IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUIYOTT, MUCHELULE & ODUNGA, JJ.A.)

CIVIL APPEAL NO. 330 OF 2019

BETWEEN

DR. KENNEDY AMUHAYA MANYONYI.....APPELLANT

AND

AFRICAN MEDICAL AND RESEARCH FOUNDATION....RESPONDENT

*(Being an application arising from the judgment of the Employment and Labour Relations Court at Nairobi (**Onesmus Makau, J.)** dated 2nd November 2018*

in

ELRC Cause No. 53 of 2014)

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JUDGMENT OF THE COURT

[1] The subject of this appeal is a performance-based termination of an employment contract of Dr. Kennedy Amuhaya Manyonyi (**the appellant**) with African Medical and Research Foundation (**AMREF**) (**the respondent**) communicated through a letter of termination dated 1st July 2013 and served on him on 2nd July 2013.

[2] Prior to the termination, the appellant held the position of Chief of Party with the respondent's Aphia Plus Marisha (**Aphia**) project on a two-year contract commencing on 10th April 2012. Whether or not he performed to expectation in his short stint is a matter of controversy.

[3] It was the contention of the appellant that he received a positive

appraisal from the respondent specifically from his immediate

supervisor, the County Director, for the period of 10th April 2012 to 9th October 2012. Again, from the Director for November 2012, and for holding fort and doing a "great job" while acting as a County Director for the period 17th December 2012 to 21st January 2013.

[4] The appellant was therefore taken aback by events that soon followed.

On 20th March 2012 he was invited for a meeting, without notice, with the County Director, which metamorphosed into a review of his performance. On 17th May 2013, he was invited for a coaching meeting, without agenda, by the County Director which again transformed into a meeting for review of his performance. In the latter meeting, serious allegations were made in respect of his performance, which he responded to in an email of 21st June 2013. He complained that the issues raised in the reply were neither investigated nor rebutted.

[5] Matters moved quickly thereafter. By a letter of 24th May 2013, the respondent revised the appellant's contract of service as Chief of party Aphia to a Programme Manager in another project with effect from 1st June 2013, a re-deployment protested by the appellant as unilateral and in breach of section 10 of the Employment Act, 2007. The appellant declined the re-deployment in a letter of 24th May 2013 in which he gave a response to the issues raised in the letter of redeployment.

[6] The refusal was met with a show cause letter of 6th June 2013 in which the respondent gave the appellant ***"an option of holding the position of HIV/AIDS, TB or Malaria Programme Manager in the interim with effect from June 10th, 2013 or stepping aside pending a fair hearing that will be held within 30 days from June 10th 2013"***. The appellant responded to the show cause letter through a letter of 10th June 2013 which elicited no response. On 11th June 2013, the appellant sought the intervention of the Director General of the respondent. On 12th June 2013 the County Director communicated to the appellant's colleagues that the appellant was no longer the Chief of Party effective 10th June 2013.

[7] The respondent paints an unglamourous picture of the appellant's tenure. It asserts that the appellant's performance was below expectation which put the Aphia project in jeopardy leading to the 20th March 2013 meeting in which the appellant's areas of underperformance were pointed out. These included; donor's rejection of a work plan; the appellant's failure to consult on project matters; appellant's poor external relations with partners and the Government; the appellant's laxity towards compliance related issues; and the appellant's failure to bring together his team. The appellant admitted the weaknesses and promised to improve. Consequently, the respondent issued the claimant with a verbal

warning as provided for in the respondent's Human Resource Policy and Procedure Manual.

[8] It was the respondent's case that the appellant was unwilling and/or unable to improve on his performance, specifically by failing to; attend meetings with donors; improve on the quality of his work and on his communication skills. Further, delay in executing his duties. This led to the meeting of 17th May 2013, in which responses by the appellant to areas of underperformance demonstrated that he could not effectively improve on his leadership of the project. As there was a sense of urgency to meet the project deliverables, a decision was made to re-deploy him.

[9] Regarding the notice to show cause that came after the appellant's refusal to take up the redeployment, the appellant informed the respondent that he would not attend the show cause meeting on 18th June 2013 as he was unwell. Subsequently, however, in a letter dated 24th June 2013, he declined to attend the meeting. A decision was then made to terminate the appellant's contract of employment.

[10] These, in a nutshell, are the rival positions taken by the parties to the claim filed in Industrial Court Cause No. 83 of 2014 (subsequently ELRC Cause No. 53 of 2014). In that claim, the appellant sought judgment against the respondent for:

> ***"(a) A declaration that the termination of the claimant's contract of service was unfair, unlawful and premised on invalid grounds;***
> ***(b) US$ 119,659.00 in compensation;***

(c) Accrued benefits scheme dues or provident fund dues;
(d) Costs; and
(e) Interest.

[11] After considering the pleadings, evidence of the appellant and that of Shadrack Kiptoo Kirui on behalf of the respondent; and the documents filed, the trial Judge (**Onesmus N. Makau, J**.) carved out two issues for determination: whether the termination of the claimant's contract was unfair; and whether the reliefs sought should be granted.

[12] To the first issue, the trial court held that the respondent had proved that the claimant was guilty of poor performance of his duties, and ***"as such the termination was justified by the said valid and fair reasons."*** In addition, that procedure followed in the termination of employment was fair. Regarding the relief to grant, the trial court awarded two months' salary in lieu of notice being USD 16200 and leave days being USD 77788.461 which were not disputed by the respondent and which had in fact been offered in the termination letter.

[13] Those are the findings that aggrieved the appellant and are escalated to us for review in this appeal. At plenary hearing, learned counsel **Mr. Otieno Wills** representing the appellant identified three grounds of appeal, two of which are co-joined, to be the gravamen of the matter before this Court. It was contended that the trial court erred in failing to consider the import of performance improvement plans (PIP) in

Employment and Labour Relations and erred, further, in not finding that the respondent failed to provide a detailed performance plan that involves setting out a detailed training plan, timelines, targets to be met before determining that the appellant had failed to improve. The third ground was that the learned judge erred in failing to find that the respondent did not adhere to and adopt its own Human Resource Manual in terminating the contract of the appellant.

[14] The appellant argued that his termination, effected by a letter dated 1st July 2013 and predicated upon grounds of poor performance, was marred with illegalities/was unprocedural/unlawful and lacked fairness. Citing the decision in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited** [2014] KEELRC 905 (KLR), it was

contended that the trial court erred by observing that, although there was no performance appraisal immediately preceding his termination, the appellant had failed to improve upon certain areas highlighted in his October 2012 appraisal, of mention are leadership, communication, and management skills concerning his team, donors, supervisors, and the Government of Kenya. The appellant submitted that the trial court's reliance on the appraisal conducted in October 2012 did not accurately reflect his true and actual performance. The appellant cited the judgment in **National Bank of**

Kenya v Anthony Njue John [2019] KECA 445 (KLR) which

reinforced the principle in **Jane Samba Mukala v Ol Tukai Lodge**

Limited Industrial Cause Number 823 of 2010; (2010) LLR 255

(ICK) (September, 2013), that poor performance, when used as a reason for termination, must be demonstrated at a high level of proof. Furthermore, the employer bore a duty to demonstrate that it had put in place an employment policy or practice on how to measure good performance against poor performance. It was imperative for the employer to show what measures were in place to enable it assess the performance of each employee and what steps it had taken to address poor performance once identified, asserting termination for poor performance without establishing the effort leading to the decision was insufficient. On procedure, the appellant asserted that the law mandated that beyond having an evaluation measure, an employee facing termination for poor performance must be given an explanation on her/his poor performance so the employee could defend herself/himself or be given an opportunity to address the weaknesses. If termination was decided, the employee must be called again, in the presence of an employee of their choice, and the reasons for termination shared. The appellant highlighted the observation in

Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause

Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) that "*the employer has the duty to demonstrate that upon the appraisal of the employee and there was a finding of poor*

performance, measures were taken to give the alleged poor performing employee training and

timelines within which to show improvement". Given that employees in such work environments are typically appraised, the appellant argued that if he had been appraised and found wanting, a training could have been recommended to address any weaknesses.

[15] Regarding the show cause letter on 6th June 2013, the appellant contended that his fate had already been sealed, hence his reluctance to respond to it. The appellant reiterated that it was the respondent's responsibility, when noting underperformance, to first appraise the employee and, if found to be performing poorly, to give the employee a chance to defend himself based on the appraisal. He maintained that all these procedures, including warnings and emails circulated, were an indicium that he was to be terminated before he was asked to appear for the disciplinary hearing.

[16] The appellant relied on the case of **Justice Amraphael Mbogholi**

Msagha V Chief Justice of The Republic of Kenya & 7 others

[2006] KEHC 3497 (KLR) to support his argument regarding the denial of a fair hearing. The appellant emphasized that the essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives the employee of his views. The decision highlights the

ingredients of fairness and natural justice that require, firstly, that a person be allowed an adequate opportunity to present her/his case; secondly,

that no one ought to be judge in his or her case (that the decision-making authority must be unbiased); and thirdly, that the administrative decision must be based upon logical proof or evidence material. The appellant argued that he was not accorded a fair hearing when the decision to terminate his services was made because it was made way before any formal hearings were convened or accorded an opportunity to defend himself.

[17] Related but on another front, it was asserted that the learned trial Judge erred in law and fact by failing to consider and apply the internal human resource manual of the respondent when determining the lawfulness of the termination. The appellant noted that the show cause letter dated 6th June 2013 cited poor performance regarding key targets, weak stakeholder relationship management, poor functionality of the project team, and complacency in handling compliance matters, new allegations in addition to those made earlier. The appellant emphasized that the Human Resource Policy and procedure manual required that for poor performance (Clause 8.3.1) the employee be interviewed by his supervisor and given a verbal warning followed by a written warning setting out details and requiring them to remedy the situation, and detailing any training or support provided. The appellant argued that the conditions precedent to issuing a written warning were not adhered

to, and it was clear that no training or support to remedy the situation was ever accorded to him as required by clauses 8.3.1 and 8.3.2.

[18] The respondent's answer was that the facts, subject of the appeal, were largely uncontested, specifically that the appellant's contract was for a fixed period of two years from 22nd March 2012 to 21st March 2014, did not provide for automatic renewal and was terminated on 1st July 2013 on grounds of poor performance. The respondent asserted that the appellant's claim that his poor performance was unsupported by law or facts was deliberately misleading. Evidence presented demonstrated that in the first six months of employment (April 2012 to October 2012), the appellant faced challenges, which were reflected in his appraisal where he scored a 'C (Fair)' rating, requiring him to improve on key areas, including enhancing strategic partnership relationships with the USAID AOR, the Government of Kenya (GOK), and Provincial Directors and DHMT. The assessment highlighted key areas for improvement, *inter alia*, the need to ensure his staff had clear performance objectives, targets, and deliverables, and to improve on nurturing strategic relationship management with the USAID AOR and team, with the GOK especially the Provincial Directors and DHMT. The respondent stressed that the negative feedback at his initial appraisal regretfully continued and ultimately led to his termination after he failed to improve. The

evidence was that the appellant continued to receive negative feedback from USAID

(the main donor). Specifically, on 21st January 2013, the respondent's Country Director referenced an email mentioning "*USAID feedback dampening our spirits*". The appellant was in charge of the project that had received this feedback. The respondent noted that the project, APHIA, headed by the appellant, continued to face challenges and was at risk of being compromised.

[19] To address the performance issues, the respondent held a meeting with the appellant on 20th March 2013 to review his performance and address concerns relating to his underperformance as head of the project. During the meeting, the appellant agreed to work on his relationship with the donor, consult more with everyone, and use the power of listening and silence to improve working relationships. The respondent issued the appellant with a verbal warning, which the appellant accepted. Despite this intervention, the appellant failed to improve. On 25th April 2013, a USAID representative wrote to the respondent, pointing out errors and raising concerns about the project's general achievement being below expected targets. The appellant acknowledged the errors and his underperformance and vowed to implement quickly. Further complaints were raised by USAID on 8th May 2013. On 15th May 2013, the appellant failed to attend a critical Chief's Breakfast hosted by USAID, a very important strategic meeting. The respondent's Country Director

subsequently wrote to him, raising concerns over his casual approach in handling

donor relationship, and gave him a warning. The respondent submitted that the appellant was offered redeployment to the Programme Manager-HIV/AIDS, TB & Malaria position on 24th May 2013 due to his failure to improve his performance, quality of work, and communication skills, which made him unsuitable for the position of Chief of Party. The appellant requested further time to consider the redeployment and then wrote back on 3rd June 2013, maintaining that he was not amenable to the redeployment.

[20] The respondent maintained that the termination of the appellant's employment on grounds of poor performance was lawful, fair, and justified because it falls within the band of reasonableness. We were asked to consider the opportunities and assistance afforded to the appellant to help him improve his performance. The respondent relied on the decision in **CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona** [2015] KECA 919 (KLR), that in adjudicating on an employer's conduct, an employment tribunal should not substitute its own views for those of the employer. The court's role is limited to determining whether the employer had reasonable grounds to dismiss the employee, looking at the range of reasonable responses test. Further, we were invited to uphold the trial court's finding that the termination was fair, citing **Ramji Ratna & Company Limited v Wood Products (Kenya) Limited** [2007] KECA 233 (KLR) a

decision

to the effect that an appeal court will only interfere if the trial judge

based findings on no evidence or a misapprehension of the evidence or acted upon wrong principles. The respondent concluded that it had proved, on a balance, that the termination was fair, and the appellant had merely alleged his termination was unfair without any proof or justification. The respondent further stressed that the burden of proving unfair termination rests solely on the employee who alleges it, citing **Lockwood Girls High School v Wasike (Civil Appeal 38 of 2018) [2024] KECA 360 (KLR)**.

[21] Regarding due process, which the appellant challenged on grounds of breach of the HR manual (Clause 8.3.1 and 8.3.2) and the Employment Act, the respondent argued that its internal human resource manual was followed before the termination. Following the initial verbal warning, a written warning was sent via email on 21st May 2013. A Notice to Show Cause Letter was issued on 6th June 2013, to which the appellant responded on 10th June 2013. The appellant was then invited to a disciplinary hearing on 19th June 2013, where he was informed of his right to be accompanied by an AMREF colleague of his choice. The appellant wrote to the respondent indicating that he was unwell and the respondent agreed to postpone the hearing. However, the appellant wrote on 24th June 2013, indicating he would not attend the disciplinary hearing, claiming the allegations were not proved and his fate had already been predetermined. The respondent

argued that the appellant was

estopped from claiming lack of a fair hearing because he failed to utilise the opportunities given in the internal process, citing **Mathew Lucy Cherusa V Poverelle Sisters of Belgamo T/A Blessed Louis Palazzalo Health Centre (Cause 1845 of 2011)** [2013] KEHC 4256 (KLR). The respondent further relied on **Wanyagah v Market Development Trust t/a Kenya Markers Trust (Civil Appeal 356 of 2017)** [2023] KECA 998 (KLR) for the holding that an employee who had been given valid reasons and invited to defend himself, but declined the option, could not subsequently claim the termination process was unfair. The respondent also noted that the appellant's failure to improve his performance and communication skills led to the determination that he was unsuitable for the position, prompting the offer to redeploy him to the Programme Manager-HIV/AIDS, TB & Malaria role, which the appellant declined. The respondent submitted that the termination was procedurally fair and met the statutory threshold for fair termination under sections 41, 43, 45, and 47(5) of the Employment Act.

[22] Finally, concerning compensation, the respondent submitted that the appellant was not entitled to the orders sought because the termination was justified and procedurally fair. The respondent

argued that this Court should not disturb the trial court's position unless the judge misdirected himself, citing **National Bank of Kenya v Samuel Nguru Mutonya** [2019] KECA 404 (KLR), which limits the

court's role to examining the circumstances of employment termination. The respondent maintained that an appellate court should not interfere unless the trial judge based conclusions on no evidence or a misapprehension of the evidence, or if the judge acted on wrong principles. The respondent reiterated that they had proved that the termination was justified and that due process was followed, which negated the appellant’s prayer for compensation. The respondent noted the statutory limit on compensation for unfair termination under Section 49(1)(c) of the Employment Act 2007, which provides that the employer may be required to pay compensation equivalent to a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary at the time of dismissal. Furthermore, it was emphasized that the power to award remedies under Section 49 was discretionary and must be exercised judiciously. Relying on **Kenya Revenue Authority & 2 others v Darasa Investments Limited** [2018] KECA 358 (KLR),

the respondent argued that the Court should not interfere with the exercise of judicial discretion unless the judge misdirected himself or demonstrably committed a palpable error or injustice. The respondent submitted that the appellant failed to demonstrate any substantial economic injury. The respondent relied on the holding in

Hema Hospital v Wilson Makongo Marwa [2015] KECA 190

(KLR**)**

which cited with approval the case of **Le Monde Luggage cc t/a**

Pakwells Petze vs. Commissioner G. Dun and others, Appeal Case

No. JA 65/205, in which the Labour Appeal Court of South Africa established that compensation must be made to the wronged party primarily to offset the financial loss resulting from a wrongful act. The purpose of compensation, according to the respondent, was to determine the extent of the loss, taking into account the nature of the unfair dismissal, and not to punish the employer. The respondent thus submitted that the appellant's termination was justified and procedurally fair and as such he is not entitled to compensation. The respondent urged this court to uphold the decision of the trial court and dismiss the appeal with costs, relying on the principle that costs follow the event, as supported by **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another** [2016] KEHC 7064 (KLR).

[23] The role of a first appellate court is to re-evaluate as well as examine fresh evidence tendered before the trial court and to arrive at its own conclusions having regard to the fact that it has not seen or heard the witnesses, and give allowance for that. This position was stated in the case of **Selle & Another v. Associated Motor Boat Company Ltd. & Others** [1968] EA 123 as follows: -

> ***"… This Court must consider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen or heard the witness and should made due allowance in that respect …" [See also***

Jivanji vs Sanyo Electrical Company Ltd. (2003) KLR 425]

[24] As the subject of this appeal is a performance-based termination, we are called upon to examine whether the respondent had a framework for measuring the performance of the appellant, if it appraised the performance of the appellant and if found wanting, measures taken to shore up his performance before a decision was arrived at that he was unwilling or incapable of improvement. A second issue we are called upon to determine is whether the termination was procedurally fair and in compliance with the contract of service between the two parties.

[25] A survey of case law (see for example **Jane Samba Mukala v Ol Tukai**

Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR

255 (ICK) (September, 2013) cited with approval by this Court in

National Bank of Kenya v Samuel Nguru Mutonya

[2019] KECA 404 (KLR)) suggests that the law on performance-based termination in Kenya is gravitating towards the following principles. The employer should have a framework, it need not be elegant or elaborate, for measuring performance of an employee. Where the employer is of the opinion that the employee is falling short of performance, it should appraise the employee's work performance, warn the employee that if her/his work performance will not improve, she/he faces the risk of dismissal and allow the employee reasonable opportunity to improve. Of course, an employee cannot be guilty of underperforming where he/she lacks

support to perform.

[26] While this is also the law elsewhere, the requirements may not apply in all instances in some jurisdictions. Two instances are explained by the Labour Appeal Court of South Africa in **Somyo P vs Ross Poultry Breeders (Pty) Ltd (JA9/97) [1997] ZALAC 3 (26 June 1997)** as follows: -

> ***"An employer who is concerned about the poor performance of an employee is normally required to appraise the employee's work performance; to warn the employee that if his work performance does not improve, he might be dismissed; and to allow the employee a reasonable opportunity to improve his performance: Craig v Rubdec (Pty) Ltd t/a Guys and Girls (1992) 1 LCD 29 (IC); James v Waltham Holy Cross UDC [1973] IRLR 202. Those requirements may not apply in two cases which are relevant to this matter. The first is the manager or senior employee whose knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer: Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318 (IC) at 324F-G; Blue Circle Materials Ltd v Haskins (1992) 1 LCD 6 (LAC). The second is where "... the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal.": Taylor v Alidair Ltd [1978] IRLR 82. Examples given in Taylor's case are the passenger carrying airline pilot, the scientist operating the nuclear reactor, the driver of an articulated lorry full of sulphuric acid and the chemist in charge of research of the possible effects of, for example, thalidomide."***

[27] A debate as to whether the requirements should apply to an employee like the appellant who held a senior position of Chief of Party has been avoided here because the service agreement

between the appellant and the respondent has a staff appraisal component

embedded in Human Resource Staff Policy and Procedure Manual with the consequence that any performance-based termination would have to meet the performance improvement protocols.

[28] The appellant has made heavy weather of the following findings by the trial court;

> ***"In this case, the reason for termination was lack of capacity, that is, poor performance. Although there was no performance appraisal just before his termination, he had failed to improve on certain arrears highlighted by his appraiser in the October 2012 appraisal including leadership, communication and management skills with his team, donors, his supervisors and the Government of Kenya. In particular, he failed to attend crucial meetings with donors, failed to improve quality of his work, delayed in executing his duties like sending programme to visiting donors and failed in improving his communication skills with his team and the external agencies. The Claimant admitted in writing some of the said performance failures and even apologized for the same in writing. Consequently, I find on a balance of probability that the respondent has proved on a balance of probability that, the Claimant was guilty of poor performance of his duty and as such the termination was justified by the said valid and fair reasons."***

[29] While it is true that the termination came on 1st July 2013 some eight

(8) months after the appraisal of October 2012, it is also true that the termination was before the date when his next appraisal was due. The more important issue, we think, is whether there was underperformance immediately prior to the termination which did not improve, notwithstanding an opportunity and support for

improvement. Auxiliary is whether there was procedural rectitude in the termination process.

[30] It is common ground that in the intervening period, on 20th March 2013, a review of the appellant's performance was conducted. Although the appellant now complains that he did not have notice that the meeting would be discussing his performance and that it simply metamorphosized into a review session, there is no evidence that he objected to the meeting proceeding as it ultimately did. Indeed, the minutes of the meeting, whose accuracy was not contested by the appellant, shows that he concedes to underperformance. Specifically, he "*promised to work on his weakness and the actions points*". Consequently, he was issued with a verbal warning in front of his supervisor and a Meshack as a witness. This meeting, we hold, substantially complied with Clause

8.3.1 of the Human Recourse Manual on verbal warning.

[31] There are then the provision of Clauses 8.3.2 and 8.3.3 of written and final written warnings respectively. They read:

> ***"8.3.2 Written Warning***
>
> ***For a major offence, poor performance, or if there is no improvement following a verbal warning, the employee will be interviewed by his or her supervisor and a written warning issued if appropriate. The written warning will set out details of the misconduct or poor performance, the action required by the employee to remedy the situation, the period of review, and details of any training or support to be provided. A copy of the written warning will be placed in the***

employee's file but will be disregarded for disciplinary purposes after

one year, subject to satisfactory subsequent conduct and performance.

8.3.3 Final Written Warning

This stage will be implemented where the misconduct is sufficiently serious to warrant only one written warning but insufficiently serious to justify dismissal or where there is no improvement following a written warning. The employee will be interviewed by the HR Manager and a member of the Senior Management Team and a final warning will be issued giving details of the offence and warning that dismissal will result if there is insufficient improvement. A copy of the final written warning will be kept in employees filed for a period of two years subject to satisfactory subsequent conduct and performance."

[32] It is contended by the respondent that the underperformance of the appellant persisted and another meeting held on 17th May 2013 was to review this continuing states of affairs. There is no evidence that this meeting complied with the strictures of Clauses 8.3.2 or 8.3.3. There is no evidence that the appellant was interviewed by his supervisor and a warning letter issued. Instead, a decision was made to redeploy him. The noncompliance with procedure was readily conceded to by Shadrack Kiptoo Kirui, the Human Resource Manager, who in his evidence stated:

"Page 55 Clause 8.3.2 – employee on poor performance is supposed to get warning under clause 8.3.2 - that warning was not given to him."

[33] The failure to adhere to this procedure notwithstanding, there is evidence of under performance by the appellant even after he had received a verbal warning on 20th March 2013. As illustration, on 25th

April 2013, the appellant acknowledged errors pointed out to him by a Ruth Tiampati. Again on 17th may 2013 he writes to Ruth relating work under his docket, "*this item has been long delayed and I am both embarrassed and very apologetic.*" This persisting underperformance must be viewed against the backdrop that the appellant's "C" appraisal of October 2012 cannot be said to be glorious nor can his conceded underperformance in the March 2013 meeting. There is merit, we find, in the argument by the employer that in the end, the termination of the appellant's employment on grounds of poor performance was justifiable and that he had been offered reasonable opportunity and support to improve.

[34] Yet in so far as the employer breached the procedure it had signed up to follow, the termination was unlawful. The respondent acted in haste when it abridged the procedure set out in clause 8.3.2. On this, we reach a different outcome from that of the trial court.

[35] Regarding damages, whilst the appellant had sought damages equivalent to 12 months' gross salary, we think that damages equivalent to two (2) months gross salary sufficiently compensates him for the procedural infraction. He contributed to his circumstances by failing to improve his performance notwithstanding opportunity and support and there can be no reason to award him the maximum compensation contemplated in

section 49(1) of the Employment Act.

[36] Ultimately there is partial success in the appeal. The judgment of the ELRC of 2nd November 2018 is hereby set aside and, in its place, we find that the termination of the appellant was unlawful, for which we award him two (2) months gross salary less any statutory deductions. There shall be interest on the amount at court rates from the date of the judgment by the trial court being 2nd November 2018. Parties shall bear their own costs both here and at trial.

Dated and delivered at Nairobi this 23rd day of January 2026.

F. TUIYOTT

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.