



**Waweru v Amoebax Insurance Agency Limited (Cause E009 of 2023)
[2025] KEELRC 233 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 233 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E009 OF 2023
SC RUTTO, J
JANUARY 31, 2025**

BETWEEN

CATHERINE NJOKI WAWERU CLAIMANT

AND

AMOEBAX INSURANCE AGENCY LIMITED RESPONDENT

JUDGMENT

1. It is common cause that the Claimant was employed by the Respondent as an Underwriting Associate on a probationary contract with effect from 1st November 2022. According to the Claimant, she was excellent in her performance based on the terms of her contract and had legitimate expectation that upon successfully completing the probationary contract, she would be employed by the Respondent on a fixed-term contract of two years.
2. It is the Claimant's case that vide a letter dated 28th November 2022, the Respondent proceeded to terminate her contract of employment without necessarily following any due process established under the *Employment Act* or her employment contract. Consequently, the Claimant prays for the sum of Kshs 1,420,000/= being damages for unfair termination and legal fees. She has further asked the Court to award her the costs of the suit plus interest.
3. The Respondent opposed the Claim through its Memorandum of Reply dated 5th February 2023 in which it avers that the Claimant's performance was unsatisfactory hence the lack of confirmation on permanent terms of employment, a fact that was communicated to the Claimant in writing on 28th November 2022.
4. According to the Respondent, the Claimant is not entitled to compensation for unfair termination since the termination of her probationary contract was occasioned by effluxion of time whereupon the same was neither confirmed nor extended. The Respondent has further stated that the separation



process was undertaken within the strict letter of the [Employment Act](#) and other applicable laws. To this end, the Respondent has asked the court to dismiss the Claim with costs.

5. The matter proceeded for hearing on 9th May 2024 and 24th October 2024 during which both sides called oral evidence in support of their respective cases.

Claimant's Case

6. The Claimant testified in support of her case and at the outset, she sought to adopt her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed alongside her Memorandum of Claim as exhibits before Court.
7. It was the Claimant's evidence that her job description was stated clearly on the Contract of Employment which she diligently delivered to the Respondent's expectations.
8. She averred that at no time did her immediate supervisor ever raise any complaint regarding her performance nor did he ever conduct any appraisal meeting or reprimand her for non-satisfactory performance either orally or by way of written notification.
9. The Claimant further averred that the allegations in the dismissal letter that she failed to deliver, report or consult her direct supervisor on the day-to-day activities are untrue since she strictly adhered to the onboarding schedule provided to her by the Respondent with instructions on how she would be trained by the Respondent's team members.
10. In the Claimant's view, the decision to terminate her services fall below the impartiality test by disregarding the laid down legal procedures of fair and lawful termination of employment.
11. The Claimant further contended that the Respondent fabricated unfounded and baseless allegations against her and proceeded to terminate her services.

Respondent's Case

12. The Respondent called oral evidence through two witnesses being Ms. Mary Njoroge and Mr. Kunihiko Kawano. Ms. Njoroge was the first to go. She testified as RW1 and started by identifying herself as the former Head of Human Resources at the Respondent company. RW1 proceeded to adopt her witness statement to constitute his evidence in chief. She further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before Court.
13. It was RW1's evidence that during the Claimant's probation period, her performance was to be closely monitored and evaluated by the Respondent.
14. It was her testimony that as with any other probationary contract, it was the understanding of both parties that confirmation of the Claimant's employment contract on fixed terms would be pegged on satisfactory performance during the probation period.
15. In further evidence, RW1 stated that the Respondent's CEO & Founder, Mr. Kunihiko Kawano (RW2), held various meetings with the Claimant to discuss her unsatisfactory performance.
16. RW1 further averred that as a result of the said meetings, the following observations were brought forward and extensively discussed between the Claimant and the Respondent, and she was given sufficient opportunity to respond:
 - a. She had failed to deliver on her role as expected of her and had failed to meet all the set goals outlined in the role description and would not be a good fit for the Respondent's needs for the role of an Underwriting Associate.



- b. Throughout her Probation Period, she had continuously failed to report to or consult her direct supervisor regarding her daily tasks but instead resorted to obtaining instructions from junior colleagues. This is a fact admitted by the Claimant in her email to the Respondent dated 29th November 2022.
 - c. She had failed to follow instructions from her direct supervisor. On one occasion, she was tasked to call customers to renew their Terms of Reference (TORs) but failed to accomplish this task and the calls she made were so unsatisfactory and below the expected standard that only two application requests were received by existing customers of the Respondent in that regard.
17. It was RW1's evidence that upon being confronted with the above issues through the Respondent's letter dated 28th November 2022, the Claimant admitted through her email dated 29th November 2022 that "sales and Marketing aren't my strength" but chose to blame the Respondent for her unsatisfactory performance during the probation period. According to RW1, the Claimant admitted to holding appraisal meetings with RW2.
 18. It was RW1's view that the Claimant's probationary contract expired on 1st December 2022 and the same was neither extended nor confirmed on fixed term basis on account of the Claimant's unsatisfactory performance during probation.
 19. According to RW1, there was no wrongful termination of the Claimant's employment and that the Respondent took the liberty to explain to the Claimant, in writing on 28th November 2022, the reasons for not extending or confirming her employment on fixed terms.
 20. RW1 further averred that the Claimant was paid her full terminal benefits including payment in lieu of the 14 days' notice period and compensation for accrued leave days.
 21. Mr. Kunihiro Kawano who testified as RW2, identified himself as the Respondent's founder and CEO. Similarly, he adopted his witness statement to constitute his evidence in chief.
 22. It is worth noting that the evidence of RW2 was by and large similar to that of RW1.

Submissions

23. The Claimant submitted that the Respondent's witnesses could not justify their actions in terminating her employment. According to the Claimant, the mere stating of reasons for termination without providing requisite support for the reasons shows the irrationality and the unlawfulness of the termination. In support of the Claimant's position, the cases of *Loice Otieno vs Kenva Commercial Bank Limited Cause no 1050 of 2011* eKLR and *Walter Ogal Anurro vs Teachers Services Commission Cause No 955 of 2011* industrial Court at Nairobi were referenced.
24. The Claimant further submitted that the Respondent went against the standards established on procedural fairness in the *Employment Act*.
25. In further submissions, the Claimant posited that there was no evaluation or appraisal report or any evaluation matrix to justify termination on account of poor performance. According to the Claimant, 19 days is an unconscionable period during which an objective evaluation and or appraisal is to be undertaken. In further support of the Claimant's submissions, the case of *Happiness Nyabonyi Maingo vs Shreeji Chemical Ltd (2020)* eKLR was cited.



26. On the other hand, the Respondent submitted that it gave reasons for the termination of the Claimant's employment and justified the same as being fair, valid, and related to her conduct, compatibility, and performance.
27. Referencing the case of *Okumu vs GoodMan Agencies Limited (2022)*, the Respondent submitted that the letter terminating the Claimant's Probationary Contract clearly specified and substantiated reasons and instances within which she failed to perform to the required standard or meet the expectations required for her role.
28. According to the Respondent, its conduct and the facts of the present case meet the tests established in the *Okumu vs GoodMan Agencies Limited (supra)* case for fair termination of a probationary contract.

Analysis and Determination

29. Flowing from the pleadings, the evidence on record as well as the rival submissions, it is clear that the Court is being called to resolve the following issues:-
 - i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
 - ii. Whether the Claimant was afforded procedural fairness prior to termination of her employment;
 - iii. Is the Claimant entitled to the reliefs sought?

Justifiable reason?

30. From the record, the Claimant was terminated on grounds related to her performance. This is discernible from her letter of termination dated 28th November 2023 which reads in part:

“Re: Termination of the Probationary Contract

Following various meetings set up to discuss your performance, the following observations were brought forward and discussed by the CEO who was your immediate supervisor:

- a. That you have failed to deliver on your role as expected of you. It has been noted with concern that you have failed to meet all the set goals outlined in your role description.
- b. Throughout your probation period, you continuously failed to report to or consult your direct supervisor on your day-to-day activities but instead resorted to consulting your colleagues.
- c. You failed to follow the instructions of your direct supervisor. For instance, you were tasked to call customers to renew their TORs. You failed to adequately accomplish this task and the calls made were so minimal that only two application requests were received by customers in that regard.

In view of the foregoing, we hereby wish to notify you that your contract will not be extended beyond its expiry date of 1st December 2022.”

31. Pursuant to Section 43(1) of the *Employment Act* (Act) an employer is required to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. Coupled



with that, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.

32. As can be discerned from the letter of termination, the Respondent enumerated the areas they considered the Claimant had failed to perform satisfactorily. These included; failure to deliver on her role as expected of her and to meet all the set goals outlined in her role description; failure to report or consult her direct supervisor and failure to follow the instructions of her direct supervisor and to call customers to renew their TORS.
33. With respect to the first limb of the allegations that the Claimant failed to meet all the set goals outlined in her role description, it is apparent from the record that the Respondent did not exhibit the Claimant's measurable targets as drawn from the said goals. If I may say, even the said goals were not exhibited before the Court.
34. As it is, the Claimant's specific targets and key performance indicators are conspicuously missing from the record. Further to that, the manner in which the Claimant's performance was to be evaluated is not apparent from the record.
35. Over and above, there is no evidence that the Claimant's performance was evaluated, hence proof that she had failed to perform her duties as expected hence justifying to termination of her employment by the Respondent on that account.
36. 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.
37. In light of the foregoing, I am led to question how the Respondent was in a position to determine that the Claimant had not met all her goals without any specific targets in place, key performance indicators, measures to assess her performance and more importantly, evaluation of her overall performance against such targets.
38. On this issue, I will follow the determination by the Court of Appeal in the case of *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR, where the Learned Judges adopted the decision in *Jane Samba Mukala vs Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK)* (September, 2013) thus;
 - a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act, 2007*. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
 - b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established..."
39. I concur with the finding by the Court in the aforementioned decision and reiterate that the Respondent was expected to have put in place measures to assess the Claimant's performance. This included but not limited to target setting as well as providing the manner of assessment of her performance against such targets and key performance indicators. Equally, the Respondent was



enjoined to demonstrate the effort leading to the conclusion that the Claimant had poorly performed in her role.

40. As the above prerequisites were not evident in this case, it follows that the decision by the Respondent to the effect that the Claimant had not delivered on her role as expected or met all her set goals was not arrived at based on an objective assessment.
41. Further to the foregoing, the Respondent did not prove in whatever form or manner that the Claimant had continuously failed to report to or consult RW2 or to follow his instructions. In this regard, the Respondent's assertions were not substantiated.
42. Revisiting the provisions of Sections 43(1) and 45 (2) (a) and (b) of the Act, the Respondent being the employer, had the onus to prove the reasons for the Claimant's termination from employment and as it has failed to do so, it goes without saying that the said termination was not substantively justified hence unfair.

Fair process?

43. Pursuant to Section 45 (2) (c) of the Act, an employer is required to prove that it terminated an employee's employment in accordance with a fair procedure. The specific requirements constituting fair process are set out under Section 41(1) of the Act. Specifically, an employer is required to notify the employee of the allegations he or she is required to respond to and thereafter grant him or her the opportunity to make representations in response to the said allegations, in the presence of a fellow employee or shop floor union representative of his own choice.
44. The Respondent in this case has averred that the Claimant's probationary contract ended by effluxion of time as the said contract was neither extended nor confirmed.
45. Prior to 30th July 2021, which is the date Section 42(1) of the [Employment Act](#) was 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 during probation. In this regard, the only procedural requirement was the issuance of a seven-day notice prior to termination of the employment.
46. However, in this case, the Claimant was terminated on 28th November 2022 hence it follows that as of then, the Respondent was enjoined to comply with the procedural requirements under Section 41 of the Act.
47. According to the Respondent, RW2 held various meetings with the Claimant to discuss her unsatisfactory performance and was given sufficient opportunity to respond. Be that as it may, the Respondent did not exhibit evidence to confirm as much. For instance, there is no evidence that such meetings were ever convened between the Claimant and RW2. Further, there is no evidence that the Claimant was put on notice that the Respondent was contemplating termination of her employment on account of her performance and that she was given an opportunity to defend herself against such allegations.
48. Indeed, in her email dated 29th November 2022 to RW1 and copied to RW2, the Claimant challenged her termination from employment and protested that RW2 had never called her to any meeting to discuss her performance and that the only meeting he called her to was to communicate his decision that he was not extending her contract. To this end, she challenged RW1 to indicate the date, time, location and follow up communication.



49. In the case of Jane Samba Mukala v Ol Tukai Lodge Limited (supra), it was held as follows:

“Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

50. As stated herein, there was no evidence that the Claimant was given an opportunity to explain her unsatisfactory performance in the presence of a fellow employee of their choice.

51. Simply put, in terminating the Claimant’s employment, the Respondent did not adhere to the provisions of Section 41 of the Act.

52. As was held by the Court of Appeal in the case of Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR, the provisions of Section 41 of the Act are mandatory hence it follows that anything short of that process is procedurally unfair.

53. All things considered, it is this Court’s finding that the Claimant’s termination from employment was procedurally unfair for want of compliance with the requirements of Section 41 of the Act.

Reliefs?

54. As the Court has found that the Claimant’s termination from employment was substantively unjustified, hence unfair, she is awarded compensatory damages equivalent to three (3) months of her gross salary. This award has considered the length of the employment relationship which I note was considerably short, as well as the circumstances attendant to the Claimant’s termination from employment.

55. The claim for legal costs is declined as the same was not proved to the requisite standard despite being a specific claim in nature.

Orders

56. Against this background, the Court enters Judgment in favour of the Claimant against the Respondent and she is awarded: -

- a. Compensatory damages in the sum of Kshs 330,000.00 being equivalent to three (3) months of her gross salary.
- b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.
- c. 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 No appearance



For the Respondent Mr. Ongweno

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

