



**Simiyu v Boc Kenya Plc (Cause E057 of 2021)
[2024] KEELRC 2185 (KLR) (6 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2185 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E057 OF 2021
NJ ABUODHA, J
SEPTEMBER 6, 2024**

BETWEEN

BRIAN BUSIYILE SIMIYU APPLICANT

AND

BOC KENYA PLC RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim dated 19th January, 2021 and pleaded inter alia as follows: -
 - a. The Claimant was employed by the Respondent by a letter dated 7/10/2013 as a Sales Manager drawing a gross monthly salary of Kshs. 692,750/= which salary was reviewed over time to Kshs. 705,750/=.
 - b. The Claimant averred that vide a letter dated 17/3/2020, the Respondent unlawfully and unfairly terminated the Claimant’s employment.
 - c. The Claimant averred that on 30/6/2017 while serving as a Sales Manager, the Respondent abruptly issued a transfer order to the Claimant and asked him to report for duty as SHEQ Manager which the Claimant understood to be a demotion and reluctantly accepted the redeployment.
 - d. The Claimant averred that Contrary to the Respondent’s Performance Management Policy, Job Competence and Education Assistance Policy, the Respondent declined to prepare and train the Claimant for the new position of SHEQ Manager.
 - e. The Claimant averred that the position of a SHEQ Manager was a new area of work to the Claimant hence the abrupt dropping in his performance in the year 2018 to which he substantially improved in 2019 following his self-learning on the job.



- f. The Claimant further averred that on 1/4/2019, for no valid or genuine reason, the Respondent demoted the Claimant to the position of officer – SHEQ and assured the Claimant that his terms and conditions of employment would remain unchanged but offered no training and/or guidance to the Claimant.
- g. The Claimant further averred that he recorded tremendous performance in the years served and oversaw success of major projects.

Procedural Injustice

- h. The Claimant further averred that he diligently served the Respondent in his positions as sales manager, Manager SHEQ and Officer SHEQ until 26/2/2020 inviting him to an incapacity inquiry on 3/3/2020 prior to which he has not been issued with any warning in regards to the alleged poor performance.
- i. The Claimant further averred that on 3/3/2020, the Claimant attended the incapacity inquiry meeting as instructed and it later turned out at the meeting that the Claimant had actually been invited for disciplinary meeting and not an incapacity inquiry as earlier informed.
- j. The Claimant averred that he was not served with a notice to Show Cause setting out the charges leveled against him prior to the disciplinary hearing nor a prior warning contrary to the law and Respondent's Disciplinary Code.
- k. The Claimant averred that he was not given to an opportunity to state his case in defence prior to the disciplinary hearing and/or given witness statement and adduce his evidence.
- l. The Claimant averred that the Disciplinary Committee as constituted offended the code of the Respondent. The chairman of the Disciplinary hearing and the Respondent's representatives actually asked the Claimant to proceed and plead his mitigation during the hearing/before the verdict ignoring the Defence tabled by the claimant.
- m. The Claimant averred that the chairman referred to the Respondent's broke and trust on the Claimant which allegation had ever been brought to the Claimant's attention.
- n. The Claimant averred that the charges read to the Claimant were:
 - i. Failure to timelessly prepare and plan for the external BSI Audit for ISO 9001,14001 AND 18001.
 - ii. The engineering audit reviewed lack of fundamental ISO 14001 requirements and poor environmental management on site.
 - iii. Failure to carry out instruction on time, providing misleading/incorrect information during thee engineering audit regarding closure of tasks but without providing evidence of completion of tasks.
 - iv. Lack of ability to pay attention to details, displaying lack of urgency in attending to, supporting SHEQ agenda and owing up to arrears that need drive like the site SHEQ induction, legal Registers, and environmental impacts and aspects register for the site.
 - v. Delaying to roll out this risk management training at Kisumu site.
- o. The Claimant averred that the Claimant in response disputed each and every charge and reinforced the same with evidence.



- p. The Claimant averred that on 31/3/2020, the Claimant appealed against the said decision to terminate his employment but instead the Respondent engaged in justification process on appeal. The Respondent endeavored to seal the missteps, illegality and unfairness of the disciplinary process exposed by the appeal. The appeal was not heard.
 - q. The Claimant averred that he was terminated at a time when the Respondent's business was performing badly and was working to cut its costs and expenses which saw it send some of its employees on retrenchment /redundancy and yet chose to terminate the Claimant on discriminatory terms.
 - r. The Claimant averred that he performed well, achieved the set goals and even earned bonus under the STIP ordinarily payable in April every year and the hurried termination of employment of the Claimant in March 2020 was calculated to deprive the Claimant of his STIP bonus.
 - s. The Claimant averred that the Respondent unlawfully and unfairly terminated employment for the Claimant in the middle of a global pandemic and he was not able to secure another commensurate job. He defaulted in servicing his personal and mortgage loans, received dunning letters, CRB listings and auction threats from various bank.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. The court reviews the decision to dismiss the Claimant from the employment of the respondent.
 - b. The declaration that the respondent breached the contract of employment and unfairly terminated the employment of the Claimant.
 - c. A declaration that the dismissal of the Claimant from employment was constructive.
 - d. Certificate of Service
 - e. Damages for constructive dismissal.
 - f. Damages for Discriminatory treatment.
 - g. Kshs. 8,400,000/= (12 months' salary) as compensation for unfair and unlawful termination.
 - h. Kshs. 1,411,500/= for being 2 months' salary for the period between termination and appeal.
 - i. Kshs. 1,270,250/= being loss of bonus and under the STIP Program for the year 2019 and payable in April 2020.
 - j. Kshs. 846,900/= being loss of pension benefits.
 - k. Kshs. 165,146/= being loss of retirement benefits.
 - l. Kshs. 22,800/= being NSSF and NHIF contributions.
 - m. Kshs. 2,643,341/= being net compensation for personal loan insurance premium waver.
 - n. Kshs.566, 820/= being net compensation for mortgage loan insurance waver.



- o. Cost of the suit
 - p. Interest on (e) and (o) above till payment in full.
- 3. The Respondent filed its Memorandum of Response dated 17th May, 2021 and averred inter alia as follows;
 - i. The Respondent averred that its terms and conditions of engagement with the Claimant were agreed upon before he commenced his employment term and hence his engagement and service for the term that he served.
 - ii. The Respondent averred that the Claimant was not subjected to an unlawful disciplinary hearing culminating into an unfair hearing.
 - iii. The Respondent averred that the Respondent Company issued the Claimant with appropriate letter to explain while he was performing very poorly which he admitted in his pleadings.
 - iv. The Respondent further averred that the Respondent Company did not infringe the Claimant's Constitutional rights since the Respondent was guided and acted according to the legal requirements and the current Employment laws.
 - v. The Respondent averred that the Claimant was lawfully and fairly terminated for valid reason of poor performance even after being subjected to Performance Improvement Plan.
 - vi. The Respondent averred that the Claimant is not entitled to the prayers sought in the Statement of Claim or any part thereof.

Evidence

- 4. The Claimant (CW1) testified in court on the 13th March, 2024 where he adopted his updated witness statement together with the pleadings filed in court dated 19th January, 2021. It was his testimony that he was aware of the Respondent's statement by one Catherine Kamau dated 19/6/2023. Further, that he never worked with the witnesses as she was not in employment when he left.
- 5. It was his case that he received a rating of 2, but was unsure how it was determined as the Respondent typically used a qualitative rating system. He also testified that he outlined his objectives and achievements for 2017 and the overall achievement for the year was 89.80%, with individual targets accounting for 20% and organizational targets for 80%. He scored 20% on individual targets and 69.8% on organizational targets, resulting in a total achievement of 89.8%. However, his overall rating may still be influenced by the company's overall performance.
- 6. CW1 testified that he had a performance rating of 3 out of 5 for the year 2017 in the CBD system and was required to do a self-appraisal before the managers evaluated him. He further stated that a rating of 3 meant he met his objectives, while a rating of 2 is considered lower but that he disagreed with this assessment.
- 7. CW1 testified that Macjessie Mula was part of the peer to peer engagement. He indicated areas where he needed more support, and Macjessie provided job coaching in quarter 4 of 2019, specifically in December after he had been put on performance training.



8. In Cross-examination CW1 testified that he claimed Kshs. 7,128,000/- in the demand letter. Further, that page 19 of the RBD showed that in 2016 his salary was Kshs 91,630/- and in 2015 it might have been different. He also testified that he was a part of the Respondent's team from October 2013 to March 2020 and went through PIP processes in 2015 and 2019, but did not remember if he had one in 2014 or 2016. He underwent PIP four times in total, and his performance made up 20% of the organization's overall performance, which was 80%.
9. It was his case that the contract of employment included provisions for termination, which he was given notice of. That he underwent a performance evaluation hearing and was presented with charges in a letter, to which he responded and the final decision would be made by the chairman. That he was dissatisfied with the process and decision, as it was not consistent with organizational procedures.
10. CW1 testified that he was not informed of the charges against him at that time. He responded to the letter on 2/3/2020, and the disciplinary hearing took place on 3/3/2020. During the hearing, the issues mentioned in the letter were discussed, and he was ultimately terminated due to performance incapacity.
11. It was further his case that there was Procedural injustice when allegations had been made and investigations done or clearly obtained first before the letter for disciplinary hearing issued. Therefore, that he was unfairly terminated and the documents submitted by the Respondent in court were never supplied to him.
12. He also testified that he was discriminated since the sales manager was retrenched in February but he was terminated and that he was not aware if he was subjected to PIP.
13. In Re-Examination CW1 confirmed that Poor performance was in COR and is referred to be a minor offence. That no counselling was done. He was not given a verbal warning. He was given a PIP which he considered a warning but it is not what is contemplated in the COR.
14. CW1 asserted that he never received final warning and the required procedure was not followed. Similarly, that he was not told his performance was under investigation and so after he pleaded not guilty and tendered his evidence, the Respondent should have considered the evidence before asking him to mitigate failure of which meant he had made up his mind. His position was that poor performance did not deserve summary dismissal. Further, that he still received bonus despite the PIP.
15. The Respondent on the other hand called one witness Catherine Kamau (RW1) who testified in court on 13/3/2024 and adopted the Respondent's documents filed in court as well as her evidence in chief. RW1 testified that she was the Respondent's HR and had not worked with the Claimant.
16. It was her case that the Claimant had been on PIP since his employment from 2014 to 2019. She further testified that on 1st September 2019, the Claimant did not do what he was required to do and was issued with a show cause letter and he responded. The response was not satisfactory and a disciplinary hearing was constituted.
17. RW1 testified that the Claimant was paid all his terminal dues upon termination.
18. In Cross-examination RW1 testified that at page 92-93, the letter does not make reference to the 4 PIPs. That a PIP has a life span, it expires. The last PIP was in 2014. It can be revisited later if the issue is still the same and there as a PIP for 90 days which were to end in December 2019. Further, that at page 92, PIP on reasons for incapacity inquiry indicated poor performance.
19. RW1 testified that the dates for certification were set by the Claimant and auditors. There was audit in 2019 and dates set (BSI auditors). The dates were changed to 3/6/2019 and an email sent by BSI



setting a new date. The audit was done in June, 2019. The lead person was to do the corrections in time for the audit.

20. RW1 testified that compliance was a continuous process. The site was not ready for audit. That page 162 of the RBD showed the charges against the Claimant. She however did not have the audit report in court. The audit was successful and ISO Certificate was issued.
21. RW1 testified that there should be a supervisor at a petrol station and the pump attendant and supervisor ought to report incidents. That the Claimant was a Safety Officer and waste was under safety.
22. RW1 also testified that there was report from BSI-audit on the leakage and waste management and the Claimant as SHEQ was the custodian of the documents. He was the one to push Shevalyne to act on the leakage. Shevalyne was the same level as the Claimant.
23. It was her case that that she knew the Kisumu site was to be rolled in 2019. The Kisumu audit was a one-day audit and the Claimant was informed in February of the audit and ought to have prepared himself.
24. In re-Examination RW1 confirmed that roll out in Kisumu was scheduled in May but executed in November, 2019. No reason was given by the Claimant. RW1 confirmed that waste and leakage was under Supply Chain Manager but the Claimant gets involved as SHEQ officer. RW1 further stated that failure to meet deadline has got to do with performance. The PIPs were documented in the Claimant's file.

Claimants' Submissions

25. The Claimant filed written submissions dated 8th May, 2024. On the issue of whether the disciplinary process under the code was followed, the Claimant submitted that the Respondent departed from its own set procedures.
26. It was the Claimant's submissions that by a letter dated 26/2/2020, the Respondent invited the Claimant to attend an Incapacity Enquiry on 3/3/2020 to assess the Claimant's ability to perform his role as a SHEQ Officer, listing 5 instances of alleged incapacity or poor performance.
27. The claimant submitted that the Disciplinary Code provides the Guidelines that any disciplinary action must meet the requirements of fairness as laid in the Code and more specifically that disciplinary action must be both procedurally and substantively fair.
28. It was the Claimant's submission that the Code sets out offences for which an employee may be dismissed summarily and the second paragraph specifically excludes poor performance and offences of a minor nature from the penalty of summary dismissal providing a summary of the Disciplinary process to be invoked for both serious and minor offences.
29. It was the Claimant's submission that before inviting the Claimant to the Enquiry on 3/3/2020, the Respondent was under obligation to follow the four progressive steps set out in the Code, namely:
 - a) Counseling Procedure
 - b) Verbal Warning Procedure
 - c) Written Warning Procedure
 - d) The Final Written Warning.
30. It was the Claimant's submission that the Respondent breached Section 41 of the *Employment Act*, article 41 of *the Constitution* read together with Article 47 on fair administration by flouting its own



- disciplinary code and justifying that that the Claimant had previously been placed under a performance improvement plan (PIP) for which reason the Claimant was disentitled to due process.
31. The Claimant submitted that the notice of Incapacity Enquiry dated 26th February, 2020 purporting to be a disciplinary enquiry failed to inform the claimant of the exact nature of the alleged offences or contraventions, the consequences or penalty likely to be imposed and suffered by the Claimant.
 32. The Claimant submitted that placing the Claimant under Disciplinary Enquiry was a violation of the Code. The alleged offences or contraventions were not the subject of any warning or proceeded by the mandatory final written warning. The alleged events were not current or of the nature and magnitude requiring the constitution of a Disciplinary Enquiry. That there was no sufficiently just and valid cause to discipline the Claimant.
 33. The Claimant submitted that in respect of substantive fairness, the Code requires that there be sufficiently just and valid cause for applying the disciplinary action. It was the Claimant's submission that the Respondent made a mistake by considering expired PIPs in their decision-making process. That the Respondent provided a Performance Improvement Plan (PIP) to the Claimant, which expired on 30/11/2019 and if there was no improvement, disciplinary action would have been taken.
 34. The Claimant submitted that the Respondent's claim that the PIP was revived on 26/2/2020 was not true as the matters in the PIP were closed within the set timeline. It was the Claimant's submission that the Claimant was terminated by the Respondent based on unfounded allegations of substandard work, which were not backed up with evidence. That the Chairman of DE did not provide any specific examples of substandard work and disregarded the Claimant's defence. The Notice of Incapacity Enquiry-Poor Performance used as justification for termination was not part of the Respondent's Disciplinary Code, which only provided for a Disciplinary Enquiry with established procedures and consequences.
 35. The Claimant submitted that the termination letter provided by the Respondent did not give specific reasons for dismissing the Claimant, only stating it was based on a recommendation from the Chairman of Incapacity Enquiry. It was the Claimant's submission that the committee was improperly constituted and did not follow the correct procedures for termination. The notice given to the employee was not in line with the disciplinary code and was too short.
 36. On the issue of whether there was substantive fairness the Claimant submitted that his performance was rated without his involvement, and there was no feedback from his superior to support the score. That the Claimant self-assessed his performance at 92% and received a final score of 91% after review by his superior. Despite positive feedback from both Line Managers, the Respondent later revised the Claimant's performance rating to 2 out of 5 during a disciplinary hearing without providing any supporting documentation which rating was seen as an attempt to force the Claimant out of office. The Claimant relied on the case of Banking Insurance and Finance Union (Kenya) vs Barclays Bank of Kenya Limited and Another (2016) eKLR and submitted that a fair performance appraisal process should involve participation from both parties, with the employee being included in the evaluation process.
 37. It was the Claimant's submission that the Respondent did not follow its performance management policy and did not provide the Claimant with clear and achievable targets and that the Respondent's line manager and other officers seemed determined to dismiss the Claimant, making vague accusations and using past incidents against him.



38. The Claimant relied on the case of *Maina Mwangi v Thika Coffee Mills Limited* [2014] eKLR and submitted that performance appraisals must meet specific criteria and involve employee participation in order to be valid.
39. On the issue of whether the Charges were wide and general, unclear and lacking in specificity, the Claimant relied on the case of *In Lydia Moraa Obara v Tusker Mattresses Limited* [2021]eKLR and submitted that section 43 of the *Employment Act* places upon the employer an obligation to prove the reason or reasons for the termination, failing of which the termination shall be deemed to have been unfair within the meaning of section 45.
40. The Claimant submitted that the Respondent in the first charge accused the Claimant of failing to prepare for an external audit, which risked the company's ISO certification. However, the specific details of the alleged unpreparedness were not provided and the Claimant showed evidence of informing Line Managers about the audit dates and corrective action plan.
41. The Claimant submitted that the Claimant did not mix up dates for a BSI audit as alleged. The audit dates were changed by BSI from July to June, despite efforts to maintain the original dates. That the Claimant successfully organized the audit despite the short notice, and the audit report did not blame the Claimant for any shortcomings. The rumor that the Respondent was at risk of losing ISO certification was sensationalized and unfairly blamed on the Claimant.
42. It was the Claimant's submission that on the second charge, the Claimant prepared the Environmental Aspects and Impacts Register in 2019, which led to the ISO 14001 Environmental Certificate being granted to the Respondent. The Claimant further submitted that during the hearing, the Respondent admitted that the Claimant's efforts contributed to the certification. That the Health and Environmental Policy from February 2019 stated that Line Managers, not the Claimant, were responsible for operating in line with the policy.
43. It was the Claimant's submission that during cross-examination, Catherine Kamau, a witness for the Respondent, acknowledged that the environmental management on site was not the Claimant's responsibility, but rather that of Shevalyne Opiyo, who reported to the Respondent's Managing Director.
44. On the third charge, the Claimant submitted that the accusation against the Claimant was broad and unsubstantiated, with no evidence provided to show that he provided incorrect information during an engineering audit. That the tasks allegedly not completed were said to be critical for ISO 14001 requirements, but no specific instructions were presented to support this claim.
45. On the fourth charge, the Claimant submitted that the charge against the Claimant was not specific enough for him to adequately defend himself, as he was bombarded with new allegations and duplicated charges.
46. The Claimant relied on the case of *Sani v JSC (Cause 7 of 2019)* [2022] KEELRC 4000 (KLR) and submitted that it was important that employees are made aware of charges in advance and having specific charges to respond to.
47. On the fifth charge the Claimant submitted that the charge against the Claimant was initially related to a Kisumu site but the evidence presented was on a Mombasa site, leading to inconsistencies and misleading statements. The Claimant's right to a fair hearing was violated due to changes in the charges and lack of prior notice for new allegations. The employer was not allowed to change or add charges after a hearing has begun if it would be prejudicial.



48. On the issue of whether the Claimant is entitled to damages for discriminatory treatment, the Claimant submitted that the Respondent discriminated the Claimant contrary to Article 27 of *the Constitution* and has not proven otherwise as provided under section 5(7) of the *Employment Act* 2007.
49. The Claimant relied on among others the case of Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others [2018]eKLR in defining discrimination in employment.
50. It was the Claimant's submission that the Respondent treated the Claimant unfairly and discriminatorily compared to other employees and did not follow proper procedures when terminating the Claimant, while another employee who performed poorly was given more favourable treatment.
51. On the issue of whether the Claimant is entitled to a payment of salary arrears, the Claimant submitted that the Claimant is owed salary arrears totalling Kshs. 1,411,500/= for the two months between termination and appeal. That it was acknowledged by the Respondent that employees remain employed and entitled to salary during the appeal process.
52. On whether the Respondent owes the Claimant due and unpaid bonuses, the Claimant submitted that the respondent failed to pay the claimant a bonus of Kshs. 1,270,350 earned under the STIP program for the year 2019, which was supposed to be paid in April 2020. That the termination did not affect benefits already accrued, and the bonus should have been paid in April 2020 regardless.
53. The claimant further submitted that he was unable to find a job during the pandemic and suffered financial difficulties due to the termination, including defaulting on loans. That the respondent also refused to provide him with a certificate of service, causing further distress to the claimant and his family.

Respondent's Submissions

54. The Respondents filed their written submissions dated 24th April 2024 and on the issue of whether the Claimant was lawfully terminated, submitted that the Claimant informed the Court that he was unfairly demoted in the year 01.04.2019 when in fact he was not demoted due to the reorganization of the Respondent's organizational structure, his title was changed from SHEQ Manager to Officer SHEQ but all his benefits including salary and allowances were maintained and he indeed lost nothing and this could not qualify as a demotion.
55. The Respondent submitted that the Claimant had a history of poor performance from 2017 to 2019 and was notified of his performance issues in February 26, 2020 and invited to an incapacity inquiry on March 3, 2020 and that the Claimant was given a fair hearing before being terminated, as the issues were discussed before the decision was made.
56. It was the Respondents' submission that the Claimant admitted that the company's performance was declining, leading to restructuring to cut costs and further submitted that the claim of discrimination was unfounded and intended to discredit the Respondent. That the Claimant confirmed participation in a disciplinary hearing hence could not claim unfair treatment.
57. On the issue of what reliefs if any are available to the Claimant the Respondent submitted that the Claimant was rightfully terminated and was not entitled to any of the requested benefits, such as pension, retirement benefits, NHIF contributions, loan repayments, or salary during the appeal process. The Respondent further submitted that there was neither basis nor proof of claim for the alleged constructive dismissal nor compensation for unfair and unlawful termination. It was therefore the Respondent's submission that the Claimant was not entitled to any of the relief since the reasons for their termination are valid and proven under Section 40 of the *Employment Act*. The Respondent



in this regard relied on the cases of *Musau Kivuva v Mastermind Tobacco Ltd* and *Nyangiry Okabanga Bwonditi v Ecobank (K) Ltd*, and submitted that the Claimant's claim was dismissed because of poor performance despite being placed on a Performance Improvement Plan.

Determination

58. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by Counsels and has come up with two main issues;
- i. Whether the Claimant's termination of employment was unfair and unlawful
 - ii. Whether the Claimant is entitled to the reliefs sought.
59. Whether the Claimant's termination of employment was unfair and unlawful I have WhethrWWhwr
60. In this instant case, the Respondent alleged that they terminated the Claimant on grounds of 5 instances of alleged incapacity or poor performance. It is the Respondent's case that the Claimant was lawfully and fairly terminated for valid reasons of poor performance even after being subjected to Performance Improvement Plan.
61. On the other hand, it was the Claimant's case that he was unfairly terminated by the Respondent when they among others; carried on a disciplinary hearing without giving him a Notice to show cause and taking his defence or witness; failed to record statements from the claimant's accusers and/ or competent evaluators on the charges against the Claimant; failed to frame and inform the Claimant the subject of disciplinary hearing prior to the hearing; failed to record a charges against the Claimant prior to the hearing in breach of the Respondent's HRM; failed to take a written statement from the Claimant on the matter subject to disciplinary hearing; resorted to a disciplinary hearing without the input of the Claimant; failed to constitute the Disciplinary Committee contemplated under the Disciplinary Code authorizing a biased chairman to hear and determine the Claimant's case and disregarding the Defence given by the Claimant at the disciplinary hearing and on appeal.
62. The events leading to the termination of employment of the Claimant points out to poor performance as the main reason for the termination. There was also the issue of discrimination of the Claimant by the Respondent which the court will address hereunder.
63. CW1 testified that he was discriminated against because the sales manager was retrenched in February but he was terminated instead. Under section 5 of the *Employment Act*, once an employee presents prima facie evidence pointing to discriminatory treatment against her by the employer, the burden of proof shifts to the employer to demonstrate that there was no discrimination as alleged by the employee. This was considered in the case of *G M V v Bank of Africa Kenya Limited* [2013] eKLR).
64. The claimant herein had a history of allegations of poor performance against him. He admitted to being placed on PIP more than once and that his performance was found not to have improved. He further conceded that poor performance was a ground for termination of employment and that he was made aware of that while being placed on PIP. Therefore the claimant cannot claim that because he was terminated and the sales manager retrenched, he was discriminated against. The claimant did not demonstrate that the sales manager too was placed on PIP but retrenched instead of being terminated like was his case.
65. Whereas section 5 of the *Employment Act* places the burden of proof of non-discrimination once alleged by an employee on the employer, it does not mean that the employee needs to barely allege discrimination. An employee alleging discrimination ought to sufficiently present the facts in support



- of such allegation. To merely allege without any iota of facts would place an employer on an awkward mission of trying to look for evidence to rebut a bare allegation. This in my view was not the intention of the drafters of section 5. To this extent the claimant has not sufficiently demonstrated that he was discriminated against to shift the burden to the Respondent.
66. The Claimant in its submissions stated that the Notice of Incapacity Enquiry-Poor Performance used as justification for termination was not part of the Respondent's Disciplinary Code which only allows for a disciplinary inquiry with specific procedures and consequences. However, a closer look at the Respondent's Disciplinary Code reveals a very elaborate procedure provided for in page 11-38; the disciplinary process, the investigation procedure, the counselling procedure, the verbal warning procedure, the written warning procedure, the final written warning procedure, disciplinary inquiry procedure, the appeal hearing procedure and considering grounds for appeal. The court further notes that during hearing, it was CW1's testimony that poor performance is on COR but according to him was referred to as a minor offence.
 67. As observed above, the claimant underwent PIP more than once. It was his evidence that in all the PIP's he was appraised and his only complaint was that the rating he gave himself significantly differed with the one given by the respondent. The claimant further conceded that he underwent four PIP's. This was confirmed by the respondent's witness who stated that the claimant was placed on PIP right from 2014 when he was employed in 2015, 2016 and 2019. This in the Court's view was not a good track record for performance for the claimant and it was not therefore surprising that the respondent decided to terminate his service on account of poor performance.
 68. Sections 41, 44 and 45 entitles an employer to discipline its employees based on poor performance as the capability of an employee to perform their duties is an essential requirement of the contract of employment. Termination of employment due to poor performance is therefore a valid and fair reasons for termination.
 69. In the case of Thomas Odol Ojwang versus Kenol Kobil Ltd [2015] eKLR the court set out the principles that the Respondent needs to incorporate in the Performance Development Plans, the Performance Improvement Plan and the capability hearings which tools/practices are to be consistent with section 41 of the *Employment Act* and article 47 of *the constitution* and on fair administrative action.
 70. Regarding procedural fairness it is now an established principle that for termination to pass fairness test there should be both substantial and procedural fairness in a number of cases including in the case of Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.
 71. When poor performance is alleged, an employer is required by the law, other than the employment contract to give the employee notice, give a hearing, and give reason(s) for termination on such a ground. It is not only a contractual requirement; there exists a legal requirement that before termination on the grounds/reason of poor performance, there must exist genuine, valid and fair reasons. The subject employee must be given a hearing in the presence of the employee's representative and most fundamentally, there must be a written notice stating the reasons upon which the employer intends to terminate employment to enable the employee give their defence. This notice must be issued before an employer makes a decision to terminate employment.
 72. CW1 stated that on February 26, 2020, he received a letter inviting him for incapacity inquiry on 3rd March, 2020. He responded to the letter on 2nd March, 2020 and the disciplinary hearing took place as scheduled. During the hearing, the issues mentioned in the letter were discussed, and he was



ultimately terminated due to performance incapacity. He appealed against the decision. The Court was not appraised whether the appeal was heard or not and the outcome thereof.

73. From the foregoing, the Court is reasonably satisfied that the respondent accorded the claimant procedural fairness while considering the termination of his employment.
74. In conclusion the Court finds the claim in its entirety without merit and the same is hereby dismissed with costs.
75. The respondent will however issue the claimant with a certificate of service.
76. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 6TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

JUDGE

