leading to this finding. Audit was underway, by the time the Claimants were disciplined. The Human Resource Manual has provision for suspension. The Claimants were not suspended. The Manual states that an Employee should be suspended on full pay, as the allegations are investigated. Decision against the Claimants was immediate.
91. There was no evidence by the Respondent, to show that it ordinarily issued circulars, notifying its esteemed partners, that an Employee has left employment.
92. Redirected, Marian told the Court that there were no third parties, who interpreted the circular as being malicious against the Claimants. It was a normal communication to the industry. The clause on suspension in the Human Resource Manual is not mandatory. Letter to show cause is likewise, not mandatory. Marian clarified that she is the Company Secretary, not the Managing Director, and anything in her witness statement describing her as the Managing Director, was a typographical error.



93. The Claims were last mentioned before the Court on 5th March 2024, when the Parties confirmed filing and exchange of their Submissions.
94. The issues are whether: The Claimants' contracts were terminated on valid grounds in accordance with Sections 43 and 45 of the *Employment Act*; whether procedure was fair in accordance with Sections 41 and 45 of the *Employment Act*, and the Disciplinary Procedure contained in the Respondent's Human Resource Manual; whether the 1st and 2nd Claimants were defamed; and whether, the Claimants merit the remedies sought.

The Court Finds: -

95. The 1st Claimant was employment by the Respondent on 16th April 2018, as an Assistant Claims Manager-Legal. He is an Advocate of the High Court of Kenya. His contract was terminated by the Respondent on 11th March 2019. He worked for 11 months. His last monthly salary was Kshs. 200,000.
96. The 2nd Claimant was the 1st Claimant's immediate supervisor, holding the position of Claims Manager. She joined the Respondent on 5th April 2016, as an Assistant Manager- Legal. She is an Advocate of the High Court of Kenya. Her contract was terminated on 11th March 2019. She served for 2 years and 11 months. Her salary at the time of termination, was Kshs. 375,000 monthly.
97. The reason justifying termination in both cases, was the same. It is stated in the respective letters of termination: -

“...there was a clear serious omission and breach of your employment contract through gross negligence on your part, in discharging your duties as the [Assistant / Claims Manager], as demonstrated on the incidents of 11th February 2019 and 14th February 2019, where the Mombasa Branch remained closed for 2 days, and was consequently attached by Auctioneers...”
98. The 3rd Claimant was employed by the Respondent as a Sales and Business Development Manager, on 29th May 2017. He is an Economist. His contract was terminated after 1 ½ year of service, on 21st November 2018. His last salary was Kshs. 400,000 monthly.
99. The reason justifying termination of the 3rd Claimant's contract, is different from the Co-Claimants. He was told in the letter of termination that he had been placed on PIP. He had asked for support from the Respondent, to facilitate him achieve set performance targets. The Respondent writes, “ however, with the continuous monthly reviews/appraisals being conducted and continuous support from Management, we have noted consistence [consistent] non-improvement of performance in the months of August, September and October 2018...regardless of the sales targets being revised downwards.”

Validity of reasons.

100. 1st and 2nd Claimants. The Respondent was a Defendant, in Mombasa Chief Magistrate's Court, Civil Suit No. 2200 of 2018. The Claim was filed by one Hemed Jumaa Mohamed. The Claimants state, that the Respondent was experiencing financial whirlwinds, and was not able to pay claims. There consequently were, declaratory Suits filed against the Respondent.
101. There is a letter dated 7th November 2018, authored by the Respondent's Legal Department, addressed to Okello Kinyanjui & Company Advocates, instructing them to enter appearance and file defence, in the Suit.



102. The Respondent had a panel of Advocates who were on retainer, and Okello Kinyanjui was one of these firms.
103. The Advocates acknowledged receipt of the instructions on the same date, 7th November 2018. They advised that they had already entered appearance and would be filing a defence.
104. On 21st January 2019, the Advocates wrote to the Legal Department, confirming that they had entered appearance and filed defence.
105. They called on the Respondent to pay their interim fees, at Kshs. 25,000.
106. On 9th February 2019, Okello Kinyanjui wrote to the Respondent, advising that by the time the defence was filed, the Plaintiff had already obtained default Judgment. The Advocates advised the Respondent that they had moved the Court, and obtained orders for stay of execution of the default Judgment.
107. On 7th February 2019, the 1st Claimant had instructed another firm, Kiprop Cheruyiot & Company. He instructed that the Respondent had earlier instructed Okello Kinyanjui, who failed to enter appearance and file defence. Kiprop Cheruyiot were instructed to file Notice of Change of Advocates, and pursue setting aside of Judgment and stay of execution orders.
108. The Respondent's complaints against the 1st and 2nd Claimants, were that, as a result of failure to enter appearance and defend the Suit, default Judgment was obtained. On 12th February 2019, the Respondent was compelled to keep its Mombasa Branch Office locked, to protect its properties from being attached by Auctioneers.
109. The Respondent negotiated with the Plaintiff and there was settlement, enabling the Respondent to reopen for business on 14th February 2019.
110. No sooner had the Respondent reopened, than Auctioneers descended, attaching the Respondent's property at Mombasa Branch.
111. The disciplinary proceedings against the 1st and 2nd Claimants indicate that the Respondent faulted the Claimants, for instructing Okello Kinyanjui Advocates, for a second time, who the Respondent felt, were unresponsive in the first instance, leading to closure of the Branch Office.
112. The Court does not think that blame could be placed at the door of the 1st and 2nd Claimants, for the alleged failures of Okello Kinyanjui.
113. There is a trail of correspondence between the 1st and 2nd Claimants' Department to Okello Kinyanjui, instructing the Advocates to enter appearance and file defence. There was assurance from the firm that appearance and defence had been filed.
114. Okello Kinyanjui was among the Advocates retained by the Respondent. There was nothing wrong in the 1st and 2nd Claimants instructing Okello Kinyanjui on both occasions.
115. When the 1st Claimant instructed Kiprop Cheruyiot Advocates, following the default Judgment, he told the Court that he was faulted by the Respondent, for engaging Advocates outside the panel retained by the Respondent.
116. There appears to have been a deeper financial problem than the Respondent cared to fully acknowledge, which led to the Respondent not paying its service providers. The Advocates were not being paid. Jengo and Company Advocates were owed Kshs. 18 million, and declined the Respondent's briefs. The briefs were directed to Okello Kinyanjui, who appear to have engaged in a costly go-slow.



- The 2nd Claimant told the Court, and was not persuasively contradicted in her evidence, that the Respondent had fallen on hard times, and was unable to pay its service providers.
117. Garages were not paid. Crystal Motors was owed Kshs. 20 million. Doctors and Investigators went without pay. The declaratory claims filed against the Respondent, were filed because the Respondent had failed to satisfy court decrees.
 118. Company Secretary Marian Kiilu, confirmed on cross-examination that the Respondent was experiencing significant financial constraints and that, “it would not be right, to blame Employees for financial problems...” She acknowledged that there was communication between the Respondent and IRA; the Claimants had generated reports for the Managing Director on delayed settlement of claims; there was an analyses of pending claims; the Respondent was advised of the risks posed by non-payment of claims, including cancellation of operational licence; and the reports had recommended settlement of pending claims, including Advocates bills.
 119. The Respondent appears to have done exactly what Marian stated would not be right, by blaming the 1st and 2nd Claimants for the financial and legal failures, of the Respondent.
 120. It is not the responsibility of Employees to correct their Employers, when their Employers turn into market failures.
 121. If there was negligence in representation of the Respondent, it could not in the respectful view of the Court, be placed at the door of the 1st and the 2nd Claimants. The Respondent should perhaps have pursued remedy from its Advocates, who were rendering services under very difficult circumstances. There was, as suggested by the 2nd Claimant, a professional indemnity cover taken out by the Advocates instructed by the Respondent. If the Respondent believed that there was professional negligence, it ought to have pursued remedy under the indemnity, instead of blaming its Employees for default that was not of their own making.
 122. Termination against the 1st and 2nd Claimants was not based on valid reasons, in accordance with Sections 43 and 45 of the [Employment Act](#).

Procedure 1st and 2nd Claimants.

123. The 1st and 2nd Claimants both received invitation to disciplinary hearing on 6th March 2019.
124. Hearing was on 11th March 2011.
125. They attended hearing, were heard, and dismissed on the same date.
126. There were no letters to show cause preceding the disciplinary hearing. The Respondent told the Court that this was not a procedural requirement, under the Respondent’s Disciplinary Procedure, contained in the Human Resource Policy and Procedures Manual, 2015.
127. Clause 11.1 states that, the procedure applies to termination based on both disciplinary and performance grounds. Action is not to be taken, until the matters have been investigated. The matters will be dealt with fairly and equitably, taking into account the requirements of the Kenyan Law, and best practice. At every stage in the procedure, the Employee will be advised of the nature of the complaint, given time to consider the complaint and given the opportunity to state his / her case, before a decision is taken.
128. The Respondent had an obligation to investigate the allegations against before the Claimants, and call for their explanations in writing, by way of letters to show cause, before formulating the charges, and calling them to disciplinary hearing. These requirements are to be read, in clause 11.1 of the



- Respondent's Manual. It is an aspect of fair and equitable procedure, and best practice, in termination of employment, to issue letters to show cause why, before the disciplinary hearing.
129. It is also clear that clause 11.1.3 [c] of the Manual, demands that where an Employee, who is accused or suspected of gross misconduct, will normally be suspended from work on full pay while the Respondent investigates the alleged offence.
 130. The clause adopts the word 'normally' and it was for the Respondent to justify why it acted outside the normal procedure, by not suspending the 1st and 2nd Claimants, as it investigated their offences of gross negligence.
 131. There is no record of investigations, suspension, and letters to show cause, preceding the disciplinary hearing.
 132. The Respondent needed to issue letters to show cause and to clarify the action taken against the Claimants, particularly because there were other circumstances prevailing at the time, that would be seen as influencing the decision to terminate the Claimants' contracts.
 133. The Respondent was in financial difficulties and undertook restructuring, where some of its Employee left employment on redundancy. All Managers, including the General Manager, had been subjected to PIP. The 2nd Claimant had been placed on inconclusive PIPs twice, the last which was in November 2018. On 6th March 2019, she was invited for disciplinary hearing, unrelated to PIP. She told the Court that the Managing Director, faced with the financial whirlwinds, had become erratic in decision-making. She was not advised on the fate of her last PIP. Letters to show cause would have assisted in crystallizing the allegations against the Claimants, and the reasons justifying termination.
 134. Clause 11.1.2 of the Manual contains a right of appeal, which does not appear to have been advised on any of the Claimants, through the letters of termination.
 135. Marian Kiilu, the Company Secretary and Legal Manager, told the Court that at the time the Respondent disciplined the Claimants, audit was underway. Should not the Respondent, have completed audit and investigations, before calling the Claimants to disciplinary hearing?
 136. Procedure was not in conformity with Sections 41 and 45 of the *Employment Act*, and clause 11 of the Respondent's Human Resource Manual.

3rd Claimant – validity of reason.

137. The Respondent's position with regard to the 3rd Claimant, is that his performance plummeted, necessitating him to be placed on PIP, for 3 months, starting 1st May 2018, to 31st July 2018.
138. The Respondent exhibited the 3rd Claimant's performance sheets for April 2018 to October 2018.
139. He was advised on the purpose of the PIP, and was required to give a corrective action plan. He asked for support from the Respondent to enable him succeed.
140. He asked for recruitment of additional 10-15 unit managers by June 2018; fuel and entertainment allowance for his sale associates; and special financial allocation to pay off some pending claims. He gave his roadmap for improved performance, in his letter to the Respondent, dated 18th May 2018.
141. The Respondent states that it supported the 3rd Claimant. It permitted him to recruit an additional 20 unit managers between May and July 2018, and another 10, in September and October 2018. Sales associates were given telephone and fuel allowances of Kshs. 5,000 and 15,000 respectively, every



- month. The sales targets were revised downwards, but there was no improvement in the months of August and September 2018.
142. The 3rd Claimant blamed his lack of improvement, on what he described as financial turmoil, that the Respondent was deeply submerged in. There were delays in settlement of claims. Lawyers, Doctors, Garages and Assessors were not paid.
 143. Agents and brokers, who were a big source of the Respondent's business, transferred their businesses elsewhere, for lack of payment by the Respondent. This dented the Respondent's financial position.
 144. The Respondent's claims arrears had risen to Kshs. 568 million. The Respondent requested its chairman for capital injection of Kshs. 200 million. It formed a Claims Allocation Committee, chaired by the 3rd Claimant. Notwithstanding that the 3rd Claimant was placed on PIP, the Respondent still entrusted him the chairmanship of this Committee. The situation could be salvaged, because the allocated funds, could not satisfy outstanding claims and obligations owed to service providers.
 145. The 3rd Claimant states that even the Committee he was entrusted to chair, could not hold the intended meetings for lack of funds.
 146. It is common ground that the Respondent undertook restructuring from March 2018. Poor performance by the 3rd Claimant was noted from the month of April 2018.
 147. The 3rd Claimant states that restructuring did not yield an improved business environment. The Respondent suffered reputational damage, because of its inability to meet its obligations. The 3rd Claimant's performance targets, became unattainable.
 148. The Court does not think that the Respondent, against this backdrop, established poor performance, as a valid reason, to justify termination of the 3rd Claimant's contract.
 149. Performance targets were set and assessed, in a depressed business environment, which did not encourage objectivity. The Respondent had fallen on hard times. All Managers, including the General Manager, were in fact, placed on PIP, in the Respondent's attempt at quick turnaround.
 150. The Respondent does not contest that it undertook a restructuring exercise, which would involve merger of some branches; split of departments; conversion of branches from sales points to service centres; creation of centralized branch network; expansion of strategy function; and consolidation of business and administrative units under operations functions.
 151. These structural reconfigurations, would result in movement of staff, and it would not be objective to assess the performance of individual Employees, even before they had settled in their redefined roles.
 152. The Respondent appears to have acted with haste against the 3rd Claimant, and blamed him for its own failure, in attainment of quick change in business fortunes, as intended by restructuring.
 153. There was no adequate thought given by the Respondent, in judging the 3rd Claimant for failing to bring new business, about the reputational damage sustained by the Respondent, in failing to meet its obligations.
 154. The Respondent wore a tag on its forehead, broadcasting that it was an Insurance Company which was not adept at paying valid claims, and paying service providers, including Advocates, Doctors, Assessors, Brokers and Agents. It was a tag that would militate against business improvement, or improvement of the Employee's performance. To the 3rd Claimant, the tag was clearly an albatross around his neck, which held him back, in bringing in new business.



155. Like all the Managers who were placed on PIP, the 3rd Claimant was an Employee who was unfairly blamed by the Respondent, for its own market failures.
156. The reason stated by the Respondent, in justifying termination of the 3rd Claimant's contract, was not valid. It did not meet the standards of validity and fairness under Sections 43 and 45 of the [Employment Act](#).

Procedure -3rd Claimant

157. As observed with regard to the procedure applied in terminating the 1st and 2nd Claimants' contracts, clause 11.1 applied to termination on disciplinary, as well as performance grounds.
158. The clause mirrors Section 41 of the [Employment Act](#), which sets the standards of fairness on termination based on disciplinary, performance and incapacity.
159. The Respondent ignored its Human Resource Manual, and simply terminated the 3rd Claimant's contract at will, on 21st November 2018.
160. He was not even given the benefit of a hearing, like his colleagues. He was just told that he had failed in the PIP and abruptly told to pack, bag and baggage, and leave.
161. Procedure was in violation of Sections 41 and 45 of the [Employment Act](#) and clause 11, of the Human Resource Manual.
162. He had a right of appeal under clause 11.1.2 of the Manual. He was not advised about his right, in the letter of termination.

Defamation.

163. The circular issued by the Respondent after the Claimants left employment, informed the Respondent's business stakeholders, that the 1st and 2nd Claimant had ceased to be Employees of the Respondent, and were no longer authorised to transact business on behalf of the Respondent.
164. The Court does not see any malice in the circular. The Claimants held senior management positions. They would speak for and act for the Respondent, and were in positions of responsibility. They could enter into binding transactions for the Respondent, in the industry during their employment. They interacted with confidential information and business secrets of the Respondent.
165. The circular was precautionary, informing the industry that the Claimants were no longer authorized to transact for the Respondent, and commit the Respondent into legally enforceable obligations.
166. Their contracts contained restrictive covenants, forbidding them from certain conduct during and after termination. The circular was issued in elaboration of the Claimant's post-employment obligations. It was regular and normal communication issued upon an Employee, upon leaving employment. It was not defamatory, and was in line with the contractual clause, on the Claimants' post-employment restrictive covenants.
167. The prayers related to defamation are declined.
Remedies.
168. It is declared that termination of the Claimants' respective contracts of employment by the Respondent, was unfair and unlawful.



169. The declaration under statute above suffices. There is no need to declare that the same acts, amounted to unfair labour practice, a remedial creature of *the Constitution*.
170. The circular was not defamatory, and an order declaring it as such, is declined. There is no justification to compel the Respondent to tender an apology to the Claimants on account of the circular. There is no justification for an order of permanent injunction restraining the Respondent, from publishing other defamatory material concerning the Claimants.
171. The prayers for loss of future income, general damages for unlawful and wrongful termination, general damages for libel and exemplary damages for malicious and libellous defamation, all have no support in evidence and are rejected.
172. The prayer for compensation for unfair termination, by all the Claimants, is merited. It suffices and redresses the whole breadth and width, of the Claimants' economic injuries.
173. They were all paid salary for days worked in the month of termination; pension dues; pending annual leave; and 30 days' salary in lieu of notice.
174. The 1st Claimant worked for 11 months. He told the Court that he is a farmer in Eldoret. He is in a noble gainful activity. He also remains an Advocate of the High Court of Kenya. He was not disbarred upon termination of employment. He has the option of supplementing farming with other professional pursuits in the legal profession. He did not cause or contribute to the circumstances leading to termination of his employment. His contract indicates that he was permanent and pensionable, and expected to retire at the age of 60 years. His last salary was Kshs. 200,000 monthly. He is granted compensation for unfair termination, equivalent of his 3½ months' salary at Kshs. 700,000.
175. The 2nd Claimant worked for 2 years, 11 months. She told the Court that she was unemployed, at the time of giving evidence. Like the 1st Claimant, she is an Advocate of the High Court of Kenya. There is no evidence of her disbarment. She is also the holder of Advanced Diploma in Insurance, with over 13 years' experience, in the insurance industry. She can still pursue gainful professional activities. She did not cause or contribute to the circumstances leading to termination. Her contract was permanent and pensionable. She expected to continue working, until retired at the age of 60 years. Her last salary was Kshs. 375,000 monthly. She is granted compensation for unfair termination, equivalent of 7 months' salary at Kshs. 2,625,000.
176. The 3rd Claimant is an Economist, who carries on unspecified gainful business, in Syokimau, Machakos County. He served for 1 ½ years. He too was not shown to have caused, or contributed to the circumstances leading to termination of his contract. His contract was permanent and pensionable. He expected to work until retirement, at the age of 60 years. His last salary was Kshs. 400,000. He is granted compensation for unfair termination, equivalent of his 5 months' salary, at Kshs. 2,000,000.
177. Costs to the Claimants.
178. Interest allowed at court rate, from the date of Judgment till payment is made in full.

In sum, it is ordered: -

- a. Cause No. 331 of 2019, Joe Ngigi Gatune v. Kenya Orient Insurance Co. Limited, is consolidated with the other 2 Causes herein, for purposes of preparation and delivery of this Judgment.
- b. A copy of the Judgment to be placed in all the separate files.



- c. It is declared that termination of the respective Claimants' contracts of employment was unfair.
- d. The Respondent shall pay to the 1st, 2nd and 3rd Claimants respectively, compensation for unfair termination, as specified above, at Kshs. 700,000; Kshs. 2,625,000; and Kshs. 2,000,000 – total Kshs. 5,325,000.
- e. Cost to the Claimants.
- f. Interest allowed at court rate, from the date of the Judgment, till payment in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 27TH DAY OF AUGUST 2024.

James Rika

Judge

