

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E045 OF 2025

JOYCE MBULA MUTUA.....CLAIMANT

VERSUS

NAIROBI CLUB REGISTERED TRUSTEES.....
RESPONDENT

JUDGMENT

1. In her Memorandum of Claim dated 23rd January 2025, the Claimant stated that she was initially engaged by the Respondent to provide human resources consultancy services from 22nd August 2022 to 31st December 2023. She further averred that she was subsequently employed by the Respondent on 1st January 2024 as a Human Resources Officer. According to the Claimant, she discharged her duties in an exemplary manner, which warranted her transition from consultant to permanent employee.

2. The Claimant contends that on 9th October 2024, the Respondent terminated her employment in a manner that was unfair, wrongful, and unlawful. Consequently, she claims Kshs 2,289,600/- as compensatory damages for unfair

termination, Kshs 2,862,000/- for loss of expected future earnings, and punitive damages for breach of contract. She also seeks an order for costs of the suit.

3. The Respondent opposed the Claim through a Statement of Response dated 14th March 2025, asserting that the Claimant's employment was terminated fairly and in accordance with the Employment Act, her letter of appointment, and the Human Resource Policy and Procedure Manual. The Respondent further characterized the Claimant's suit as frivolous, incompetent, and unsustainable, and urged the Court to dismiss it with costs.
4. The matter proceeded for hearing on 29th July 2024 and 23rd October 2025, during which both parties called oral evidence.

Claimant's Case

5. The Claimant testified in support of her case as CW1. At the outset, she adopted her Memorandum of Claim, witness statement, and the lists and bundles of documents filed on her behalf to constitute her evidence in chief.
6. The Claimant testified that she completed her probation in June 2024. However, she was appraised by the Respondent's Chief Executive Officer (CEO) on 13th August 2024, two months later.

7. She stated that, despite scoring 66% in her appraisal, the CEO alleged that she had not met the pass mark, which he had arbitrarily set at 70%, and recommended a two-month extension of her probation. This recommendation was never officially communicated, as her appointment was instead terminated.
8. The Claimant contended that the CEO's comments regarding her performance were inconsistent with the appraisal factors and contradicted the actual score she received according to the rating.
9. She further averred that throughout her employment, she performed her duties with dedication and consistently exceeded the Respondent's expectations. As evidence of the Respondent's approval of her performance, her salary was increased from Kshs 180,000 per month to Kshs 190,800 per month within four months. On this basis, she disagreed with the appraisal and requested a more objective evaluation.
10. While awaiting a response to her request, on 9th October 2024, she received a letter dated 7th October 2024 from the CEO terminating her contract.

11.The Claimant further contended that the dismissal letter did not provide any avenue for appeal, prompting her to seek legal redress.

Respondent's Case

12.The Respondent called **Einstein Nyangeresi** to testify as RW1. He identified himself as the Respondent's Chief Executive Officer and equally, he adopted his witness statement, along with the lists and bundles of documents filed on behalf of the Respondent, to constitute his evidence in chief.

13.RW1 testified that the Claimant's position as Human Resource Officer was to be confirmed on a two-year contract, contingent upon satisfactory performance following a six-month probation period.

14.He stated that in or around April 2024, the Respondent awarded a general Cost of Living Adjustment to all staff, resulting in a 6% increase in the Claimant's gross salary to KES 190,800.00.

15.During her employment, the Claimant reported directly to the CEO, and following the completion of her probation period, an evaluation was conducted on 13th August 2024.

16. This evaluation assessed the Claimant's suitability for confirmation in the role of Human Resource Officer based on her performance over the six-month probation period.

17. RW1 further testified that he discussed the evaluation report with the Claimant, advised her on areas for improvement, and recommended an extension of her probation until October 2024. The Claimant, however, declined the proposed extension. He subsequently forwarded the evaluation report to the Respondent's Human Resource & Administration Sub-Committee on 14th August 2024.

18. The Sub-Committee concluded that the Claimant's performance was below the Respondent's expectations, as she had failed to achieve the objectives set for her.

19. On 29th August 2024, the Respondent's Main Committee reviewed the evaluation report and agreed that, given the Claimant's underperformance, refusal to accept the probation extension, and lack of improvement, it was fair to release her from her contract and pay her all outstanding dues.

20.RW1 stated that the Respondent issued a notice of termination dated 7th October 2024, which the Claimant received and executed on 9th October 2024.

21.The Respondent and the Claimant subsequently agreed on the payment of her dues, and two cheques of Kshs 406,587.00 each were issued to settle all amounts owed in accordance with her Letter of Appointment and the Employment Act. The Claimant accepted and collected the cheques in person on 4th November 2024.

Submissions

22.After the close of the hearing, the Court issued directions on the filing of written submissions. While the Respondent uploaded its submissions, the required filing fees were not paid. Consequently, the submissions were not deemed to have been properly filed.

23.On behalf of the Claimant, it was submitted that there were significant inconsistencies between the other reasons advanced for her termination and the outcomes of her performance appraisals. The Claimant further contended that if non-performance were indeed the genuine and legitimate ground for termination, the Respondent had the opportunity to end her employment before the completion of the six-month probation period.

Analysis and Determination

24. Based on the pleadings of both parties, the evidence on record, and the submissions filed, the Court has distilled the following issues for determination:

- i. Whether the Respondent has demonstrated a valid and fair reason for terminating the Claimant's employment;**
- ii. Whether the Claimant was accorded procedural fairness prior to the termination; and**
- iii. Whether the Claimant is entitled to the reliefs claimed.**

Valid and fair reason for termination?

25. In terms of **Section 43(1) of the Employment Act**, an employer is required to prove the reasons for terminating an employee's employment, failure to which the termination is deemed unfair. Further to this, **Section 45(2)(a) and (b)** provides that a termination is deemed unfair if the employer fails to demonstrate that the reason for termination is valid, fair, and related to the employee's conduct, capacity, or compatibility, or is based on its operational requirements.

26. The record bears that the Claimant was terminated on performance-related grounds. Through the letter of termination dated 7th October 2024, the Respondent notified the Claimant that, following her performance appraisal, she

had scored 66%, which was below the required 70%. It was further alleged that she had left several key assignments incomplete and that there were concerns regarding her ability to handle pressure, demonstrate initiative, and engage in problem-solving initiatives.

27. In light of Sections 43 and 45(2) (a) and (b) highlighted above, the Respondent's duty to prove the reasons for termination is unequivocal. The Court is thus tasked with determining whether, on the balance of probabilities, the Respondent has established that it was justified in terminating the Claimant's employment based on her performance.

28. Following her appraisal, the Claimant noted in the *Employee Performance Rating Record* that the evaluation was subjective and based on perception. She stated that she had not been informed of her weaknesses or cautioned to improve prior to the appraisal. As such, she requested a review in which joint SMART objectives could be set and subsequently evaluated.

29. The Respondent exhibited an extract from the minutes of the Human Resources and Administration Sub-Committee meeting held on 14th August 2024, where the Claimant's appraisal was discussed. The Sub-Committee observed that the appraisal was fair, noting that several assignments had not been completed

despite her tenure at the Respondent, first as a consultant and then as an employee. In particular, the members stated that the issue regarding the medical scheme remained unresolved despite prior directions. The Sub-Committee therefore recommended the Claimant's release, as they wondered whether extending the probation period was likely to improve performance, as the Claimant had not demonstrated that she was convinced within herself that she needed to do better.

30. It is apparent that the Sub-Committee's recommendation was subsequently endorsed by the Main Committee at a meeting held on 29th August 2024.

31. It is noteworthy that the 10 areas in which the Claimant's performance was assessed were broad and susceptible to subjective judgment. Here is why. The performance appraisal tool did not include the Claimant's Key Performance Indicators (KPIs), specific targets, expected outcomes, or timelines for achieving the targets.

32. Further to the foregoing, the assessment areas bore little or no direct relevance to the Claimant's core duties as outlined in her employment contract. For the appraisal to have been objective and fair, the broad areas of evaluation, for

instance, “*quality of work*” or “*level of knowledge, skills, and ability*”, should have broken down into measurable targets.

33. Given the generality of the assessed areas and the absence of defined KPIs, specific targets, and expected outcomes, it is highly doubtful that the Claimant’s appraisal was conducted objectively and fairly.

34. What’s more, the Respondent was obliged to provide evidence supporting the Claimant’s alleged poor performance, including details of the key assignments reportedly left incomplete. However, no such evidence was presented to substantiate this claim.

35. All in all, as the Respondent has not demonstrated that the performance evaluation was conducted in a fair and objective manner, resulting in the score of 66%, the Court finds that the Claimant’s termination was not for a fair and valid reason within the meaning of 45(2) (a) and (b) of the Employment Act.

Procedural fairness?

36. With respect to procedural fairness, **Section 45(2)(c) of the Employment Act** places the onus on the employer to demonstrate that the termination was conducted through a fair process. Further, Section 41 outlines the specific

requirements for such a process, which include notifying the employee of the allegations against them and providing an opportunity to respond, in the presence of a fellow employee or a union representative of their choice.

37. Given that the Claimant's appraisal occurred at the end of her probation period, it is pertinent to review **Section 42(1) of the Employment Act** (now declared unconstitutional), which previously provided as follows:

“The provisions of Section 41 shall not apply where a termination of employment occurs during a probationary contract.”

38. Prior to 30th July 2021, when Section 42(1) was declared unconstitutional in the case of **Monica Munira Kibuchi & 6 others vs Mount Kenya University (2021) eKLR**, employers were exempt from complying with Section 41 aforementioned in the event of termination of employment during probation, with the sole requirement being the issuance of a seven-day notice prior to termination.

39. In the present case, the Claimant was terminated from employment on 7th October 2024. In accordance with the decision in **Monica Munira Kibuchi & 6 others vs Mount Kenya University (supra)**, the Respondent was therefore

obliged to comply with the procedural requirements under Section 41 of the Employment Act.

40. The record indicates that the Claimant's termination did not comply with Section 41. In this regard, she was not notified that the Respondent was contemplating termination of her employment on account of her performance, nor was she given an opportunity to explain or defend her performance prior to the termination.

41. It follows that the Claimant's termination was procedurally flawed.

42. Regardless of the length of her employment, the Claimant did not merit termination in such a cursory manner. Although her termination followed the conclusion of her probation, she was still protected from unfair termination.

43. It is important to underscore that **Section 41 of the Employment Act** sets out mandatory procedural requirements and any deviation renders the process unfair and unprocedural. This principle was reaffirmed by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR*.

44. On the totality of the evidence before me, I cannot help but find that the Claimant's termination from employment was procedurally unfair within the

meaning of Section 45(2)(c) read together with Section 41 of the Employment Act.

Reliefs?

45. As the Court has found that the Respondent failed to establish that the Claimant's termination was for a fair and valid reason and procedurally fair, the Court awards her compensatory damages equivalent to three (3) months' gross salary. In making this award, the Court has taken into account the relatively short duration of the employment relationship and the circumstances surrounding the termination.

Orders

46. In the final analysis, the Court enters Judgment in favour of the Claimant against the Respondent as follows:

- (a) The Claimant is awarded compensatory damages amounting to Kshs 572,400.00, representing three (3) months' gross salary.**
- (b) Interest on the amount in (a) above shall accrue at court rates from the date of this Judgment until full payment.**
- (c) The Claimant is also entitled to the costs of the suit.**

DATED, SIGNED and DELIVERED at NYERI this 17th day of February 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant

Mr. Bunde

For the Respondent

Mr. Muimi instructed by Mr. Gitonga

Court Assistant

Ndati

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective

which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

ORIGINAL