REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

APPEALS DIVISION

APPEAL NO. E235 OF 2024

MWENDE MBAE…….
APPELLANT

VERSUS

BEAN INTERACTIVE LIMITED……. RESPONDENT

(Being an appeal from the Judgment of Hon. H.M. Ng'ang'a delivered on 15th July,2024 in Milimani CMEL 340 of 2024.)

JUDGMENT

1 By a memorandum of appeal dated 13th August, 2026, the appellant appeals against the Judgment of Hon. H.M. Ng'ang'a delivered on 15th July, in Milimani CMEL 340 of 2024 on grounds inter alia

a) **THAT** the Learned Magistrate erred in fact and law in finding that the dismissal of the Appellant by the Respondent was fair and lawful thus ignoring the evidence to the contrary including but not limited to the Respondent's offer to settle the Appellant by paying three (3) months' salary.

b) **THAT** the Learned Magistrate erred in fact and law in failing to properly frame, consider and determine one of the main issues framed by the Claimant on whether the Claimant's employment was terminated unfairly by the Respondent

as per the reasons advanced by the Respondent.

c) **THAT** the Learned Magistrate erred in law and fact in arriving at a decision that the Claimant had failed to discharge the burden of proof in terms of **Section 47 (5) of the Employment Act, 2007** thus unfairly relieving the Respondent from the burden of justifying poor performance as a ground for termination of the Appellant from employment.

d) **THAT** the Learned Magistrate failed to interrogate the performance evaluation tools availed before the Honourable Court by the Respondent to determine whether the Respondent had fairly utilized them to establish a case of poor performance against the Appellant.

e) **THAT** the Learned Magistrate erred in law and fact in picking out a single incident of email dated 25th April in finding and concluding that the Appellant's performance was so bad thus ignoring the criterion test set out in binding judicial authorities cited before him by the Appellant in making a decision whether poor performance has been proved.

f) **THAT** the Learned Magistrate erred in law and fact in completely ignoring to consider whether the process of termination was fair in terms of Section 41 of the Employment Act, 2007 as well as the Respondent's Human Resources Manual.

g) **THAT** the Learned Magistrate erred in law and fact in dismissing the Appellant's claim with costs and interest to the Respondent without assigning any reasons thereof.

h) **THAT** the Learned Magistrate erred in fact and law in finding that the Appellant had not satisfied the test set in the landmark case of G M V v Bank of Africa Kenya Limited [2013] eKLR despite overwhelming evidence brought by the Appellant to show that she was targeted and terminated on account of pregnancy.

i) **THAT** the Learned Magistrate erred in law and fact in failing to award the Appellant the reliefs sought in her Memorandum of Claim.

2. The appellant therefore prayed that the appeal be allowed and the Judgment and order of the trial court be quashed and set aside the appellant further prayed for the costs of the appeal.

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3. The appeal was disposed of by way of written submissions and Mr. Manyara for the appellant submitted among others as that The Appellant was issued with a letter dated 1st August 2019 terminating her employment and at the 2nd last Paragraph of the letter, the Respondent **fronts poor performance as the basis and reason for the dismissal**. At Para. 17, 25 and 26 of the Statement of Claim, the Claimant challenged the reasons for such dismissal and the procedure utilized by the Respondent to effect the dismissal. From the pleadings and evidence, it was clear that the Appellant properly presented before the trial court a proper claim of unfair termination of employment by the Respondent as per the letter of termination. Section 47 (5) of the **Act** provides for the procedure to be followed in matters of complaints of unfair termination as follows:

> For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer."

4. According to counsel if the trial court properly framed the issues for determination, it would have been clear that the Appellant would only be required to prove that a dismissal had occurred and further, lay out *prima facie* reasons or basis why she considered the said dismissal to be unfair. It is our humble submissions that the Appellant discharged the burden as by law required.

5. Counsel further submitted that the Appellant in the body of the Claim demonstrated the fact that termination indeed occurred and why the reasons fronted for her dismissal were not valid and no fair procedure was utilized to terminate her. She proceeded and testified and furnished the court with relevant evidence to prove that indeed she was unfairly dismissed from employment.

6. All the Appellant was required to do was to demonstrate on a prima facie basis that she was a good performer to displace the Respondent's assertions of poor performance. In support of the above proposition counsel relied on the case of **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] KEELRC 323 (KLR),** where the court held as follows:

> *The interpretation given to the section by courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the*

termination. (underline added for emphasis)

7. Commenting on the interplay between sections 43 and 47(5) of the Employment Act, the Court of Appeal in **Muthaiga Country Club v Kudheiha Workers [2017] eKLR** ruled as follows:

> *"The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under **Section 47(5)** of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play **Section 43(1)** and **47(5)** of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment." (Underline added for emphasis)*

8. Mr. Manyara submitted that the trial court failed to interrogate whether the Appellant had laid out a basis on a *prima facie* manner to prove she was a good performer and hence satisfied the burden as by law required. Instead at **Paragraph 42** of the impugned Judgment, the trial court erred by making a wrong assumption of facts that **there existed no clear reasons for dismissal with both parties giving different accounts**. This was despite the fact that the letter of termination annexed was comprehensive as regards the actual reasons for termination. According to counsel, it was clear that the trial court failed to clearly differentiate between **actual reasons for termination** and the **motive behind the termination process**. The situation not being a case of constructive dismissal, it was not upon the Appellant to proffer actual

reasons for termination for adjudication by the Court. She had only prove that the dismissal process occurred but was motivated by discriminatory act.

9. Counsel, therefore submitted that the reasons for termination of the Appellant's employment which was to be adjudicated by the court were as regards fairness or otherwise and was not to be discerned by the accounts of both the Claimant and the Respondent, far from it. The letter of termination dated 1st August 2019 was clear on the actual reasons for termination being poor performance. It was this ground that the trial court ought to have properly framed and interrogated whether or not the Appellant had discharged the burden of proof that there existed a wrongful termination on account of the proffered poor performance.

10. The trial court however erred in its finding that there were two competing grounds of dismissal and the Appellant having not proved their claim of discrimination (which was not a ground for termination), thereby by extension failed to discharge her burden as required under section 47(5) of the Employment Act.

11. Counsel reiterated that the trial Court in seeking to compare side by side the actual reasons for termination and the motivation thereof fell in grave error. The court ought to have first dealt with the separate issue of whether or not there existed a fair dismissal and thereafter consider if in the process, there existed discrimination as alleged by the

Claimant.

12. In determining the separate issue of unfair dismissal, the court fell in grave error when it ruled that the Appellant had not discharged the burden in terms of section 47(5) of the Employment Act merely on account of having not proved a yet separate claim for discrimination.

13. Counsel urged the court to find that indeed as per the Appellant's Claim wherein she directly challenged the reasons fronted for her dismissal, the evidence availed of proof and testimonies of the witnesses, the Appellant indeed satisfied the burden on a *prima facie* basis as required under the provisions of section 47(5) that she was not indeed a poor performer and was not availed due process in the process leading to her termination of employment and that the trial court erred in failing to make this clear finding.

14. Regarding ground 4,5 and 7 of the appeal, Counsel submitted that the Honourable Court erred in failing to interrogate the allegation that the Appellant's performance was poor and hence arriving at an erroneous conclusion and decision. A quick perusal of the Judgement of the trial court, it is clear that the Court only analyzed the question of the Appellant's performance at **Paragraphs 53** and **54** only. Specifically, at Paragraph 53 of the impugned Judgement, the court made the following finding as regards performance of

the Appellant:

'..yet her own performance was so bad as to necessitate several complaints from the Respondent's clients.'

15. It is clear that the court merely utilized a single e-mail dated 25th April 2019 being a complaint from a client as a proof of poor performance of the Appellant. In so doing, the trial Court completely ignored the Respondent's laid out procedures for assessment and management of performance while ascertaining instances where an employee could be deemed a poor performer. It was therefore submitted that this was a grave error on the part of the trial court. While ignoring the clear performance management procedures set out and produced by the very Respondent, the court erred in equating poor performance to instances of mere negligence and which need not be subjected to performance management procedures. In this regard, counsel relied on the Canadian case of **Borden vs. Purolator Courier Ltd**, where the court stated:

"Here (Poor performance) to a large extent, the employer bases its dismissal of the Plaintiff (Employee) on the Plaintiff's incompetence. In order to establish an employee's incompetence as a ground for dismissal, ***an employer must show more than mere dissatisfaction with the employee's work and it is not enough to show that the employee was careless or indifferent.***

16. The trial Court erred in basing a mere complaint letter with proof of incompetence/poor performance. Further, the trial

court ignored this court's decision in **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR**, relied upon by the Claimant to the following:

> *'Poor work performance is an allegation that should be supported by evidence of specific performance targets, appraisal of the performance, with specific results. The Claimant had worked directly for 2 months, for the Respondent. There were no targets set for him in those 2 months which he was shown to have been appraised on and failed to meet.* ***It was alarming to hear Mutuku say that the e-mails exchanged between the Claimant and Laban constituted performance appraisal.*** *The Court has not found any evidence or material on record to conclude that the Claimant performed his work poorly.*' Underlining added for emphasis.

17. Counsel submitted that this could not displace the performance management tools agreed upon by the parties and utilized to gauge the competency of the employee. The issue before the trial court was not a question whether there existed any aspect of misconduct on the part of the employee, far from it. It was purely a question of whether the Appellant was a poor performer as per the standards set and gauged through performance evaluation instruments laid out by the Respondent. This called for clear and in-depth interrogation of the performance management tools and procedures laid out before the trial court. In the circumstances, the trial court failed to consider *the extent to which the Respondent applied their policy which guides on how to discern poor performance*. The Respondent exhibited before the trial court a comprehensive Human Resource Manual which at page 113 of the Record

explicitly deals with **PERFORMANCE MANAGEMENT** whose aim is to *measure the performance of its employees*. At Para. 10.3 thereof, the Respondent has put in place a performance review mechanism, which they properly describe as follows:

'A performance review is an appraisal of assessment of how an individual has performed against set objectives, goals and behavior/skill..

18. At **Para. 10.4** and **10.5** of the said Human Resource Manual**,** the Respondent has contracted with the employees to conduct mid-year and end year performance appraisals. **There exists no other mode or tool of measuring performance of employees in the Respondent's establishment away from the provided mid and end year appraisals.** This is such that the corrective action as provided for or contemplated in Para. 10.6 of the Policy can only kick in when the results of either the mid or end year performance appraisal records that an employee has not performed to the required standards.

19. Put in another way, an isolated act of negligence or carelessness which is not properly captured in or subject of performance review does not attract a corrective action in the form of Performance Improvement Plan. It is purely to be addressed under the rubrics of section 44 of the Employment Act. This would in effect put a PIP as a tool to be used by an employer to instantly get rid of employees in an arbitrary manner, even where evidence exists that an employee is indeed a good performer. In light of the outlined performance

management instruments availed before the trial court, the key question that the trial Court failed to frame and determine is **whether the Appellant was a poor performer due regards being on her performance appraisal results prior to her dismissal.**

20. During cross-examination, the Respondent's witness, as captured at **Pages 210 and 211** of the Record of Appeal, rightly conceded that ALL previous performance appraisals of the Appellant were positive. As proof thereof, counsel referred the court to Annexures captured at **Pages 38** and **39** of the Record of Appeal which show that in December 2018, the Appellant had scored 1.765 equivalent to **Met Expectations** while in August, 2018, she had scored 2.20 which is equivalent to **Met Expectations** as well. The Respondent's witness further during cross examination, as captured at Para. 1 at Page 211 of the Record of Appeal, confirmed that prior to being put on a Performance Improvement Plan (PIP), there were no performance appraisals that rated the Appellant as having performed **below expectations.**

21. Apart from the results of evaluation process, there existed further clear evidence proving that the Appellant was indeed a good performer but was ignored by the trial court. First, during the trial, the Appellant produced a letter dated 2nd September, 2019 signed by the Respondent's witness that described the Appellant as follows: *(See Page 31 of the Record of Appeal)*

''Mwende was always very supportive, friendly, hardworking, excellent with all duties assigned to her. She accepted her responsibilities with eagerness, and she completed them in a timely and professional manner. Mwende's attendance was exemplary, and her interpersonal skills were very polished.''

22. Secondly, the Appellant went further and produced *WhatAssp* chats dated 24.4.2019 between herself and the Chief Executive Officer of the Respondent where she was rated highly using the following words: (*See Page 32, Record of Appeal)*

'' We greatly value the contribution you make to the team and look forward to enhancing this going forward.''

23. Lastly, the Appellant was greatly valued by the Respondent and this is further underscored by the fact that the Appellant received **a substantial 40% performance salary increment** in the same month of April, 2019. There was no evidence tabled by the Respondent to prove that the salary increment was given to each and every other employee in the company. We submit therefore that there was no evidence availed before court that the Appellant was a poor performer and hence there was no basis to subject the Appellant to a Performance Improvement Plan.

24. On the flipside, Counsel further submitted, even if the Appellant was rightly to be subjected to a Performance Improvement Plan, which is denied, Para. 10.6 of the Respondent's Human Resources Manual annexed at Page 115

of the Record of Appeal provides expressly for the *First performance review* and *Second performance review.* At Page 116 thereof, the Policy is clear that **it is after the conclusion of the second performance review with no marked improvement, that a recommendation would be made for initiation of discipline against the affected employee.**

25. The court record is clear that as at the date of termination of the Appellant's employment, **she had not even completed the first performance review**. In support of this proposition, Counsel relied on the evidence availed by cross examination of the Respondent's Witness RW 1 which proceedings are annexed at page 211 of the Record of Appeal, where the witness reveal as follows:

> *'At 10.6 take of 1st performance review for Mwende, it was still her first performance review...in the case, we were still under the first performance review. There was a discussion with the Manager before 10.5.2019 to 10.5.2019 issue of non-performance was not documented..*

26. According to Mr. Kamotho, Courts have been clear and explicit that a Performance Improvement Plan must be completed as required in the Policy. It is not open for an employer to purport to commence a Performance Improvement Plan and thereafter proceed to abandon the same in favor of outright dismissal of the employee. The same constitutes an act of unfair labour practices and is a clear testimony that the reasons advanced for termination being poor performance was

not established. In support of this proposition, we rely on the decided case of **George Kabue v Nokia Siemens Networks [2014] KEELRC 1421 (KLR)**

> *In this case the Claimant's employment was terminated on grounds of poor performance based on Performance Improvement Program* ***yet no results of the evaluation were presented to the court****. The Performance Improvement Program form which was produced by the Respondent only has the indicators that were printed on the form. There were to be several evaluations, none of which was done. There was no evidence of poor performance in the evidence submitted by the Respondent*

27. Concerning ground 6 of the appeal, Counsel submitted that the Respondent equally failed to follow due process in making a decision to dismiss the Appellant from employment. There was no Notice to Show Cause issued to the Appellant based on lack of performance to pave the way for a hearing under Section 41 of the Employment Act and that the conduct by the Respondent against the Appellant ignored the import of Section 41 of the Employment Act, 2007 on **Notification and hearing before termination on poor performance before an employee of his choice.**

28. During cross examination of the Respondent's Witness as captured in Page 212 of the Record of Appeal, conceded that the Appellant was not taken through a disciplinary hearing in presence of a fellow employee prior to being terminated which is against the law. Counsel therefore submitted that the trial court erred in failing to make a clear finding that the

Respondents had not only proved validity of the reasons fronted for termination, but equally failed to follow due process. In support of this proposition, counsel relied on case of **George Kabue v Nokia Siemens Networks [2014] KEELRC 1421 (KLR)**

> *Secondly, the claimant was never taken through any disciplinary process even though the Performance Improvement Program has a note in the 1st page to the effect that if there is no marked improvement in the areas mentioned disciplinary action may be taken... I find that the termination of the claimant's employment was without valid reason and failed to comply with fair procedure as prescribed in Section 41. I therefore declare the same both unlawful and unprocedural and therefore unfair.*

29. Concerning ground 8 of the appeal, Mr. Kamotho submitted that at Para. 49 and 50 of the impugned Judgement, the trial Court correctly laid out the principles set out in the celebrated case of *GMV v Bank of Africa Kenya Limited*. The trial court rightly conceded that the Appellant indeed belonged to a protected class. However, the trial court proceed to err when it ruled that there did not exist, even on a prima facie basis, a nexus between the adverse employment decision and the Appellant's pregnancy. According to Counsel, the genesis of the issues which bedeviled the Appellant started when on **7th May 2019,** she wrote an e-mail titled, **‘'Medical Matters''** where she informed the HR Department as follows:

> ***‘**'This is to bring to your attention that I will need some urgent time off work (wed to fri) from home this week. I saw my doctor today and he requested*

that I stay off my feet to observe a particular issue I am experiencing with my pregnancy.''

30. Counsel therefore urged the Court to take notice of the fact that prior to the said date of 7th May 2019, the previous performance appraisals of the Appellant coupled with the communication dated 24th April 2019, confirmed that the Appellant was a good performer. However, all things changed drastically immediately the Respondent learnt that the Appellant was pregnant and required some time off her feet. The subsequent conduct of the Respondent clearly proves on the requisite balance of a party irked with the said confirmation and schemed to get rid of the Appellant from work on basis of being pregnant but at the pretext of poor performance.

31. Prior to the lapse of the requested and approved time off work, the Appellant was shocked to receive a calendar invitation from the Respondent headed ‘**''Account Management Concerns''** demanding her to attend a meeting which was described as crucial. it was during this crucial meeting on Friday *(*when she was supposed to stay off her feet) that the Respondent was, **for the very first time, informed of her poor performance and punished by being put on one-month probation/improvement plan to run from 19th May, 2019 to 20th June, 2019**. She was on sick leave when she was informed about her lack of performance.

32. Counsel referred the court to the contents of Para. 10.6 of

the Respondent's Human Resources Manual is correctly titled: '*Corrective Action in case of Unsatisfactory Performance*.' Correctly interpreted, it is clear that a Performance Improvement Plan is dubbed as a corrective action and **can only be implemented upon staff on a confirmation of a clear evidence of Unsatisfactory Performance, based on the results of the Evaluation and not otherwise.** He urged the court to examine the 'Ranking Guide' in the Performance Evaluation tools used by the Respondent. *(See Page 39 of the Record of Appeal).* The Court will note that a rating of 2.5 to 3 is the one deemed as 'unsatisfactory Performance.' This is the rating deemed as unsatisfactory performance necessitating corrective actions by dint of Clause 10.6 of the Respondent's HR Manual. It would lead to a bizarre situation where employees who have either met or exceeded expectations to be again deemed as having unsatisfactorily performed. **The Appellant having performed well in the period prior to announcing her pregnancy, was not a candidate of a PIP at all**. According to counsel, the Appellant as a good performer until she broke the news of her pregnancy. For record, the Appellant announced her pregnancy on 7th May 2019 and was exited on 1st August 2019 without any further performance appraisal, completion of the PIP nor even a hearing. To demonstrate the fact that the Appellant being christened poor performer and being put on a PIP was pretentious. Counsel submitted.

33. Counsel urged that the Courts have held that the Appellant's raising prima facie case of discrimination on account of pregnancy and the pretextual or limping justification of poor performance by the Respondent should be sufficient to have the trier of facts lead a conclusion that indeed the Appellant faced discrimination in the hands of the Respondent on account of pregnancy. In support of this proposition, we rely on the decided case of **GMV v Bank of Africa Kenya Limited,** were the court held as follows:

> *The Court is persuaded that the falsity of these explanations by the Respondent in justifying termination, enables the Court to infer that the employer was dissembling to cover up for a discriminatory purpose. It was not by mere chance that poor performance, in a career spanning five years, was co-incidental to the Claimant's two pregnancies. It was not by chance that the letter of 26th November 2010, alleging customers had complained against the Claimant, was authored upon the Respondent discovering that the Claimant was on her second pregnancy. These were* pretexual *termination of employment reasons. Once the employer's justification has been eliminated, discrimination is most likely to be the alternative explanation. The Claimant's* prima facie *case, combined with the Respondent's limping asserted justification, is sufficient to permit this Court as a trier offacts, to conclude that Vundi was unlawfully discriminated against by the Bank of Africa Kenya limited, on account of her pregnancies. She was deemed to be an expensive employee.*

34. In conclusion, counsel urged the Court to set aside the trial court's judgment in entirety as it erred both in law and fact in finding that the Appellant's dismissal was not wrongful and unfair. It is our submission that the Appellant clearly discharged his burden of proving wrongful dismissal as

required under Section 47(5) of the Employment Act.

RESPONDENT S WRITTEN SUBMISSION.

35. Counsel for the respondent Ms. Gakure submitted inter alia that the role of the Court as an appellate Court is found under rule 11 of the Court Rules and in the case of ***Selle & Another v Associated Motor Boat Co. Ltd & Others*** **[1968] EA 123,** where the Court stated thus:-

> *"'...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.."*

Counsel submitted that the trial court correctly found that the Appellant was not unfairly dismissed. In reaching this conclusion, the court relied on the decision in ***Matsesho v Newton*** **(Cause No. 9 of 2019) [2022] KEELRC 1554,** where it was held:

> *"Of course, the law expects an employee to provide prima facie evidence in terms of Section 47(5) of the Employment Act to prove unfair termination before the presumption [of unlawfulness of the termination] comes into play."*

According to counsel, the trial court rightly found that the claimant failed to provide such prima facie evidence in support of her claim for unfair termination. The Respondent submitted that Section 47(5) places evidential burden of proof on the Claimant to present

a prima facie case of unfair termination. It is only upon the Claimant presenting a prima facie case of unfair termination that the burden shifts to the Respondent to justify the termination. In this regard counselm relied on the case of **Peter Otabong Ekisa v County Government of Busia [2017] eKLR** where the Court sated that:-

> *"The standard of proof is set out under Section 47(5) of the Act. In terms thereof the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.*

36. According to Ms Gakuru, the Appellant's Statement of Claim(see **page 5-15 of the Record of Appeal)** claims that she believes that the reason for her termination was on the basis of pregnancy, yet she never presented any evidence to indicate that her termination was linked to her pregnancy. All the Claimant's allegations were based on own her assumptions not backed by any evidence. As correctly pointed out in paragraph 55(see page 226 of the Record of Appeal) of the Judgement, no single evidence was adduced by the Claimant to link her pregnancy to the termination.

37. Nonetheless, even if the Claimant never presented a prima facie case of unfair termination, the Respondent still

met the evidential burden of proving that her termination was in accordance with the law. The Respondent was aware that to prove fair termination, the termination has to be substantively and procedurally fair as was held in the case of **Walter OgalAnuro v Teachers Service Commission (2013)e KLR,**

38. According to Counsel, the Respondent during trial was able to prove that the reason for termination was poor performance, the Respondent produced email correspondence from several clients expressing dissatisfaction with the Appellant's performance. More specifically, on page 61 of the record of appeal, there are email correspondence indicate that Mabati Rolling Mills, who was a Client of the Respondent was complaining on the performance of the team. Notably, the account manager of Mabati Rolling Mills was the Appellant, she confirmed the same during cross examination. Similarly, on **page 67 of the Record of Appeal,** email correspondences show that the Client was pleading with the Claimant directly to try and meet a deadline as they had been disappointed before. The Client states as follows;

"*Hi Mwende....*

We are really pressed by time on this one, please priotrize and share this morning. You know we don't ask this often please assist.."

39. Further that at **page 73 of the Record of Appeal,** Unilever, a client of the Respondent wrote an email complaining on the services being provided by the Respondent. Notably, the Claimant was an account manager of Unilever, Notably on **page 74 of the Record of Appeal,** the Claimant specifically mentions the Claimant in the email and states that;

"brief given on Tuesday 30th April to have congratulatory post for the London marathon winners. The revert came on Thursday with a creative that was out of line with digital mandatories yet I had asked Mwende 1 week if she was familiar with digital mandatories..'' there are few experiences I've had with Bean that has made me question whether Bean is the correct partner for our digital campaigns.."

40. These complaints, according to Counsel, were only coming from Client who the Claimant was specifically managing, she was the Account Manager of the Clients who were complaining. It was clear that there was an issue of poor performance that needed to be addressed. These communications detailed concerns including missed deadlines, inadequate follow-up, and poor client engagement. Notably, some clients even threatened to terminate their contracts with the Respondent as a direct result of the Appellant's conduct. These complaints provided credible and objective evidence of poor performance, particularly critical in a client-facing role where service delivery directly impacts business continuity and reputation.

The Appellant was duly made aware of these concerns and was placed on a Performance Improvement Plan (PIP) as indicated on **page 88 of the Record of Appeal** to afford her an opportunity to improve. The PIP was well intended, as indicated in the in the case of **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) versus Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010)** the Court stated thus:

"*The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time...*"

41. The Respondent designed a performance improvement plan aimed at assisting the Claimant to improve, however, she failed to cooperate with the PIP process, including refusing to engage meaningfully with her supervisors or to take corrective action in response to the concerns raised. The Respondent's witness stated that there were weekly check ins in the PIP which the Claimant did not attend. Furthermore, the Claimant was aware that the overall outcome of her performance not improving would be termination of employment. According to Counsel, prior to termination, the Respondent undertook reasonable steps to support the Appellant's improvement. However, these efforts were ultimately frustrated by the Appellant's lack of

responsiveness and unwillingness to participate in the PIP process. Furthermore, the Respondent sought feedback from the Claimant's colleagues to ascertain whether she was improving(see **page 153 of the Record of appeal)** it was unanimous from her colleagues that she still had not improved. On page 77 of the record of appeal, a 360 peer review of Mwende was done which also confirmed that she had not improved. Notably, even after the first phase of the PIP ending on 29thJune 2019,the Respondent still did not terminate the Claimant and she was only terminated two(2) months later. The Respondent was very committed in assisting the Claimant improve but she never did, and was not willing to have a sit down with the Respondent on her performance.

42. The Respondent's explanation on the Claimants performance is well anchored and supported by evidence and cannot be termed as mere cover ups for terminating the Claimant on account of her pregnancy . It is the Claimant's assertion that issues of her performance only came about during her gestation period. This is false and the Respondent has tabled evidence to show that Complaints regarding her performance stem all the way from March 2019 where a client, Huawei, and the Claimant were engaged in a back and forth regarding influencers and sending the reports.**(See page 146-152 of the Record of Appeal)**

43. Further, the Claimant has not provided any evidence to challenge the Respondent's evidence on her poor performance. In fact, she does not dispute that performance was an issue, she states that putting her on PIP was a bit drastic and therefore she was supposed to be issued with a warning letter instead. It is trite law that poor performance is a valid reason for termination as seen in the Court of Appeal case in **National Bank of Kenya v Anthony Njue John [2019] KECA 445 (KLR)** furthermore, the Claimant was not willing to engage and cooperate with the PIP.

44. Ms. Gakuru further submitted that at the end of the PIP, the appellant was called for a meeting to address the issues relating to her PIP but she was unresponsive and unwilling to cooperate. This testimony is affirmed by the 360 peer review where the Claimant's laxity and unresponsive is noted and the comments by the Account Director, Betty Njiraini indicate the same(see **page 153 of the Record of Appeal)** therefore, the Claimant was not terminated unheard. In this regard Counsel relied on the case of **Ogero v CCI Kenya Limited (Appeal E008 of 2024) [2025] KEELRC 524 (KLR) (24 February 2025) (Judgment) where this Court stated as follows;**

> " *The Court takes the view that section 41 of the Employment Act is sufficiently adhered to if the employer can illustrate that an employee was heard on allegation sat hand and provided a reasonable opportunity to respond to them.*"

Counsel further relied on the case of **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR,** where the Court summarized those procedures for determining if an individual has been terminated fairly and held:

> The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision section 45 employment Act. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee. Also not to be overlooked is the conduct and capability of the employee up to the date of termination."

45. According to counsel, it was clear that the Respondent adhered to the performance evaluation tools according to the Respondent's staff policy. As indicated on **Page 115 of the Record of Appeal,** the Respondent has a corrective action policy in the case of unsatisfactory performance which entailed the following provisions that were followed to the letter. These were;

- **First performance review-** A supervisor or Manager raises concerns about a staff member and a plan is developed to hep them improve, this was done for the Appellant after a series of complaints from Clients. A performance improvement plan was developed for the Appellant which she agreed to abide by.
- **Second performance review-** this was done when Mwende frustrated the PIP process, feedback was sought for her supervisors, who all agreed that she had no intention to improve, she had not attended her weekly check ins, hence termination of employment was warranted

46. It is clear that the Performance management

mechanism adopted by the Respondent was was in accordance with the Law as stated in the case of; **Periosteum Bheekhoo v. Linksoft Group [2015] eKLR: Cause No.1232 of 2014 at Nairobi;** it was held that

"*the employer must prove that the employee was aware of performance standards, efforts were made to support improvement, and time was given for the employee to make necessary improvements.*"

47. The Respondent having proved that there was substantive and procedural fairness in terminating the Claimant, we urge this Honourable Court to uphold the findings of the trial court that indeed the Claimant's termination was fair and reasonable.

48. On the issue of discrimination on account of pregnancy, Counsel submitted that the Appellant claimed discrimination on grounds of pregnancy against her by the respondent on account of pregnancy but the trial court dismissed this assertion noting that; the Respondent's decision was motivated purely by poor performance concerns as evidence adduced through complaints in email from their clients **(Unilever, Huawei and Mabati Rolling Mill).** The email raised concerns of over missed deadlines and lack of responsiveness all attributed to the Appellant/Claimant's poor performance. As a result, the court held that the Appellant/Claimant's assertion that the termination is tainted by discrimination was speculative as the clients' raising

complaints had no knowledge of her pregnancy. The court found that the Appellant/Claimant's failed to establish a nexus between the employer's decision and her pregnancy and that she suffered adverse employment action, directly because of poor performance but not on account of her pregnancy.

49. In arriving at the same finding the court relied on the threshold set out in the case of **GMV v Bank of Africa Kenya Limited [2013] Eklr,** it was rightfully quoted as follows;

> *"All the ladies are required to do, is establish a prima facie case, through direct evidence or statistical proof, that they have been discriminated against at employment, on account of their pregnancies. Courts have stated that the employee needs to: -*
>
> - *Establish she belongs to a protected class.*
> - *Demonstrate she qualified for the job she lost.*
> - *Show she suffered adverse employment action, directly as a result of her pregnancy. She must provide prima facie proof, that other explanations by the employer are pretextual, and the real reason for termination was pregnancy.*
> - *Lastly, the employee must, as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy.*"

50. According to Counsel if the Respondent wanted to terminate the Claimant on account of her pregnancy then the same would have been done upon her revealing that she was

pregnant. There was no need for the Respondent to create a Performance Improvement Plan(PIP) that was time consuming so as to eventually decide to terminate her on account of her pregnancy.

51. Ms. Gakuru submitted that the Respondent agrees with the trial court's decision in dismissing the Appellant/Claimant's claim of discrimination on account of pregnancy and relied on the case of **Barclays Bank of Kenya LTD & Another versus Gladys Muthoni & 20 Others [20181 eKLR** which was defined as:

> "*... Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description is subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.*" She failed to provide a comparator in her claims of discrimination."

52. The respondent submits that the court rightly dismissed the allegation of discrimination based on pregnancy because there was no nexus between her pregnancy and the termination of her employment. The Respondent presented evidence that indeed the sole reason for the Claimant's termination was poor performance and not pregnancy no explanation has been accorded by the Claimant to show why

she is claiming that the termination was based on pregnancy yet the complaints against her came from people who had no knowledge of her pregnancy. In all the correspondences discussing the Claimants termination, none has addressed her pregnancy, the theme of those conversations has been her performance.

53. In conclusion counsel urged the Court to dismiss the appeal.

DETERMINATION AND DISPOSITION

54. The Court has substantially reviewed the pleadings, evidence and submissions by counsel and the judgment of the trial court and finds the main issues to be decided in this appeal to be:-

a) Whether the respondent had valid and justifiable reasons for terminating the appellant's service;

b) Whether the termination had anything to do with the fact that the appellant was pregnant hence amounted to discrimination on account of pregnancy.

55. The role of this court as an appellate court has been stated in several authorities, for instance in the case of **Peters v Sunday Post Limited [1958] EA 424** (Sir Kenneth O'Connor)

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has,

> indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of **Lords in Watt v Thomas (1), [1947] A.C. 484".**

Further in the case of ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** **[2013] eKLR** it was stated thus:

> ***"****This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"*

And the case of **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR,** where the Court of Appeal stated that:-

> *"[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"*

The appellant was terminated on account of poor performance which the trial court upheld and further the trial court found that the termination had no relationship with the appellant's pregnancy hence not discriminatory.

56. From the record, the claimant stated in her evidence

that she applied for sick leave on 7th May, 2019 which was approved and the issue of her performance was raised in May, 2019. This was confirmed by the respondent's witness Ms. Frida Meliana Akinyi Otieno who stated that the issue of the claimant's performance was raised three days after she informed the respondent of her pregnancy. It was common ground that there were no previous issues concerning the appellant's performance and that she had previously performed exemplary well. These were well captured in the trial court's judgment. It was therefore perplexing that the trial court in its judgement came to the view that the two parties gave diametrically opposed versions on the particulars of the employment relationship as well as how the relationship ended. Contrary to the finding of the trial magistrate, the appellant was clear in her contention that her termination was unfair and that it was on account of communicating her pregnancy which resulted in being placed on PIP three days after such communication. The respondent on its part denied the appellant's allegations and maintained that her termination was objective and not influenced by the disclosure of her pregnancy. The termination according to the respondent was purely on grounds of poor

performance by the appellant which was evidenced by complaints from its key clients.

57. The trial court correctly appreciated the burden of proof as apportioned by section 47(5) of the Employment Act. The trial court further noted that the appellant was invited for an urgent meeting to discuss account management concerns merely a few days after she sought a break to care of health issues relating to her pregnancy. It is therefore problematic in understanding why the trial court despite appreciating the close nexus between the appellant's communication of her pregnancy and placement on PIP still reached the conclusion that the meeting could not serve as evidence of the respondent relying on the appellant's pregnancy to set in motion plans to terminate her employment.

Whereas the trial court relying on the case of **Matsesho v. Newton KEELRC 1554** correctly acknowledged the apportionment of burden of proof between an employee and an employer as provided under section 47(5) of the Employment Act, the court however erred in taking the view that an employee must prove unfair termination first for the

employer to justify the termination. The burden of proof envisaged under section 47(5) is mutually exclusive and failure by one party does not lessen the burden of the other. For instance, an employee guilty of apparent gross misconduct such as overt theft and therefore cannot challenge the reason for dismissal, still deserves procedural process in the termination. He cannot just be told *"you are fired!"* as was the case under the old employment law. The trial Court further correctly appreciated the holding in the case of **GMV v. Bank of Africa (Kenya) Limited (2013) eKLR** regarding discrimination on account of pregnancy leading to termination of employment but erred when she concluded that the mere timing of the meeting could not serve as evidence of the respondent relying on the appellant's pregnancy to set in motion plans to terminate her employment.

58. The Court cannot claim professional knowledge on matters pertaining to pregnancy but its common knowledge that a pregnant woman undergoes significant hormonal changes and its

further common knowledge that some pregnant women develop unconventional behavioural changes such as dislike for certain foods, colours and some even resort to eating murram stones.

59. It was conceded by the respondent's witness that the issue of the appellant's poor performance arose soon after she communicated her pregnancy to the respondent and further that she had no questions over her performance previous to this. It could therefore be reasonably concluded that the issue of her pregnancy had something to do with her placement on PIP and eventual termination of service. Under section 5(7) of the Employment Act, in a claim by an employee that he or she has been discriminated in employment, the burden is on the employer to prove that there was no discrimination. The court unfortunately is of the view that the respondent failed to discharge this burden.

60. But assuming that the appellant's pregnancy had nothing to do with her perceived poor performance leading to placement on PIP and eventual dismissal, could it be said that the termination of service under such circumstances was reasonable and proportionate?

61. This Court in the case of Leon ***Yang Wang vs. Equity Bank [2023] eKLR*** stated thus:-

> *"Reason for termination of employment need not be strictly proved but must however be reasonable and proportional in the circumstances.*

Further in the case of **British Leyland UK Ltd v. Swift [1981]IRLR 91** Lord Dening stated thus:-

> The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him"

62. On the issue of proportionality, in the English case of **R v Home Secretary; Ex parte Daly [2001] 2 AC 532 it** was stated as follows concerning the proportionality test:

> "…It leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations…"

63. The foregoing having been said, this court comes to the inevitable conclusion that the trial court erred in finding that the appellant was not unfairly terminated and further that her termination had nothing to do with her pregnancy hence not discriminatory.

64. Discrimination is inhuman and degrading treatment and a violation of person's human rights protected in the Bill of Rights and under article 27 read together with articles 19, 20, 21 and 22 of the Kenya Constitution among other articles pertaining to the protection of human rights and fundamental freedoms. Further, under article 22 of the constitution, every person has a right to institute proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or threatened. These rights and fundamental freedoms are enjoyed simply by the reason of being a human being and as provided under article 19(3)(a) are not donated by the state. Therefore in any allegation that they have been violated, they are compensable independent of any provision in a statute limiting the quantum of damages payable in the event that a person proves to the satisfaction

of the court that they have been violated. In this regard, in an employment relationship they are independent of compensation provided for in the Employment Act. Any other interpretation would not only be absurd but tantamount to emasculating the enjoyment these rights and fundamental freedoms.

65. The foregoing having been said and from the analysis of the evidence, the court finds and holds that the appellant was terminated from employment on account of her pregnancy hence discriminated against and is therefore entitled to compensation under article 23(3)(e) in addition to compensation for unfair termination under section 49 of the Employment Act.

66. In assessing damages for discrimination the Court will be guided by case of **Ol Pejeta Ranching Limited v. David Wanjau Muhoro [2017] eKLR** where the Court of Appeal awarded the respondent Kshs. 7.5 million on account of discrimination in the course employment and the later Supreme Court's decision in the case of **Gichuru v Package Insurance**

Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) where the Court awarded Kshs. 2 million on account of discrimination in an employment relationship. Considering the lapse of time since the award by the Supreme Court and the nature of the discrimination the appellant was subjected to, an award of Kshs. 3 million will be reasonable in the circumstances. leave

67. With regard to compensation for unfair termination the court will award the appellant the sum of Kshs.420,000/- Being four months' salary considering the appellant was employed sometime in 2017 and was terminated approximately two years later, that is in 2019 and further that the court has already awarded her damages on account of discrimination on account of her pregnancy. The claim for Kshs. 210,000/- on account of leave and Kshs. 19,381 on account of 6 days untaken leave will be awarded if not paid already since these are statutory entitlements and were not contested by the respondent

68. In conclusion the Court determines this appeal as follows:

a) **The judgment of the trial Court Hon. Dismissing the appellant's claim is hereby set aside and substituted with an order allowing the appeal herein.**

b) **The appellant is awardes as follows:**

Kshs.

i) Unpaid maternity leave (if not paid already) …. 210,000

ii) 6 days untaken leave…….. 19,381

iii) Four months' salary as compensation for unfair termination of service…… 420,000

iv) Damages for discrimination on account of pregnancy……3,000,000

Total 3,649,381

v) Costs of the Appeal and costs in the trial Court.

69. **It is so ordered.**

Dated at Nairobi this 2nd day of March 2026

Delivered virtually this 2nd day of March, 2026

Abuodha Nelson Jorum

Presiding Judge-Appeals Division