



**Wangeci v Securex Agencies (K) Ltd (Cause E289 of 2022)
[2025] KEELRC 227 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 227 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E289 OF 2022
SC RUTTO, J
JANUARY 31, 2025**

BETWEEN

GRACE WANGECI CLAIMANT

AND

SECUREX AGENCIES (K) LTD RESPONDENT

JUDGMENT

1. It is common cause that the Claimant was employed by the Respondent on a one year contract in the position of a Senior Sales Advisor vide an employment contract dated 6th October 2021. Seemingly, the employment relationship was short-lived seeing that the Claimant was terminated from employment on 30th November 2021 on grounds of her suitability and performance in her role.
2. The Claimant contends that in terminating her employment, the Respondent did not accord her the prerequisite procedure set out in Sections 41, 43 and 45 of the *Employment Act*.
3. It is on this account that the Claimant prays for an order of declaration that she was wrongfully and unfairly dismissed from employment, maximum compensatory damages equivalent to 12 months of her gross salary and general damages for stress and mental breakdown. She further prays for the costs of the suit.
4. The Respondent countered the Claim through its Reply dated 5th July 2022, in which it avers that the suit against it is misconceived and bad in law as the Claimant was terminated fairly and consequently, the Respondent owes no contractual or any obligation whatsoever to the Claimant. To this end, the Respondent prays that the Claimant's suit be dismissed with costs.
5. During the hearing which proceeded on 6th November 2024, both sides called oral evidence.



Claimant's Case

6. At the outset, the Claimant sought to adopt her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed alongside the Memorandum of Claim as her exhibits before Court.
7. It was the Claimant's evidence that she performed her duties as expected as per the job description with due professional care and without performance issues raised by the Respondent.
8. The Claimant further averred that on 30th November 2021, she was served with a termination letter purportedly terminating her probationary contract. That this was despite her protestation and utter disregard of her right to be heard.
9. According to the Claimant, the actions by the Respondent caught her by surprise as it was unexpected and she holds the same to be wrongful and unfair as she was not given the reasons for the termination of her employment contract, was not issued with a show cause letter as required and was not accorded a hearing pursuant to Section 41 of the [Employment Act](#).

Respondent's Case

10. The Respondent called oral evidence through Ms. Dorothy Kaane who testified as RW1. She identified herself as the Respondent's Assistant Human Resources Manager. Equally, she adopted her witness statement to constitute her evidence in chief.
11. In her testimony, RW1 stated that the Claimant executed the appointment letter and the Contract dated 21st September 2021 and 6th October 2021 respectively without duress and in full knowledge of its provisions.
12. That the contract at clause 5 provided for six months' probation period and this provision was to be read exclusively separate from the termination clause.
13. RW1 further averred that upon termination, the Claimant collected her terminal dues on 30th November 2021 and was also issued with a Certificate of Service.

Submissions

14. It was submitted on behalf of the Claimant that the Respondent's decision to terminate her employment on grounds of performance was unjustified and unprocedural. On this score, it was submitted that no documentary evidence of performance appraisal was produced before this Honourable Court, to show that the Claimant's performance was unsatisfactory and did not meet the company's expectations.
15. Citing the decision in *Loice Otieno v Kenya Commercial Bank Ltd* (2013) eKLR and *Jane Samba Mukala v Ol Tukai Lodge Limited* (2013) eKLR, it was posited on behalf of the Claimant that she was not accorded procedural fairness prior to being terminated from employment. In the same vein, it was submitted that the Claimant did not participate in any performance evaluation and/or appraisal exercise and she was not given an opportunity to justify her performance.
16. The Respondent did not file written submissions as the same were not traceable on the Court's physical record and the online portal at the time of writing this Judgment.



Analysis and Determination

17. Flowing from the pleadings by both parties, the evidence on record as well as the Claimant's submissions, it is clear that the Court is being called to resolve the following questions: -
- i. Whether the Claimant's termination from employment was fair and lawful; and
 - ii. Whether the Claimant is entitled to the reliefs sought.

Unfair and unlawful termination?

18. In terms of Section 45(2) of the *Employment Act*, termination of an employee's contract of service is unfair where the employer fails to prove that such termination was based on a fair and valid reason related to the employee's conduct, capacity or compatibility. Over and above, the employer is duty-bound to prove that the termination from employment was in accordance with fair procedure. Differently expressed, an employer is enjoined to prove that termination of employment was fair substantively and procedurally.
19. I will start by considering whether the Respondent has proved that it had a fair and valid reason to terminate the Claimant's employment based on the grounds set out in the letter of termination.
20. The record bears that the Claimant was terminated from employment with effect from 30th November 2021. As can be discerned from the Claimant's letter of termination, she was terminated on grounds of her suitability and performance as a Senior Sales Advisor. Through the letter of termination, the Claimant was informed that the decision to terminate her employment had been made on the basis of her overall performance and suitability for the role of a Senior Sales Advisor which had not met the company's expectations.
21. Despite the Respondent terminating the Claimant's employment on account of suitability and performance, there is no evidence on record to demonstrate that she was evaluated and if so, against what targets or performance indicators.
22. As it is, the Respondent did not adduce evidence to demonstrate that the Claimant had been issued with specific measurable targets and that she was required to meet within specified timelines together with the key performance indicators.
23. Revisiting the letter of termination, the Respondent indicated that the Claimant's suitability and performance had been assessed. As such, I cannot help but question how such an assessment if any, was undertaken devoid of specific targets in place and key performance indicators.
24. What's more, the Respondent did not prove that it had put in place measures to evaluate the Claimant's performance against any set targets or key performance indicators. To top it off, there was no report or such other document constituting the Claimant's overall performance evaluation.
25. In the circumstances, I am led to question how the Respondent was in a position to determine that the Claimant's suitability and overall performance was wanting as a Senior Sales Advisor and that she had not met the Respondent's expectations without proof that her performance had been evaluated.
26. On this issue, the Court agrees with the sentiments expressed in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK)* (September 2013) that it does not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established. This position was reiterated by the Court of Appeal in the case of *National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR*.



27. It is against this background that I am led to conclude that the Respondent has failed to discharge its evidential burden by proving that it had a valid and fair reason to terminate the Claimant's employment based on her suitability and performance. To this end, the Claimant's termination from employment was not substantively justified.
28. With respect to procedural fairness, Section 45 (2) (c) of the *Employment Act* places the burden on the employer to prove that termination of employment was in line with a process that is fair. Further to this, Section 41 (1) makes specific requirements regarding the process to be complied with by an employer. This process entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
29. The Respondent's case is that the Claimant was terminated from employment during probation in line with the provisions of Section 42(1) of the *Employment Act*.
30. Section 42(1) of the *Employment Act* (now declared unconstitutional) provides as follows:
- “The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.”
31. Fundamentally, prior to Section 42(1) being declared unconstitutional through the decision in the case of *Monica Munira Kibuchi & 6 others vs Mount Kenya University (2021) eKLR*, an employer was excused from complying with the requirements of Section 41 in the event of termination of an employee serving on probation. In this regard, the only requirement with respect to process, was the issuance of a seven-day notice prior to termination of the employment.
32. Worthy to note is that at the time the Claimant was terminated from employment, Section 42(1) of the *Employment Act* had been declared unconstitutional vide the Judgment dated 30th July 2021. Therefore, the Respondent was enjoined to observe the legal requirements set out under Section 41 of the *Employment Act*.
33. From the record, there is no evidence that the Claimant was put on notice that the Respondent was contemplating termination of her employment on grounds of her suitability and performance. Coupled with that, there is no evidence let alone an indication that the Claimant was given an opportunity by the Respondent to give an explanation against the allegations relating to her performance and suitability as a Senior Sales Advisor.
34. I find it imperative to underscore that the provisions of Section 41 of the *Employment Act* are mandatory hence it follows that anything short of that process, is unprocedural and unfair. This position was buttressed in the case of *Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR* in which the learned Judges of the Court of Appeal expressed themselves as follows:
- “It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.....Four elements must thus be discernible for the procedure to pass muster:-
- (i) an explanation of the grounds of termination in a language understood by the employee;
 - (ii) the reason for which the employer is considering termination;
 - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;



(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

35. Guided by the precedent above, it is this Court’s view that the Claimant herein was not accorded a fair hearing as envisaged under the *Employment Act*, prior to the termination of her employment.
36. Needless to say the Claimant’s termination from employment was procedurally unfair within the meaning of Section 45 (2) (c) as read together with Section 41 of the *Employment Act*.
37. The total sum of my consideration is that the Claimant’s termination from employment was unjustified in all respects.
38. That said I now turn to consider the appropriate reliefs to be awarded in this case.

Reliefs?

39. As the Court has found that the Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant’s employment based on her suitability and performance and that it failed to accord her a fair hearing prior to termination, she is awarded compensatory damages equivalent to three (3) months of her gross salary. This award has taken into consideration the length of the employment relationship which was considerably short as well as the circumstances attendant to the Claimant’s termination from employment.

Orders

40. In the final analysis, the Court enters Judgment in favour of the Claimant against the Respondent as follows:
 - a. A declaration that the termination of the Claimant from employment was unfair and unlawful.
 - b. The Claimant is awarded compensatory damages in the sum of Kshs 450,000.00 being equivalent to three (3) months of her gross salary.
 - c. Interest shall apply on the award at (b) above at court rates from the date of Judgment until payment in full.
 - d. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY, 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Ochieng instructed by Mr. Mwangi Kinyanjui

For the Respondent Mr. Wekesa

Court Assistant Millicent

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

