

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E688 OF 2023

STEPHEN OCHIENG OKUMU.....
CLAIMANT

VERSUS

ADRIAN KENYA LIMITED.....
.....RESPONDENT

JUDGMENT

Introduction

1. In a Statement of Claim dated 22nd August, 2023 and filed in court on the 24th August,2023, the Claimant sued the Respondent alleging unfair termination of his contract. He seeks the following remedies: -
 - i. That the Claimant be paid Kshs2,383,082.40, comprising severance pay, one month's salary in lieu of notice, loss of income, and compensation for unfair termination.
 - ii. Costs of the claim
 - iii. Interest on (i) and (ii) above at Court rates
 - iv. Certificate of employment be issued
2. The Respondents entered an appearance and subsequently filed a Response to the Statement of Claim dated 5th December, 2023, denying the Claimant's claim.
3. The Claimant's case was heard on 23rd April, 2025, when he testified in support of his case. He adopted his witness

statement and produced his list and bundle of documents, which were admitted as exhibits 1-15. Upon objection by the Respondent's counsel, Exhibit Number 14 was expunged from the court record.

4. The Respondent's case was subsequently heard on 3rd November, 2025. Ms. Samantha Mugo testified on behalf of the Respondent, adopted her witness statement, and produced the list and bundle of documents filed in support of the Respondent's position.
5. Submissions were filed for both parties and have been duly considered.

The Claimant's Case

6. The Claimant's case is that he was appointed as a Warehouse Team Lead by the Respondent on 2nd February 2021 and placed on a 180-day probation period, after which he was to transition to a contractual position. He avers that he accepted the offer and later signed an employment contract on 3rd March 2022.
7. It is the Claimant's case that during the probation period, the Respondent reviewed his performance and found him suitable for continued employment, leading to his confirmation on 5th July 2022. He avers that following confirmation, he worked diligently and loyally.

8. The Claimant states that his contract was for one year with a gross monthly salary of Ksh. 85,000.
9. The Claimant further states that on 5th September 2022, he was called to a meeting and issued with a show cause letter, which he responded to on the same day. He avers that shortly thereafter, on 15th September 2022, the Respondent terminated his employment, citing alleged poor performance, only about two months after his confirmation in the Respondent's service.
10. The Claimant states that the sudden termination of his contract occurred without adequate notice, causing him significant stress, mental anguish, and financial hardship, as he had dependents relying on his income and an outstanding loan to service.
11. The Claimant states further that the abrupt termination of his employment placed him in serious financial difficulty, forcing him to withdraw his savings from his SACCO to support his family, pay school fees, and service an existing loan.
12. It is the Claimant's case that after termination of his contract, the Respondent failed to pay his terminal dues and repeatedly delayed the process by sending him back and forth regarding clearance procedures, despite the termination having been stated as "with immediate effect."

13. The Claimant further argues that requiring clearance afterward was merely an afterthought, since the immediate termination left him with no opportunity to complete the process earlier, which situation caused him additional mental distress.

14. In examination in chief, the Claimant told the court that his services were terminated on the ground of poor performance. He avers further that although he was given evidence of the poor performance, he was not given any disciplinary hearing.

15. On cross-examination, the Claimant told the court that the issues raised in the show cause letter do not relate to his performance. He further states that the concerns raised related to his department.

16. The Claimant further told this court that he was directed to respond to the show cause letter on the same day it was issued, and he avers that he did respond. The Claimant further told the court that no issues with his performance were raised prior to the issuance of the show cause letter.

17. The Claimant further told the court on cross-examination that two meetings were held, the first one being on 5th September 2022, and the second one on 15th September 2022, but which he contends were not formal meetings. He avers further that, although he attended the meetings, he was not given an opportunity to defend himself.

18. It is his position that the meeting of 15th September 2022 was neither a disciplinary hearing nor a review of his performance.

19. The Claimant confirmed that he was facing challenges at work and had raised the need for support by the Respondent through email, which he can no longer access.

20. The Claimant further confirmed that he was not declared redundant and is thus not entitled to severance pay.

21. It is his case that he presented himself at the Respondent's offices three times with an intention to clear, but that some heads of departments refused to clear him, while at other times, he was denied access. He confirmed that he has to date not cleared with the Respondent.

22. The Claimant also told the court that although he claims special damages, he does not have any receipts to prove the special damages.

23. The Claimant prays that the court allow his claim as drawn.

The Respondents' Case

24. The Respondent states that the Claimant was employed on 3rd March 2021 on a 180 day probation period, after which he was engaged as a Warehouse Team Leader under a 12 month contract beginning 5th July 2023.

25. The Respondent further acknowledges that a 12-month contractual relationship existed between it and the Claimant, but states that each contract was independent, giving it the right to assess the quality and consistency of the Claimant's services for each contract period.
26. The Respondent, however, denies the Claimant's assertion that he performed his duties diligently and satisfactorily, stating that it was dissatisfied with his services and therefore considers the Claimant's statement about his performance to be subjective.
27. The Respondent does admit that the Claimant's gross monthly salary was KES 85,000 as stipulated in his contract.
28. The Respondent states that the Claimant's employment was terminated due to poor performance. It maintains that the termination was substantively justified, arguing that an employer is considered justified in terminating an employee if the employer genuinely believed the reasons for the termination existed at the time the decision was made.
29. The Respondent denies any responsibility for the Claimant's personal socio-economic activities, stating that such matters were entirely the Claimant's personal choices. It argues that an employer-employee relationship is based on a legitimate anticipation of continued employment rather than a legitimate expectation; hence, the Claimant had only the hope of continued employment and payment under the 12

month contract, and not a guaranteed expectation of continued work.

30. The Respondent further states that the Claimant voluntarily assumed the risk of engaging in financial commitments, despite knowing that his employment was based on a fixed 12 month contract. It maintains that it cannot be held liable for the Claimant's financial obligations, emphasizing that it never entered into any agreement with third parties, such as ABSA Bank or any SACCO, nor did it guarantee or assume responsibility for any loans or financial facilities obtained by the Claimant.

31. The Respondent states that the Claimant's claims go beyond what is provided under Section 49(1) and (3) of the Employment Act, and describes the allegations as imaginative and unfounded.

32. The Respondent further states that it does not guide or influence the Claimant's personal or socio-economic decisions, including how he manages his financial affairs or lifestyle, and therefore, any financial difficulties allegedly suffered by the Claimant are considered personal matters unrelated to the Respondent, and it cannot be held responsible for them.

33. The Respondent further asserts that the Claimant voluntarily engaged in his personal socio-economic activities out of his

own choice and interest, not due to any action by the Respondent.

34.The Respondent avers that clearance procedures are a standard company process that must be completed by anyone leaving the company, whether they are current employees or former employees, before final matters can be concluded.

35.The Respondent further argues that the clearance process required after termination is a standard administrative procedure and should not be interpreted as an attempt at reconciliation between the employer and the employee.

36.The Respondent states that the Claimant is not entitled to severance pay, arguing that severance only applies in cases of redundancy, which does not apply in this situation.

37.The Respondent also denies that the Claimant is entitled to the claim for compensation for the unexpired contract period, stating that anticipatory earnings are not supported by law. It maintains that employment contracts include termination clauses, meaning there is no guarantee that an employee will serve the entire contract term, provided the termination is lawful.

38.According to the Respondent, the contract dated 5th July 2023 allowed termination by either party through 30 days' written notice or one month's salary in lieu of notice. Additionally, the Respondent argues that the Claimant is

capable of finding other employment, given that he is able-bodied and professionally qualified.

39. Finally, the Respondent denies liability for the Claimant's claimed special damages, stating that such damages arise from the Claimant's personal financial arrangements with third parties, over which the Respondent had no involvement or control.

41. On cross-examination, the Respondent's witness (RW1) told the court that the Claimant's probationary contract ended on 5th July, 2021, and not 5th July, 2023, as indicated. The witness maintains that the Claimant was dismissed for poor performance, and states that poor performance is a ground for summary dismissal under section 44 of the Employment Act, 2007.

42. It is RW1's position that an employee must be reviewed or appraised. She states that the Claimant was appraised, but that the appraisal report is not before the court. It is her further testimony that the Claimant's KPIs are also not evidence before this court.

43. It is RW1's evidence that the Claimant was issued with a show cause letter and that a disciplinary hearing was conducted, but the minutes of the hearing are not before the court.

44. She avers that the Claimant was not invited for a hearing, and was not informed of his right to have a representative

present. She further avers that the Claimant took his leave, but the leave record has not been produced in evidence before court.

45. She finally confirmed that the Claimant is yet to be paid his terminal dues.

46. The Respondent prays that the Claimant's claim be dismissed with costs.

Analysis and Determination

47. I have considered the pleadings, the evidence tendered, the witnesses' testimonies, and the rival submissions. The following issues crystallize for determination;

- a) Whether the Claimant was unfairly dismissed.
- b) Whether the Claimant is entitled to the remedies sought.

Whether the Claimant was unfairly dismissed

48. A termination/dismissal from service is unfair where the employer fails to adhere to the twin tenets of procedural and substantive fairness espoused under Sections 41, 43, and 45 of the Employment Act, 2007.

49. Section 41 of the Employment Act, 2007 states: -

“(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance (emphasis own) or physical incapacity explain to the employee, in a language the employee understands,

the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

50. By the foregoing provision, the law demands that an employee be informed of the specific allegations levelled against him/her and allowed an opportunity to respond to the allegations in the company of either a fellow employee or a union representative where the employee is a member of a union.

51. The Claimant's position is that he was issued with a show cause letter, which he was required to respond to on the same day, and which he confirmed to have responded to within the set timelines. He, however, disputed being invited to a disciplinary hearing or being informed of his right to have a representative.

52. The Respondent's position is that the Claimant was heard in a disciplinary hearing meeting held on 15th September, 2022. The letter terminating the Claimant's services is dated 15th September, 2022, which is the same date the disciplinary is said to have taken place. Further, the said letter of termination states in its paragraph 2, thus:

“Reference is made to the performance review meeting held on 05th September, 2022, and subsequently 15th September,

2022, in the presence of the HR Team and your HOD....”

53. The letter referred to above is clear that the meetings held between the Claimant and the Respondent were in relation to his performance review and not disciplinary hearings. Further, the said letter of termination does not at all refer to any disciplinary hearing on the Claimant's poor performance or any other form of misconduct whatsoever.

54. It is therefore evident that the Claimant's assertion that he was not given an opportunity to defend himself is uncontroverted, further considering that the Respondent failed to produce minutes of any disciplinary hearing.

55. RW1 further confirmed on cross-examination that the Claimant was not informed of his right to be accompanied by a representative, which further speaks to there having been no disciplinary hearing.

56. In ***Hosea Akunga Ombwori v Bidco Oil Refineries Limited (2017) eKLR***, the court had this to say on procedural fairness: -

“To satisfy the requirements of Section 41 of the Employment Act, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also

request him to respond within a reasonable time.

The notice also ought to inform the employee that disciplinary action, which might lead to termination of employment, is under consideration. In other words, the notice should be set out in clear terms.”

57. In the circumstances of this case, the court finds that the Respondent did not comply with the mandatory requirements of Section 41 of the Employment Act, hence the termination is procedurally unfair.

58. On whether the termination was substantively fair, Section 43(1) of the Employment Act, 2007, requires that an employer bear the burden of proving the reason for termination, failing which the termination is deemed unfair. Further, Section 45(2) of the Employment Act provides that termination is unfair if the employer fails to prove that the reason for termination was valid and fair, and the reason related to the employee's conduct, capacity, or compatibility, or was based on the employer's operational requirements.

59. The Respondent's position is that the Claimant's employment was terminated on the grounds of poor performance. The Claimant, on his part, asserts that his performance was above board and that it was never reviewed.

60. It is settled that where termination is based on poor performance, the employer must demonstrate that clear performance standards were set, that the employee was notified of any shortcomings and given an opportunity to improve, and that performance was evaluated objectively (See ***Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR***).

61. Further in ***Maina Mwangi v. Thika Coffee Mills Limited (2014) eKLR***, the court opined that once set, performance standards should be clear to the employee if she/he is to be accountable and responsible for their attainment.

62. Similarly, in ***National Bank of Kenya Ltd v Samuel Nguru Mutonya [2019] KECA 404 (KLR)***, the Court of Appeal emphasized that poor performance must be supported by objective evidence such as appraisal reports or performance evaluations.

63. The Respondent's witness told the court during cross-examination that they did not produce the appraisal reports and the KPIs before the court, and that there was no documentary evidence demonstrating poor performance on the part of the Claimant.

64. In the absence of such evidence, I return that the Respondent has failed to discharge the statutory burden placed upon it under Section 43 of the Employment Act.

65. Consequently, I find and hold that the Respondent has failed to substantively justify the termination of the Claimant's employment.

66. In the end, I conclude that the termination of the Claimant's employment is both substantively and procedurally unfair and unlawful, and so I hold.

Whether the Claimant is entitled to the remedies sought

67. Having found the Claimant's termination both substantively and procedurally unfair, the court now considers the remedies available to him under Section 49 of the Employment Act.

Severance Pay

68. The Claimant admitted on cross-examination that he was not declared redundant. Under Section 40 of the Employment Act, severance pay is only payable where termination occurs on account of redundancy.

69. The Court of Appeal in ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR*** affirmed that severance pay is strictly confined to redundancy situations.

70. Accordingly, the claim for severance pay fails and is dismissed.

One Month Salary in lieu of Notice

71.The Claimant's contract allowed termination through the issuance of a 30-day notice or payment in lieu. There is no evidence before the court that the Claimant was issued with a termination notice or paid in lieu thereof.

72.The claim is merited and is allowed as prayed.

Compensation for Unfair Termination

73.Under Section 49(1)(c) of the Employment Act, the court may award up to 12 months' salary as compensation for unfair termination.

74.In assessing the appropriate award under Section 49(4), the court considers the length of service, the circumstances leading to termination, and the employee's contribution to the termination, amongst others.

75.The Claimant served the Respondent for a relatively short period and admitted experiencing challenges in his department, and although he told the court that he sought support from the Respondent, he did not lead evidence in that regard.

76.Taking these factors into account, the court finds that an award equivalent to 5 months' salary is reasonable compensation for the unfair termination.

Loss of income for the unexpired term of the contract

77.The Claimant seeks payment for the remainder of the contract period. In ***D.K. Njagi Marete v Teachers Service***

Commission [2013] eKLR it was held that employment remedies under the Employment Act do not include anticipatory earnings for the remainder of a contract.

78. This position was also affirmed in **Engineer Francis N. Gachuri v Energy Regulatory Commission (2013) KEELRC 675 (KLR)**.

79. Accordingly, this claim fails and is dismissed.

Special Damages

80. It is settled that special damages must be specifically pleaded and strictly proved. The Claimant admitted that he did not produce receipts to support his claim for special damages.

81. The claim lacks legal basis, and it therefore fails.

Certificate of Service

82. Under Section 51 of the Employment Act, an employer is obligated to issue a certificate of service to an employee upon termination.

83. I therefore hold that the Claimant is entitled to a certificate of service.

84. In conclusion, the Claimant's claim succeeds, and the following reliefs are granted: -

- a) A declaration that the termination of Claimant's employment is unfair and unlawful.

- b) That the Respondent shall pay the Claimant one month's salary in lieu of notice at Kshs. 85,000/-
- c) That the Respondent shall pay the Claimant five (5) months' salary as compensation for the unfair termination at Kshs. 425,000/-
- d) That the Respondent is ordered to issue the Claimant with a certificate of service within 14 days of this Judgment.
- e) The costs of the suit shall be borne by the Respondent.

85. Judgment accordingly.

SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 19TH DAY OF MARCH, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Ms. Jepchirchir Present for the Claimant

Ms. Ajumba h/b for Ms. Oganya for the Respondent

Ms. Esther S-C/A