



**Ikiugu v Takaful Insurance of Africa (Cause E002 of 2022)
[2024] KEELRC 13604 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13604 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E002 OF 2022
DN NDERITU, J
OCTOBER 31, 2024**

BETWEEN

JAPHETH MWENDA S IKIUGU CLAIMANT

AND

TAKAFUL INSURANCE OF AFRICA RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a statement of claim dated 18th May, 2021 filed in court on 16th February, 2022 through Ndiwa Serebe & Company Advocates. As expected statement of claim was accompanied with a verifying affidavit, claimant's witness statement, a list of documents, and a bundle of copies of the listed documents.
2. On 14th June, 2023 the claimant changed his legal representation and appointed Mburu Maina & Company Advocates to act for him in place of the above-mentioned-law firm.
3. On 12th October, 2023 the claimant filed an amended statement of claim dated 11th October, 2023, seeking the following –
 - a. A declaration that the termination of the claimant's employment was discriminatory, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the claimant
 - b. Damages for unfair and unlawful termination of employment contract.
 - c. One month pay in lieu of notice.
 - d. Claimant be reinstated to his managerial position.
 - e. A certificate of service as per Section 51 of the *Employment Act*



- f. Costs and interest of this suit.
- g. Any other award as the honorable court deems fit to grant in the circumstance of this case.
Broken As Hereunder
 - a. Kshs135,000 being one month's pay in lieu of notice;
 - b. Compensation for unfair termination under Section 49(1) (c) of the Employment Act =Kshs135,000 x 12 months = Kshs1,620,000; and
 - c. Service pay/Gratuity at Kshs. 67,500.

Total Claim= Kshs1,822,500.

- 4. Together with the amended statement of claim was filed a verifying affidavit, list of witnesses, claimant's witness statement, a list of documents, and a bundle of copies thereof in support of the cause.
- 5. Alongside the amended statement of claim the claimant filed a reply to the statement of response dated 15th September 2023 seeking that the respondent's statement of response be struck out.
- 6. On 18th March, 2022 the respondent entered appearance through Macharia, Burugu & Company Advocates and filed a statement of response to the claim dated 13th October, 2022. In its statement of response, the respondent prays that the claimant's cause be dismissed with costs for want of merits.
- 7. Alongside the statement in response to the claim the respondent filed a list of witnesses, and a bundle of copies of documents in support of the response.
- 8. On 21st February, 2023 the respondent filed a list of witnesses, a statement by Slyvia Kimuge (RW1), a second list of documents, a bundle of copies thereof, and a certificate of electronic evidence.
- 9. The claimant's case came up in court for virtual hearing on 11th March, 2024 when the claimant (CW1) testified and closed his case.
- 10. The defence was heard on the same day with RW1 testifying and the respondent's case was closed.
- 11. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Mr. Ojuo, filed his submissions on 11th May, 2024 while the respondent's counsel, Mr. Barugu, filed his submissions on 9th July, 2024.

II. The Claimant's Case

- 12. The claimant's case is expressed in the statement of claim, the oral and documentary evidence by the claimant (CW1), and the written submissions by his counsel, and the same is summed up as hereunder.
- 13. In his testimony in court, the claimant adopted his filed witness statement on record at his evidence-in-chief and stated that he was engaged by the respondent as a branch manager from 13th May, 2019 at a monthly gross salary of Kshs135,000 until when he was terminated on 2nd December, 2020.
- 14. He stated that in the course of his employment he was not reprimanded or issued with a notice of poor performance. He testified that in 2019 his performance was amongst the best as per the standard performance appraisal. He stated that the letter dated 13th June, 2019 from the respondent on alleged branch's poor performance had been addressed to him as the Nakuru branch manager and not in his personal capacity. He stated that as at the time the said letter was addressed, he was one month old in his position, and he could not be held responsible for an outstanding debt that should have been blamed on the previous branch manager.



15. About his termination, the claimant alleges that he was not issued with a show cause letter and no disciplinary process or hearing was conducted.
16. He stated that the termination letter indicated that his performance was unsatisfactory, yet no appraisal was done for the year 2020 or at all. He stated that he had performed better in 2020 than in 2019 despite the cuts in salary, travel allowances, and other allowances due to the Covid-19 pandemic.
17. The claimant stated that the respondent created a hostile working environment by transferring all good underwriters to the Isiolo branch; moving all electronics to the head office; and closing the office from 1st July 2020 to December 2020. He testified that the closure of the office for the above period led to the loss of customers and revenue.
18. He stated that he met his targets and hence his dismissal was wrongful, unfair, and unjust. The letter of dismissal dated 2nd November, 2020 stated as follows –

Ref: TIA/500/281/11/20

NOVEMBER, 2, 2020

Japheth Mwenda

Dear Japheth

RE: Separation

The management has noted with concern the unsatisfactory performance you have registered in the period from January 2020 to date.

Your actual Performance is as illustrated below.

KPI	YTD Performance (%)	Monthly Performance (%)									
		Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct
-	-	19.4	12.8	22.9	26.3	16.8	21.9	51.0	10.1	17.3	11.0
Overall KPI (Collection Vs. Budget)	20.7										

(The above performance is despite the reduction of the production budget by 30% following the effects of the Covid-19 Pandemic.)

Japheth, performance discussions with your supervisor have been held with you several times but there has been no improvement in your performance. The management has equally been very patient with you by giving you time to turn around but that has not been the case.

With your role being a sales role, your current contract is no longer tenable.

Your contract is therefore terminated effective December 2, 2020.

Kindly clear with the company by handing over any company assets in your possession before your last working day. You will be paid your final dues upon successful handover.



Should you wish to appeal against the termination, please formally do so to HR within 2 weeks of receipt of this letter.

Separately, the management wishes to offer you an alternative position of DSR team leader under different applicable terms. Should you be interest in the role, please formally request through the HR. You are also invited to explore any other venues for partnership with the company.

On behalf of TIA, I wish you all the best in your future endeavors.

Please append your signature below to signify receipt of this letter.

Sincerely

Sumayya Hassan

Chief Executive officer

Acknowledgment

I acknowledge receipt of this letter

Name:

Signature:

Date:

19. The claimant stated that vide a letter dated 12th November, 2020, he appealed the dismissal. The said letter of appeal produced as an exhibit by the claimant sated as follows –

JAPHETH MWENDA

NAKURU

12TH NOV 2020.

TO THE HR,

TAKAFUL INSURANCE CO LTD

ATT. SLYVIA

RE: APPEAL ON SEPARATION /TERMINATION

I am in receipt of your letter on the above subject.

None of my supervisors, about 4 of them, have ever discussed poor performance and or performance appraisal with me, or reprimanded or warned me.

When covid pandemic struck, I operated in a tough environment including a 65% salary cut and withdrawal of all marketing allowances.

In July 2020, a notice on closure for relocation of the branch pinned on our branch office entrance made it difficult to convince clients to do business with us.

A second notice in August on the same made it even worse as most clients thought services to them may be compromised.

After closure in August, I was excluded in production meetings and received no way forward on relocation. The underwriter was relocated to head office and I have been operating without an office.

I humbly request to be given even a chance to prove that I am up to the task.



Signed.

20. In cross-examination the claimant stated that he attended a meeting in 2019 during which the 2019 performance was discussed but no targets were set. He conceded that his branch's performance was poor. He stated that he was given an opportunity to appear in a physical hearing for his appeal and allowed to be accompanied by a colleague. He confirmed that salary cuts were for all employees and he had consented to receiving a reduced salary during the period of the Covid – 19 pandemic.
21. The claimant admitted that the respondent gave him an opportunity to take up an alternative position upon dismissal.
22. He stated that there was no mention of his personal performance other than that of the branch and the respondent failed to accord him a hearing before he was dismissed. He stated that the copy of the minutes of the hearing of the appeal produced was false as it did not bear his signature yet he had signed the original copy of the said minutes.
23. It is on the basis of the foregoing that the claimant prayed that his cause be allowed as prayed in the statement of claim.

III. The Respondent's Case

24. The respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, the head of human resources and administration, and the written submissions by its counsel, as summarized hereunder.
25. RW1 stated that as per the performance reports for November 2020, the claimant's branch performed poorly and all poorly performing branches were closed.
26. In cross-examination, she admitted that the claimant was engaged on 13th May 2019 and as of 13th June 2019, the claimant was a month old. She stated that as of that date, 13th June, 2019, there was an old debt that the claimant was obligated to collect. She confirmed that the claimant had been summoned due to poor performance although there was no specific allegation about the claimant's performance but rather that of the branch. She alluded that the respondent had not filed appraisals for 2019 and 2020 and nothing could demonstrate the claimant's personal performance. She stated that the company was affected by Covid -19 in terms of performance and the claimant's office was closed from September to December, 2020. She confirmed that once the office was closed there were no expectations from the claimant who was working remotely and being paid. She stated that the separation letter contained an account of the claimant's performance.
27. She confirmed that no show cause letter, a letter inviting the claimant for a hearing, or a hearing before termination, were issued or conducted and that the only hearing held was on appeal. She testified that she attended hearing of the appeal and recorded the minutes which the claimant did not sign and no copy was supplied to the claimant.
28. She produced the respondent's documents in the bundle as exhibits 1 to 7.

IV. Submissions By Counsel

29. On the one hand, the claimant's counsel submitted on three issues – Whether the termination of the claimant's contract of employment was unfair and unlawful (substantive justification); Whether the respondent upheld the procedural fairness in terminating the claimant's contract of employment (procedural fairness); and, Whether the claimant is entitled to the reliefs as prayed.



30. On the first issue, it is submitted that the respondent had no reasonable grounds for terminating the claimant and the dismissal was in violation of the provisions of Sections 41, 43, 44, 45 and 47 of the *Employment Act* (the Act). Counsel cited *Galgalo Jarso Jillo v Agricultural Finance Corporation (2021) eKLR* in support of the assertion that an employer must observe procedural fairness before terminating or dismissing an employee. Procedural fairness includes – informing the employee of the accusations against him/her including particulars thereof; allowing the employee to be heard in the company of a co-worker or a shop-steward of his/her choice; and to be notifying him or her of the decision made and the reason(s) therefor.
31. It is submitted that the claimant’s alleged poor performance was never raised by the respondent and his performance for the year 2020 had been affected by the Covid -19 pandemic, which resulted in him working remotely or for reduced working hours.
32. Further, it is submitted that the closure of the office in July or September, 2020, and the removal of underwriting files and electronics from the claimant’s branch may have contributed to the alleged poor performance as it made it be difficult to work and perform as it was in the previous years.
33. Counsel cited *National Bank of Kenya v Anthony Njue John (2019) eKLR* and *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others (2019) eKLR* in support of the assertion that the decision to terminate the claimant’s employment through dismissal was wrongful, unfair, and unreasonable in the circumstances.
34. On the second issue, it is submitted that contrary to the provisions of Section 41 of the Act the respondent failed to accord the claimant a hearing before termination. It is submitted that no show cause letter was issued; no hearing convened before the decision to terminate the claimant was reached; and a hearing was only convened to hear the claimant’s appeal which was not the primary hearing.
35. Citing *National Bank of Kenya v Anthony Njue John (supra)* it is submitted that the respondent failed to accord the claimant an opportunity to be heard and defend himself making the entire process untenable and unlawful.
36. For all the foregoing reasons the court is urged to find in favour of the claimant and award all the reliefs as prayed.
37. On the other hand, counsel for the respondent identified the following issues for determination – Whether the respondent had valid reasons to terminate the claimant’s services (substantive fairness); Whether a fair procedure was followed (procedural fairness); and What remedies, if any, are available to the claimant.
38. On the first issue, it is submitted that the claimant’s poor performance was reflected in his branch’s performance. It is submitted that the claimant’s reliance on Covid-19 as a reason for poor performance is untenable as the claimant’s previous performance throughout his employment was poor. It is submitted that the respondent had a right in evaluating the performance of its employees, including the claimant, and thus the reason for termination was valid and fair.
39. On the second issue, it is submitted that upon serving the letter of termination, the claimant was accorded a proper hearing at the appeal hearing pursuant to the provisions of Section 41 of the Act.
40. It is submitted that an appeal hearing is also a disciplinary hearing, and the claimant was allowed to be accompanied by an employee of his choice. It is further submitted that despite the minutes of the appeal being signed by the claimant, the law does not obligate an employee to sign minutes. It is further submitted that the allegation that the minutes of the hearing of the appeal were inaccurate was not



substantiated or proved. It is submitted that the claimant received a formal and adequate hearing even though on appeal.

V. Issues For Determination

29. The court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The court identifies the following issues for determination –
 - a. Was the dismissal of the claimant by the respondent wrongful, unfair, and unlawful?
 - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

VI. Dismissal

29. The facts on the circumstances leading to the dismissal of the claimant are in dispute. While the respondent alleges that the claimant's performance was poor, the claimant asserts that he was never reprimanded or notified of the alleged poor performance.
30. It is the claimant's case that none of his supervisors complained about his performance; he was neither given any warning prior to his dismissal nor was a show cause letter served upon him. He stated that no disciplinary hearing was conducted before he was dismissed. In not so few words the claimant is saying that his dismissal was wrongful, unfair, and unlawful.
31. The respondent's position is that the claimant in 2019 received correspondence from the respondent's chief executive officer on his wanting performance. The respondent's case is that the claimant was summoned to the head office on account of poor performance but did not improve. The respondent alleged that despite the allegation that the Covid-19 pandemic was responsible for the claimant's poor performance, his performance prior to the pandemic was equally poor. The respondent asserts that the claimant was given a hearing before the decision for his dismissal was made.
32. The claimant challenges the dismissal on two fronts. Firstly, he argues that the reason for his dismissal was not established and, secondly, that the respondent did not follow the laid down procedure before dismissing him which was unlawful.
33. On the other hand, the respondent takes the view that it had a right to set targets that the claimant was obligated to meet but failed. The respondent asserts that the claimant's poor performance was reasonable grounds for summary dismissal.
34. The jurisprudence on what constitutes fair hearing, both in substance and procedure, in employment matters is now fairly settled – See *Mary Chemweno V Kenya Pipeline Company Limited* (2014) eKLR, *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, and *Janet Nyandiko V Kenya Commercial Bank Limited* (2017) eKLR. The bottomline in fairness is that an employer must have a legal reason and adopt the proper legal procedure before terminating or dismissing an employee.
35. The law in its wisdom recognizes that employment contracts, like all other contracts, are organic and shall come to an end at some point in time. There are a variety of reasons that could terminate a contract of employment and the *Employment Act* (the Act) provides for many such reasons. For example, since employment is personal in nature the death of an employee brings the relationship to a natural end. Further, Sections 40 (redundancy), 43, 44, 45, & 46 of the Act provide for reasons and circumstances that may form good reasons or grounds for termination or dismissal. Similarly, Sections 35, 36, 40, & 41 of the Act provide for germane pointers towards what constitutes procedural fairness.



36. It is in the context of the foregoing that the facts and evidence in this cause shall be weighed in determining if the dismissal of the claimant by the respondent was substantially and procedurally fair and lawful.
37. The Claimant is alleged to have performed poorly against alleged set targets of the respondent. The respondent unilaterally terminated the claimant's contract on 2nd December, 2020 on the said ground. The claimant appealed against the dismissal but the appeal was dismissed. The evidence on record is that no show cause letter was issued to the claimant. No particulars of the poor performance were served upon the claimant before the dismissal and the respondent only supplied these particulars after the claimant appealed.
38. RW1 confirmed that there was no evidence availed in court on the claimant's alleged poor performance as the respondent had not filed an appraisal for the 2019 and 2020 performance cycles. The claimant produced an appraisal form asserting that his performance for the year 2019 was good. RW1 testified that she could not confirm the contents of the form as the form had only been issued to employees and none was filed in court. RW1 conceded that there was no evidence of allegations of poor performance relating to the claimant. RW1 testified that indeed the claimant's office had been closed in September 2020 and staff transferred to another branch. The claimant testified that with Covid -19 the performance was poor across board and the closure of the office contributed to the dismal performance. RW1 admitted that the respondent was affected by Covid -19 in terms of performance generally.
39. The court has carefully and thoughtfully considered the evidence adduced by both sides and finds and holds that the claimant's performance was never called into question formally and the respondent did not appraise the claimant's performance, to its detriment. The failure to notify the claimant of his poor performance before dismissal shifts in favour of the claimant as he could not possibly have known that his performance was considered poor. The court takes the considered view and holds that the respondent failed to exercise due diligence and responsibility by say informing the claimant of his shortcomings and helping him to improve. In substance, therefore, the respondent did not have good reason(s) upon which to found the summary dismissal. No performance review or appraisal was carried out to evaluate the productivity of the claimant and hence the alleged poor performance was founded on quick sand.
40. In terms of the procedure adopted by the respondent the court takes the considered view that the claimant was not given a reasonable and fair opportunity to be heard. The purported hearing on appeal is not the fair hearing as envisaged in the law as it came after the dismissal. RW1 admitted that indeed no show cause letter was issued to the claimant nor was a disciplinary hearing conducted before the separation/dismissal letter was issued.
41. A disciplinary hearing is not expected to meet the standards of a court trial as the courts are subject to strict rules of evidence and procedure. However, rules of natural justice apply in disciplinary hearings in that no one may be condemned unheard; an employee has a right to all information and particulars of charges before the hearing; and s/he has a right to test the evidence by way of cross-examination. An employer has to establish a prima facie case against an employee for the hearing to meet the minimum threshold of fair hearing as envisaged under Articles 47 & 50 of *the Constitution* and the various provisions of the *Fair Administrative Action Act*.
42. The court takes the view and holds that the claimant was not afforded and accorded a fair and reasonable opportunity to present his defence and he was thus not heard within the meaning and context of the provisions of the law and more so Sections 41, 43, 44, & 45 of the Act.



43. In the circumstances, and in view of all the foregoing, the court finds and holds that the claimant was not afforded and accorded both substantive and procedural fairness before the dismissal.

VII. Reliefs

29. Having held that dismissal of the claimant by the respondent was wrongful, unfair, and unlawful the court shall now consider each of the reliefs sought as set out in the introductory part of this judgment.
30. Prayer (a) is for a declaration that the dismissal of the claimant was discriminative, malicious, unlawful, unfair, and unprocedural. This issue has been tackled and decided in the foregoing paragraphs of this judgment and an order shall issue accordingly.
31. Prayer (b) is for compensation under Section 49 of the Act. The claimant has pleaded for the maximum compensation equivalent 12 month's gross salary of Kshs1,620,500/=. Section 49(4) of the Act provides for some of the factors that this court ought to consider in determining the appropriate award in compensation for unfair and unlawful dismissal or termination. The claimant testified that his branch was performing poorly but performance in his personal capacity was not questioned. The respondents did not provide evidence to prove that the claimant contributed to the alleged poor performance. The respondent submits that the claimant is only entitled to two months' salary compensation, if at all. The claimant testified that he is engaged in business signaling that he obtained alternative occupation after the dismissal.
32. Compensation is essentially not aimed at punishing an employer but rather intended to compensate an employee for the loss of salary or earnings bar the dismissal or termination. The court takes the view that this is not an appropriate case for the award of the maximum 12 months' gross salary in compensation. The court considers compensation equivalent to ten months' gross salary to be fair compensation in the entire circumstances. The same is calculated at Kshs70,000/= (the last salary) *10= Kshs700,000/=.
33. Prayer (bb) is for one-month salary in lieu of notice. The court has found that the dismissal was wrongful, unfair, and unlawful. The claimant was a month-to-month employee and hence the notice applicable is for one month or payment of one months' gross salary in lieu thereof as per clause 10 of the letter of appointment/contract dated 30th April, 2019. The claimant admitted that he agreed to a pay cut as evidenced by the letter dated 4th April, 2020. There is no evidence that this position ever changed before the claimant's dismissal. The record of the minutes of the appeal hearing held on 16th December, 2020 indicates that the claimant admitted that he was being paid 35% of his salary being Kshs35,000 plus allowances. This position was not rebutted. The allowances in Clause 5 of the letter of appointment/contract were a mileage allowance of Kshs15,000/= and an entertainment allowance of Kshs20,000/= per month. The claimant was thus earning a gross salary of Kshs70,000/= as at the time of his dismissal. The claimant is hence awarded Kshs70,000/= under this head.
34. Prayer (bbb) is for reinstatement of the claimant to the managerial position that he held prior to the dismissal. Section 12(3)(vii) of the *Employment and Labour Relations Court Act* provides that an order for reinstatement of an employee can only be made within three years of dismissal. The claimant was dismissed on 2nd December, 2020. Three years lapsed on 2nd December, 2023 or thereabout. The court lacks the jurisdiction to make that order. The parties, and more so the claimant, did not express willingness to re-engage. As was held in *Giella V Cassman Brown* a court has to be careful in making orders for specific performance in cases of personal service. Employment is such one personal service.
35. Prayer (c) is for a certificate of service under Section 51 of the Act. No lawful explanation has been advanced by the respondent as to why the claimant has not been issued with a certificate. The issuance of the same should be unconditional. The court orders that a certificate of service be issued by the



respondent to the claimant and that the same be delivered to his counsel on record within 30 days of this judgment.

36. The other prayer, which appears to have been abandoned, is for service pay/gratuity of Ksh67,500/=. No evidence was adduced that the claimant was entitled to gratuity under the contract. Gratuity is paid if and where the same is agreed upon and or provided for in the contract of service. For this reason, this prayer is denied. As for service pay, the pay-slips produced by the respondent for May 2020 and July 2020 indicate that deductions payable to National Social Security Fund (NSSF) were remitted on claimant's behalf. Additionally, under clause 5 of the letter of appointment, 7.5 % of the claimant's basic salary was deductible for a contributory pension scheme. Therefore, gratuity and or service pay is not payable to the claimant under Section 35 of the Act.

VIII. Costs

37. The claimant is awarded costs of the cause.

IX. Disposal/orders

38. The court issues the following orders –
- a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
 - b. The claimant is awarded a total of Kshs770,000/= together with interest thereon from the date of this judgment less statutory deductions. The said sum is made up as follows –
 - i. Compensation for wrongful and unlawful dismissal.....Kshs700,000/=
 - ii. One month's gross salary in lieu of notice..... Kshs70,000/=Total..... Kshs770,000/
 - c. Certificate of service should be issued by the respondent to the claimant and the same be delivered to his counsel on record within 30 days of this judgment.
 - d. Costs of the cause to the claimant together with interest.
- The award is subject to statutory deductions.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 31ST DAY OF OCTOBER, 2024

.....

DAVID NDERITU

JUDGE

