



REPUBLIC OF KENYA



KENYA LAW
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**Kibor v Takaful Insurance (Cause E005 of 2021)
[2025] KEELRC 171 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 171 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE E005 OF 2021
MA ONYANGO, J
JANUARY 30, 2025**

BETWEEN

PENINA JEBIWOT KIBOR CLAIMANT

AND

TAKAFUL INSURANCE RESPONDENT

JUDGMENT

1. Vide her Statement of Claim dated 18th May, 2021 and filed on 5th November, 2021, the Claimant avers that on 30th July, 2018, she was employed by the Respondent, a limited liability company registered in Kenya and operating an insurance business, as an administrator of its Kitale branch office. She worked for the Respondent until 2nd December, 2020 when the Respondent unfairly terminated her employment. Her last salary was Kshs. 135,000.
2. The Claimant seeks the following remedies against the Respondent in her Statement of Claim:
 - a. A Declaration that the termination of claimant's employment was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the Claimant;
 - b. Damages for unfair and unlawful termination of employment contract itemised as below-
 - i. One month pay in lieu of notice
Section 36 of the *Employment Act*
Legal Notice No. 112 of 2017
 $135,000 \times 1 = 135,000/=$
 - ii. Compensation for unfair termination
Section 49 (1)(c) of *Employment Act*



Gross pay x 12 months

135 x 12 months Ksh.1,620,500/=

iii. Service pay/Gratuity

15 x basic salary x No. of Complete years worked

15 x 135,000 x 2 years

30

- c. A Certificate of Service as per Section 51 of the [Employment Act](#);
 - d. Costs and interest of this Suit:
 - e. Any other award as the honourable court deems fit to grant in the circumstance of this case.
3. On 26th September, 2022 the Respondent filed a Statement of Response dated 23rd September, 2022 in which it admits employing the Claimant as a Branch Manager in its Kitale Branch around 16th July, 2018.
 4. The Respondent avers that the performance of the Claimant was not satisfactory and, in the course of 2019, she was issued with several letters to that effect, but her performance did not improve. That the Claimant blamed her dismal performance on the Covid-19 pandemic yet her poor performance started before the pandemic.
 5. The Respondent states that the Claimant was given a hearing following which her employment was terminated. She appealed against the termination but her appeal was not successful.
 6. The Respondent denied that the termination was without valid reason or fair procedure. The Respondent prays that the Claimant's suit against it be dismissed.

Evidence

7. At the hearing of the suit the Claimant testified on her own behalf while the Respondent called Sylvia Jerotich Kimuge, its Human Resource Manager who testified on its behalf as RW1. The parties thereafter filed and exchanged written submissions. The Claimant's submissions are dated 24th June, 2024 while the Respondent's are dated 20th September, 2024.

Claimant's Case

8. The Claimant adopted her witness statement dated 18th May, 2021 and her bundle of documents as her evidence in chief. It was the Claimant's testimony that she was dismissed for poor performance which in her opinion was unfair.
9. It was the Claimant's case that in the year 2020 none of the Respondent's 19 stations achieved excellent performance and that only one station achieved a performance of above average. The performance of all other stations was below average. The Claimant testified that for Kitale branch the score for 2020 was 13% of 130% and 17% of 100%.
10. The Claimant testified that at the beginning of the year 2020 the Covid-19 pandemic caused the employees to work from home. That as marketers who mainly rely on going out to prospect for clients, they were unable to perform at their best because of the Covid restrictions.



11. The Claimant testified that another reason why Kitale did not perform well was that several branches, including Kitale, were merged with other branches. Nakuru was merged with Nairobi and Kitale with Eldoret.
12. The Claimant testified that after the merger of Kitale with Eldoret the Claimant worked without an office and staff. That some Kitale business was booked under Eldoret Branch. That she raised the issue with Head Office but nothing was done.
13. The Claimant further testified that although production was always posted, no performance appraisal was done in 2020. It was her evidence that the performance of her station was not drawn to her attention. That the few meetings held with all branches discussed performance and improvement as well as challenges.
14. She testified that apart from the zoom meetings the Regional Branch Manager who was in charge of branches and was her immediate supervisor used to discuss with her individually with regard to performance of her station.
15. The Claimant testified that before separation with the company there was no show cause letter issued to her. That she appealed against the separation and was heard by an appeals tribunal which did not share the minutes of the meeting with her. She was thereafter informed that she could not be reinstated.
16. On cross examination the Claimant stated that she received the Respondent's letters dated 18th April and 13th June, 2019 both of which related to her performance as branch manager Kitale. That she did not dispute the contents of the 2 letters.
17. The Claimant conceded that there was a reduction in targets during covid. She further conceded that Kitale branch performed the lowest out of all branches. The Claimant further concede that Kitale Branch was moved to Eldoret in September, 2020 and not in July, 2020 as she had alleged. Further, that the notice she attached to her bundle indicating the branch was moving to Eldoret on 1st July, 2020 was not pinned on the door.
18. In re-examination the Claimant stated that the minutes of the appeal hearing were not accurate. That the original minutes were handwritten and signed.

Respondents Case

19. RW1, Sylvia Jerotich Kimuge, adopted her witness statement dated 24th March, 2022 in which she reiterated the contents of the Respondent's Statement of Response, as her evidence in chief. She further adopted the bundles of documents dated 23rd September, 2023, 24th March, 2023 and 24th November, 2023 which she produced as part of her evidence.
20. RW1 testified that the Respondent generated a table on performance of branches weekly, monthly, quarterly and for the year. That at the beginning of each year targets were set for every branch and the same target was used throughout the year. The targets contained Key Performance Indicators (KPIs).
21. She testified that the performance of Kitale Branch based on 100% target was 12.9% and 10.2% based on 130% of the target. She explained that reference to 100% and 130% in the year 2020 referred to adjustments of targets due to covid. That a decision was made to lower the targets by 30% so that 100% was the target originally set for the year and 130% was the target after adjustment due to covid. She testified that the score for Kitale ranked lowest.
22. RW1 testified that she attended the Claimant's appeal hearing. That the minutes of the hearing produced in court were accurate and a true reflection of what transpired at the meeting.



23. Under cross examination RW1 stated that the reason for termination of the Claimant's employment was performance of 2020 but the 2020 performance was not considered in isolation.
24. RW1 testified that it was not true as alleged by the Claimant that most stations performed poorly in 2020. That the average performance was 40.4% based on 130% target which was not used due to the impact of covid and was reduced by 30%.
25. RW1 stated that some of the staff were required to work from home due to covid, and this included staff of Kitale branch. That Kitale merged with Eldoret on 30th September, 2020 but its business was booked under Kitale. She testified that Kitale office was closed after 30th September, 2020 but continued to work even after closure.

Claimant's submissions

26. In her submissions the Claimant identified the issues for determination to be whether the Claimant's dismissal was illegal, unfair and/or unlawful and in violation of sections 41, 43, 44(4) and 45(2) of the *Employment Act*, 2007. The Claimant addressed the issue on two limbs: the procedure adopted before termination; and whether the reason for termination was a valid and fair reason.
27. On the first limb on the procedure it was submitted that the Respondent had a duty to first communicate to the Claimant its intention to terminate her services and the reasons for the intended termination.
28. That instead the Respondent first terminated the contract then offered her an opportunity to be heard on appeal contrary to the provisions of section 41 of the *Employment Act*. That for this reason the procedure adopted by the Respondent was irregular and un-procedural.
29. On the second limb on valid and fair reason for termination the Claimant submitted that the grounds for termination was poor performance for what it referred to as "D" rating. That prominence was given to the production report in the email dated 10th December, 2020 which captures the average score in the performance from 1st January, 2020 to 9th December, 2020 for each station.
30. The Claimant submits that the court addressed the issue of poor performance in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR where the court cited with approval the decision in *Jane Samba Mkalla* thus:

In *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;

- 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.

- c. 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.

31. It is submitted that as expressed by the court, there ought to have been an appraisal before termination. That the Claimant should further have been put on a performance improvement plan and thereafter, given notice of intended termination.
32. It was the Claimants submission that she would have performed better if she had a physical office throughout the year, with staff and a commensurate budget. That the performance of a branch administrator largely depends on the performance of other employees. That in the current case the employees were transferred to Eldoret with the exception of the Claimant, who was left alone for more than 4 months.

Respondent's submissions

33. The Respondent synthesised the issues for determination under the following heads:
 - a. Whether the Respondent had valid reasons to terminate the Claimant's services (substantive fairness).
 - b. Whether a fair procedure was followed (procedural fairness).
 - c. What are the remedies.
34. On substantive fairness the Respondent submitted that the reason given by the Respondent was the poor performance of the Claimant which was reflected by the performance of the branch she was the head of. This was confirmed by inter alia the letter to the Claimant at page 7 of the Respondent's initial bundle showing performance with a "D" rating. There were also branch performance reports. The allegation by the Claimant that she was never appraised or that appraisals never took place at the Respondent's establishment was countered by her answers in cross examination where she admitted to attending meetings over her branch performance. There are also emails, for example the emails at page 1 of the Respondent's second bundle of documents, where she was being summoned for a meeting on her branch performance which meeting she attended as admitted during hearing. She was also given a chance to improve from as early as April 2019 from the letter at page 7 of the Respondent's Initial Bundle.
35. It was further submitted that the separation letter showed the Claimant's performance from January to October 2020 as is evident at page 11 of the Respondent's initial bundle. That although the Claimant blamed Covid 19 for her poor performance, it was demonstrated from this letter during her cross examination that her performance for some months after Covid 19 began was even higher than months before Covid 19. For example, July performance score was 17.3% which was higher than March to June 2020, hence Covid 19 cannot really be the reason or excuse for her performance. All allegations alluding to Covid 19 are not applicable in such circumstances, otherwise her performance would have gone down entirely and continuously after the Covid 19 pandemic began.



36. The Respondent submitted that it was established that the issue of the Claimant's performance as reflected by the branch performance was discussed throughout her employment as is evident from pages 43, 45 and 46 of the Claimant's second bundle, and branch performance was gauged monthly.
37. The Respondent submitted that the allegation that the branch was closed in July 2020 was not proven. That the Claimant admitted that the notice of closure was not pinned at the branch door and that the branch was still open even as at September 2020.
38. It was the submission of the Respondent that an employer retains the right to measure the performance of its employees and the Respondent was within its right to do so. That the reason for termination was valid and fair.
39. On procedural fairness the Respondent submitted that it gave the Claimant a termination letter then later gave her a detailed appeal during which all the tenets of a proper disciplinary hearing pursuant to Section 41 of the *Employment Act* were complied with. That irrespective of the name or nomenclature of the Appeal hearing, it took the place of a disciplinary hearing and thus complied with the rules of natural justice and Section 41 of the *Employment Act*. That an appeal hearing is also a hearing noting that the Claimant even had a chance to bring an employee of her choice as admitted during cross examination. That although she alleged that the minutes of the hearing do not reflect what transpired at the hearing, she did not specify what was different been the minutes and the proceedings at the hearing. That the law has never required that an employee sign minutes to approve the same. That not all employees will gladly confirm the contents of minutes which give adverse findings against them. Thus, the Claimant's allegations that the minutes were not accurate should be taken with a pinch of salt.
40. The Respondent emphasized that the result of the hearing given to the Claimant whether called an Appeal or other name would have been the same and she cannot complain that she was not heard when the facts are looked at in totality. That the Claimant is not in the same position as an employee who received no formal hearing at all, and neither is the Respondent as bad an employer as the Claimant has purported to argue.
41. On remedies the Respondent submitted that the Claimant is not entitled to pay in lieu of notice as the separation was a normal termination and she was paid one months' salary in lieu of notice on 2nd November, 2020.
42. On compensation the Respondent submitted that the termination having been fair she does not merit compensation. It was further submitted that even if the court finds otherwise the Claimant was with the Respondent for a fairly short period of around two and a half years which was mired with poor performance. That she was able to mitigate her losses by engaging in farming activities as is evident from her testimony to court. The Respondent proposed compensation of 2 months' salary.
43. On service pay/gratuity, the Respondent submitted that there is no basis for payment of the same as the Claimant was a member of NSSF which she admitted. That gratuity was not provided for in her terms of service.
44. The Respondent prayed that the Claim be dismissed with costs.

Analysis and Determination

45. Having considered the pleadings, evidence and submissions on record, the issues for determination are whether the termination of the Claimant's employment was valid both substantively and procedurally and if she is entitled to the remedies sought.



46. Termination of employment is provided for in sections 41, 43 and 45 of the *Employment Act*. Section 41 provides for notification and hearing before termination on grounds of misconduct as follows:
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance 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.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
47. Section 43 provides for proof of reason for termination as follows:
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
48. Section 45(1) and (2) provide-
- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
49. In the instant case it is not in contention that the Claimant was terminated, then appealed and was given a hearing on the appeal by a panel of officers from the Respondents head office. The Claimant submitted that the Respondent first terminated the contract then offered her an opportunity to appeal contrary to the provisions of section 41 of the *Employment Act*. That for this reason the procedure adopted by the Respondent was irregular and un-procedural.
50. This fact was admitted by the Respondent who submitted that the Claimant was given a hearing after she appealed against the termination of her employment.
51. In the case of *CMC Aviation Limited v Mohammed Noor* [2015] eKLR the Court of appeal held that: -

“Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service, but the employer does it in a procedure that does not



conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract.”

52. The Claimant further submitted that the reason for termination having been poor performance, the Respondent should have put her on notice and placed her on a performance improvement program before termination as was held in *National Bank of Kenya v Samuel Nguru Mutonya* (supra).
53. The Respondent on its part insisted that the Claimant was put on notice by letters dated 18th April and 13th June, 2019 both of which related to her performance as branch manager Kitale. Further, that the Claimant’s performance was assessed on a weekly, monthly, quarterly and yearly basis.
54. I have considered the letters from the Respondent which I reproduce below:

Takaful

Insurance of Africa

Confidential

Ref: TIA/500/246/04/19

April 18,2019

Peninah Jebiwot Kibor

Branch Administrator, Kitale

Dear Peninah,

Re: 2019 Quarter 1, Branch Production Performance

Reference to the communication made to all TIA employees by the HRM on January 14, 2019 on performance Management and as per the company’s HR Policy on performance Management, it has been noted that your branch’s performance is currently below expectation in regards to achievement of the targets and collection.

Your branch production for quarter 1 is noted to be at 34% against the target and 55% on collection, which is a D rating. Clearly, we can’t achieve our corporate targets with this level of performance.

The Management’s expectation is that, every staff/branch should meet the set targets for us to realize the corporate strategic plan 2019-2023. You are therefore expected to respond to this letter in a comprehensive manner, providing your strategies on how you will meet the branch’s production variance as well meet the future budgetary targets.

Further, you will be put on Performance Improvement Plan (P.I.P) for the next three months with strict monthly monitoring of your performance. Your performance shall be evaluated during the P.I.P period to decide if there is acceptable improvement, and the next course of action will be decided including termination of your services for poor performance. Even though, if the Management considers it necessary the P.I.P period may be extended for a further three months.

Kindly acknowledge receipt of the letter by signing in the space provided below.

Signed

Dr. Wanyonyi Wanyama



Chief Executive Officer
Takaful
Insurance Of Africa
Confidential
Ref: TIA/CC/053/2019
13th June,2019
Branch Manager
Kitale Branch
Takaful Insurance of Africa Ltd
BOX 1811-00100
Nairobi

Dear Peninah Kibor,

RE: Kitale Branch outstanding premium of Kes 2,90,722/=

Reference to the Kitale Branch outstanding premium of Kes 2,590,722/= (below is the summary as 31st May, 2019).

Branch	Kitale
Aged Analysis	Sum of O/S
0-30 days (May 1019)	1,201,558
31 – 60days	203,373
61-90 days	614,062
91-120 days	127,435
Above 120 days	44,204
Above 181 days	400,090
Grand Total	2,590,722

As per the credit policy, no underwriter/Branch Manager is allowed to confirm cover for any Client until the premium payable (or a portion of its approved) is received or guaranteed to be paid by such person in such manner and within such time as approve, or unless and until a deposit of a prescribed amount, was made in advance.

Any violation to the credit policy have percussions to whoever is responsible. Further; Failure to receive premiums as per the agreed terms will lead to cancellation



of the policies and accounts forwarded to external debt collectors without further notice.

If there are credit arrangements that existed in the above outstanding balances, provided signed/approved written credit application letters for each of your det to confirm that the debt is valid. (Evidence solicited should be in writing).

Provide also evidence of compliance with the said credit arrangements; in case of violations to agreed credit arrangements, provide evidence showing follow up efforts and give your recommendations for each of the debt. For TPOs zero debt is expected, provide confirmations that you have complied 100% with this requirement.

For intermediaries with credit arrangements with Takaful Insurance of Africa Ltd, there should be zero debt over 61 days; provide an explanation why KES 1,185,791/ = ageing over 61 days is still outstanding, and the strategies you have put in place to ensure zero overdues over 61 days in your branch.

Note that the above debt only covers the period of 1/8/2018 to 31/5/2019 and the balance provided does not include County Government business.

Be instructed that you are expected to ensure that receipting is done on a daily basis and there is no outstanding Mpesa deposits that there not yet receipted. Also note that as the Branch Manager you are responsible for the entire debt of your branch, whether or not you are the Branch Manger at the time the debt was created.

You are advice to revert back to the CEO on the above by Thursday 27/6/2019. Please not that this deadline will not be extended for any further period; with regards to POs, your branch is expected to have zero debt related to TPOs by that date.

Please be advised.

Yours faithfully,

Signed

Dr. Wanyonyi Wanyama

Chief Executive Officer

For Takaful Insurance of Africa Limited

Cc

1. Chief Executive Officer
2. Head of Business
3. Regional Business Development Manager
4. Credit Controller
5. HR File Copy

55. The letter of separation also refers to several discussions between the Claimant and her supervisor on her performance. During her examination in chief the Claimant testified that she used to discuss her performance with her supervisor. The exact words she used were: "The few meetings we had in general as all branches we discussed about performance and improvement as we also mentioned our challenges.



Apart from the zoom meetings the regional manager who was in charge of branches used to discuss with us individually in regards to performance. He was my immediate supervisor.”

56. The Claimant further admitted that performance for branches were produced and shared weekly, monthly, quarterly and yearly. She was thus aware of her performance which she discussed with her supervisor.
57. From the foregoing I am satisfied that the Respondent complied with the procedure set out in the case of *National Bank of Kenya v Samuel Nguru Mutonya* (supra).
58. The Respondent however did not give the Claimant a hearing before termination in the manner anticipated in section 41 of the Act. This was only complied with in her appeal. Having not given the Claimant a hearing before termination, the termination was unfair in terms of procedure even though the Respondent had valid reason for the termination which was on grounds of poor performance.

Remedies

59. Having found the termination procedurally unfair, I will consider the remedies sought by the Claimant.

One months' pay in lieu of notice

60. The Response to the Claimant's appeal informed her that her final dues would be paid to her upon clearance. Having been terminated and not summarily dismissed, the Claimant did not complain that her terminal dues were not paid. RW1 testified that the Claimant was paid in lieu of notice. I find that the Claimant is not entitled to this prayer as it was already paid to her.

Compensation

61. The Claimant prayed for maximum compensation of 12 months salary.
62. Having found that there was valid reason for termination and that the Respondent only failed to notify the Claimant of the intention to terminate her employment in the manner provided in section 41 but also noting that there was substantial compliance, further taking into account the reasons for termination, the length of service of the Claimant and the fact that the termination occurred during the Covid pandemic when performance was compromised by the Covid movement restrictions, it is my view that 3 months' salary is reasonable compensation. I accordingly award the Claimant the same in the sum of Kshs. 405,000.

Service Pay/Gratuity

63. The Claimant conceded during the hearing that she was a member of NSSF and that her employment contract did not provide for gratuity. Under section 35(6) of the *Employment Act* the Claimant is not entitled to service pay. The prayer is accordingly declined.

Conclusion

64. In conclusion judgment is entered for the Claimant against the Respondent in the sum of Kshs. 405,000. The Respondent shall pay the Claimant's costs and interest shall accrue from date of judgment.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY, 2025.

M. ONYANGO



JUDGE

