

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI

CAUSE NO. E063 OF 2024

ERIC MURAI.....
.....CLAIMANT

VERSUS

NASH FINANCIAL SERVICES
LTD.....RESPONDENT

JUDGMENT.

Introduction

1. Before Court is the Claimant's Memorandum of Claim dated 24th January 2024, wherein the Claimant seeks the following reliefs as against the Respondent: -
 - a) A declaration that the Claimant's employment with the Respondent was unfairly and unlawfully terminated.
 - b) An award of 12 month salary for unfair termination and to redress the Claimant's unfair loss of employment, being 12 x 130,000 /= Kshs.1,560,000 /=
 - c) An award of 1 month's salary in lieu of notice.
 - d) An order that the Respondent properly compute the Claimant's dues and pay any outstanding amount in addition to the damages above.
 - e) An order on general damages for discrimination, mental anguish, and violation of constitutional rights as pleaded herein
 - f) Interest on the above

g) Costs of the Suit.

2. The Respondent filed a Memorandum of Response dated 29th February, 2024, in response to the Claimant's claim.
3. The Claimant's case was heard on 11th November, 2025, when the Claimant (CW1) testified in support of his case. He adopted his witness statement dated 15th July, 2024, and produced his list and bundle of documents dated 24th January, 2024, and a supplementary list dated 5th May, 2025, as exhibits in the matter, which were admitted as Claimant's exhibits Nos. 1-11.
4. Although the Respondent filed a witness statement sworn by one Antony Wagacha, it opted not to call a witness and sought instead to rely on its response to the claim.
5. Submissions were received from both parties and have been duly considered.

The Claimant's case

6. The Claimant states that he was employed by the Respondent in May 2021 as a Software Engineer on a renewable one-year contract at a gross monthly salary of Kshs. 130,000/=. He avers that the contract was implicitly renewed in May 2022, and that he continued to serve diligently, earning commendations for good performance.

7. The Claimant states that throughout his employment, he was never subjected to disciplinary proceedings and that he consistently acted on feedback from his supervisor.
8. He avers that on 17th December 2022 at 00:12 a.m, which time was outside his working hours, he received an email terminating his employment on alleged poor performance, which claim he contends was unsupported by any evidence.
9. The Claimant maintains that the termination was unfair, malicious, and did not meet legal standards. He further alleges that the Respondent subjected him to unfair labour practices, including discrimination and denial of equal protection.
10. The Claimant further asserts that the Respondent lacked any clear performance evaluation policy, had never raised concerns about his performance, and did not place him on a performance improvement plan prior to termination.
11. The Claimant asserts that even if the termination had been based on poor performance as alleged, he was still entitled to procedural fairness and the substantive justification for the termination, which he was not granted. He further avers that the termination was carried out with malice and in an unfair manner.
12. The Claimant contends that the termination was procedurally and substantively unfair as the Respondent never communicated any allegations of poor performance

prior to dismissal, it failed to issue notice or accord him a hearing, and relied on reasons that were unjust and not genuine. He further states that he was not placed on a performance improvement plan, nor given training or timelines to address any alleged shortcomings.

13. The Claimant further avers that the termination caused him significant hardship, as he has dependants, and resulted in financial distress, mental anguish, and irreparable loss, for which he holds the Respondent fully liable.

14. The Claimant contends that the Respondent's actions were unconstitutional and violated his right to fair labour practices under Article 41 of the Constitution, including protection from unfair and exploitative treatment. He contends further that his termination lacked transparency, reasonable notice, and a fair hearing, thereby breaching both Article 41 and his right to fair administrative action under Article 47.

15. He further avers that the termination infringed on his dignity and socio-economic rights by depriving him of his livelihood, and violated his right to a fair hearing by denying him a capability hearing and an opportunity to appeal.

16. Additionally, the Claimant asserts that the Respondent breached Sections 41, 43, and 45 of the Employment Act by failing to provide a valid reason for termination and for failure to follow due process.

17. It is his position that the Respondent's actions contravened the Constitution, statutory law, and applicable labour practices, entitling him to remedies for the losses suffered.
18. On cross-examination, the Claimant told the court that his contract was to expire on 30th May, 2022, but that the same was renewable. He confirmed that he did not have a letter renewing his contract and that his employment was terminated on 16th December, 2022.
19. It is his position that his contract was renewed by implication. He contends that he had a verbal conversation with the Respondent's Human Resources department, which told him that his contract would be renewed.
20. The Claimant further avers that his salary was Kshs. 130,000 and not the Kshs. 65,000/- provided for under the contract. He avers that his Mpesa statement shows that he was paid the difference by Mpesa. He confirmed that it is the amount of Kshs. 65,000/- that was paid to his bank account.
21. He states that he got a salary rise of Kshs. 90,000, which was paid through MPesa, and that the rise was not in writing.
22. The Claimant confirmed that he received one month's notice pay at termination of his contract. He avers that the Respondent complied with clause 10 on termination by notice.

23.It is his further testimony that his work was never reviewed.

24.The Claimant's prayer is that the Court grant him the relief sought.

The Respondent's Case

25.The Respondent states that the Claimant was employed on a fixed one-year contract commencing on 30th May 2021 and expiring on 30th May 2022, unless mutually extended in writing, which was never done. The Respondent further disputes the Claimant's alleged salary of Kshs. 130,000/=, maintaining that under the contract dated 30th May 2021, the Claimant earned a gross monthly salary of Kshs. 65,000/=

26.The Respondent denies that the Claimant performed diligently, contending that from November 2022, he received several warnings from his supervisors for poor performance, but failed to improve despite the feedback given.

27.The Respondent further denies the Claimant's assertion that his employment contract was renewed by implication.

28.The Respondent admits terminating the Claimant's employment through a letter dated 16th November 2023, asserting that it lawfully exercised its right under Clause 10.2.1 of the employment contract due to the Claimant's repeated failure to improve his performance despite several warnings.

29. The Respondent denies that the termination of the Claimant's contract was unfair or malicious as alleged by the Claimant, and maintains that under the contract dated 30th May 2021, the Claimant had undertaken to discharge his duties professionally and diligently, and that his performance was assessed against those agreed standards and found to be unsatisfactory.

30. The Respondent further states that the Claimant's underperformance was repeatedly brought to his attention, and despite assistance and guidance from his supervisors, he failed to improve.

31. The Respondent contends that the Claimant's performance was fairly assessed by his direct supervisors and found to be unsatisfactory. It avers that he was informed of shortcomings in his performance and advised to improve.

32. Further, the Respondent states that management offered the Claimant assistance and support aimed at helping him improve his performance, and that he was also warned in advance that failure to attain satisfactory performance levels would result in termination of his employment.

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

Analysis and Determination

34. I have considered the pleadings, the Claimant's testimony, and the rival submissions. The following issues arise for determination: -

- i. Whether there existed a valid contract of employment between the parties beyond 30th May 2022, if yes;
- ii. Whether the termination of the Claimant's employment was substantively and procedurally fair; and
- iii. Whether the Claimant is entitled to the reliefs sought.

Whether there existed a valid contract of employment between the parties beyond 30th May 2022.

35. The Respondent contends that the Claimant was engaged on a fixed-term contract commencing on 30th May 2021 and expiring on 30th May 2022, unless renewed in writing. The Claimant, on the other hand, maintains that the contract was renewed by implication as he continued working beyond the expiry date with the Respondent's knowledge and authority.

36. The Claimant confirmed to the court on cross-examination that he had no written renewal letter. The Court, however, notes that although the Claimant did not produce a letter renewing his contract, he testified that he continued rendering services after the expiry of the initial term and continued receiving remuneration from the Respondent on account of the services rendered.

37. Further, the Respondent, in its Memorandum of Response, admits terminating the Claimant's employment on grounds of poor performance in December 2022, thereby

acknowledging the existence of an employment relationship beyond 30th May 2022. In my considered view, had the contract lapsed automatically, there would have been no need to terminate or even anything to terminate.

38. In ***Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho [2017] KECA 194 (KLR)***, the Court held that where an employee continues serving after expiry of a fixed-term contract with the employer's acquiescence, an implied renewal may arise from the conduct of the parties.

39. Similarly, in ***Margaret A. Ochieng v National Water Conservation & Pipeline Corporation (2014) KEELRC 573 (KLR)***, the Court observed that continued service and payment of salary after expiry of a fixed-term contract may create a legitimate expectation of renewal.

40. In the premise, I find and hold that an employment relationship subsisted between the parties beyond 30th May 2022.

Whether the termination was substantively and procedurally fair

41. Sections 41, 43, and 45 of the Employment Act place upon an employer the burden of proving valid and fair reasons for termination and demonstrating compliance with procedural fairness.

42.The Respondent herein asserts that the Claimant was terminated for poor performance after repeated warnings and upon assistance from supervisors to improve his performance, which did not bear fruit.

43.The Claimant, on his part, contends that the Respondent lacked any clear performance evaluation policy, had never raised concerns about his performance, and did not place him on a performance improvement plan prior to the termination of his services.

44.Despite the Respondent's contentions of poor performance, it did not call any witness to testify or produce documentary evidence demonstrating the alleged poor performance, warnings issued, performance appraisals, performance targets, or any performance improvement plan.

45.The law on termination on account of poor performance is now settled. In ***National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR***, the Court of Appeal held that where poor performance is alleged, the employer must demonstrate the evaluation criteria used, the shortcomings identified, and the measures taken to assist the employee improve. Likewise, in ***Jane Samba Mukala v Ol Tukai Lodge Ltd [2013] KEIC 634 (KLR)***, the Court held that before terminating an employee for poor performance, the employer must establish clear targets, provide support, allow reasonable time for improvement, and conduct a fair capability hearing.

46. In the instant case, the Respondent merely pleaded that warnings were issued and assistance offered, but no warning letters, appraisal reports, emails, minutes, or performance review documents were produced in evidence before the Court. Assertions in pleadings are not evidence, and since the Respondent elected not to call a witness, its pleadings remain unsubstantiated.

47. Further, the Claimant testified that he was never subjected to a disciplinary or capability hearing prior to termination. The Respondent did not rebut this evidence. Section 41 of the Employment Act requires an employer contemplating termination on grounds of poor performance to explain the allegations to the employee in a language he understands and to accord him an opportunity to respond in the presence of a fellow employee or shop floor representative.

48. In ***Walter Ogal Anuro v Teachers Service Commission (2013) KEELRC 386 (KLR)***, the Court held that for termination to pass the fairness test, there must be both substantive justification and procedural fairness. Failure to satisfy either limb renders the termination unfair.

49. In the circumstances, I find and hold that the Respondent failed to prove valid and fair reasons for the termination of the Claimant's employment as required under Section 43 of the Employment Act, and further failed to comply with the mandatory procedure prescribed under Section 41.

50. Consequently, the termination of the Claimant's employment was both procedurally and substantively unfair and unlawful, and so I hold.

Whether the Claimant is entitled to the reliefs sought

51. Having found the termination unfair, the Claimant is entitled to remedies pursuant to Sections 49 and 50 of the Employment Act.

52. The Claimant admitted during cross-examination that he received one month's salary in lieu of notice. The prayer for notice pay therefore fails and is dismissed.

53. In ***Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR***, the Court pointed out that an award of the maximum of 12 months' pay must be based on sound judicial principles, and that the trial judge must justify or explain why a Claimant is entitled to the maximum award.

54. Considering that the Claimant was in the service of the Respondent for slightly over a year, and further considering the Respondent's failure to comply with statutory procedure, and the absence of evidence supporting the allegations of poor performance, I deem an award of seven (7) months' salary sufficient compensation for the unfair termination.

55. On the applicable salary, there is a dispute on how much the Claimant's salary was. The Claimant contends that his salary

was Kshs. 130,000, while the Respondent contends that the Claimant's salary was Kshs.65,000/- as is shown in his contract of employment.

56.The Claimant told the court that he received dual payment, one by Mpesa, and the second through his Bank account, which position was not rebutted by evidence from the Respondent.

57.The Claimant has further produced in evidence his bank statements and Mpesa messages indicating that he indeed received dual payment from the Respondent, and which, in my view, is proof that the Respondent did not make the full payment through the bank as it alleges.

58.In the circumstances, the Court adopts Kshs. 130,000 as the Claimant's applicable gross salary.

59.Finally, the prayer for general damages for discrimination, constitutional violations, and mental anguish is declined, as the Claimant did not prove specific acts of discrimination or constitutional violations distinct from the unfair termination claim that the court has already addressed and remedied.

60.In the final analysis, Judgment is hereby entered for the Claimant against the Respondent as follows: -

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

- b. That the Respondent shall pay the Claimant seven (7) months' salary as compensation for unfair termination at Kshs. 910,000/-
- c. The Claimant shall have costs of the suit and interest at Court rates from the date of Judgment until payment in full.

ORIGINAL

61. Judgment of the Court.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 14TH DAY OF MAY, 2026.**

**C. N. BAARI
JUDGE**

Appearance:

Mr. Ogada present for the Claimant

Ms. Ogonyo present for the Respondent

Ms. Esther S- C/A