



**Owenga v First Community Savings & Credit Co-operative Society Ltd (Cause E061 of 2024) [2025] KEELRC 49 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 49 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE E061 OF 2024**  
**JK GAKERI, J**  
**JANUARY 22, 2025**

**BETWEEN**

**LILIAN ALOO OWENGA ..... CLAIMANT**

**AND**

**FIRST COMMUNITY SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced the instant suit on 25<sup>th</sup> July 2024 alleging unfair and unlawful dismissal from employment by the respondent.
2. It is the Claimant's case that she was employed as a customer care officer vide a renewable contract dated 28<sup>th</sup> February 2019 and was later appointed Accounts Clerk effective 1<sup>st</sup> August 2020 at Kshs. 22,800 and on 21<sup>st</sup> July 2020 confirmed as a Business Development Manager.
3. The Claimant avers that her employment was terminated on the ground that her performance was below expectations.

The Claimant alleges that she served diligently and prays for: -

- i. A declaration that the Claimant was unfairly and/or wrongfully dismissed from employment.
- ii. General damages for unlawful dismissal.
- iii. Salary for the remainder of the contract Kshs. 410,400.
- iv. 3 months salary in lieu of notice Kshs. 68,400.
- v. Leave allowance for 7 years Kshs. 159,600.
- vi. Certificate of service.



- vii. Costs of this claim and interest.
- viii. Any other relief deemed fit and just to grant.

### **Respondent's case**

- 4. The Respondent admits that the Claimant was initially appointed as a Customer Care Officer and later promoted to Accounts Clerk and terminated from employment effective 31<sup>st</sup> December 2023, but denies that she served diligently and was appraised before employment was terminated and attended an appraisal meeting on 7<sup>th</sup> December 2023 when the appraisal report of all employees were discussed and was given an opportunity to explain herself and was paid the salary for December 2023 and January 2024.

The Respondent prays for dismissal of the Claimant's case with cost.

### **Claimant's evidence**

- 5. On cross examination, the Claimant confirmed that a performance appraisal took place on 7<sup>th</sup> December 2023 and had previously been given performance targets. It was her evidence that her performance was not discussed as the meeting took the form of an interview and she was not feeling well on the material day.
- 6. The Claimant admitted that she did not meet the targets because they were extra ordinary as she had to bring on board 50 clients within one (1) month to buy the respondent's shares, deposit cash and use its products and was not given a chance to voice her concerns.
- 7. The witness admitted that she was employed by the respondent effective January 2017, took leave in 2017, 2028, 2029 and in 2020 she worked from home. That she applied for leave in 2021, 2022 and maternity leave in 2023.
- 8. She admitted that she received the letter of termination of employment on 19<sup>th</sup> December 2023 and was paid the salary for December 2023 and January 2024.
- 9. On re-examination CW1 testified that she was neither invited to explain her performance nor given a warning letter and her targets were affected by maternity leave and had not utilized all her leave days.

### **Respondent's Evidence**

- 10. RW1, Mr. Vincent Ouma confirmed that the Claimant was continuously promoted to various positions and the last was that of Business Development Officer as the respondent required a person who could convince people to join the SACCO.
- 11. The witness admitted that the Respondent did not give the Claimant a notice of termination of employment and was not invited for a meeting in the company of a friend, though she was called for a meeting on issues affecting the SACCO, but the witness had no evidence of the invitation or what the Claimant stated at the meeting.
- 12. RW1 admitted that the appraisal took into consideration the entire duration though the Claimant was on maternity leave from 21<sup>st</sup> April 2023 to 10<sup>th</sup> August 2023 and although she indicated that she was not ready for the interview, she was not accorded another date and her leave entitlement was 25 days as per the contract of employment.



13. On re-examination RW1 testified that the Claimant was not given an opportunity to explain herself and did not attend the Board meeting held on 19<sup>th</sup> December 2023 and the appraisal did not consider the Claimant's maternity leave.
14. RWII, Mr. Michael Otieno confirmed that the Claimant started as an Office Assistant and rose to become the Business Development Officer and was trained and learnt on the job through coaching and had no complaint and was not given a notice of termination of employment. That during the appraisal meeting held on 7<sup>th</sup> December 2023, the Claimant stated that her performance was affected by domestic responsibilities and was given a chance to defend her performance before the performance appraisal committee.
15. It was his testimony that for the January- December 2023 period, the Claimant worked for 9 months only.
16. On Re-examination, the witness contradicted RW1 by testifying that the Board Performance Appraisal Committee took the Claimant's maternity leave into consideration.

### **Claimant's Submissions**

17. The Claimant's Advocate submitted that the fact that the Claimant's career and remuneration progressed overtime without any warning letter, suspension or reprimand showed that the Claimant was hardworking and the respondent was biased as it did not consider the Claimant's maternity period and the targets were unachievable. According to Counsel, the Claimant had proved her case for judgment in her favour.
18. Reliance was made on the decision in Edda Anyango Okumu V. AAR Insurance Kenya Ltd (2018) eKLR.

### **Respondent's submissions**

19. As to whether the termination of the Claimant's employment was unfair or wrongful, counsel for the respondent submitted that the letter dated 19<sup>th</sup> December 2023 to the Claimant gave the reason for termination of employment as her performance was rated as below expectations for failure to meet targets and was given a chance to explain the same on 7<sup>th</sup> December 2023 when she attended with an unnamed colleague as other attendees were Business Development Officers who appeared for the same appraisal.
20. Counsel urges that the Claimant was informed of the dispute between her and the respondent and attended a meeting in the presence of her colleagues but declined to defend herself and the respondent complied with the provisions of Section 41 of the *Employment Act*.
21. Concerning the claim for general damages for the remainder of the contract, the respondent submits that the claimant is not entitled to the same as the respondent complied with the provisions of the *Employment Act* and renewal of the contract of employment was largely based on her performance and having breached her part of the bargain, the respondent was at liberty to terminate her employment and did so in accordance with the terms of the contract of employment which had no provision for 3months salary in lieu of notice as prayed for by the Claimant.
22. As regards leave allowance the respondent relies on the provisions of Section 90 of the *Employment Act* to urge that no leave allowance for 2018, 2019 and 2020 can be claimed on account of being statutorily time barred and no amount has been pleaded for 2021 and 2022 as the Claimant took maternity leave in 2023.



23. The respondent submits that the Claimant was instructed to collect the certificate of service but did not and no court order was necessary.

### **Analysis and determination**

24. It is common ground that the Claimant was an employee of the Respondent from 1<sup>st</sup> January 2017 to 31<sup>st</sup> December 2023 when her employment was terminated by the respondent vide letter dated 19<sup>th</sup> December 2023.
25. It is also not in contest that the Claimant rose from the position of Office Assistant to Customer Care Officer, Accounts Clerk and Business Development Officer over the period of her employment and served diligently until 2023 when her performance was rated as below expectations as the respondent conducted performance appraisals regularly.
26. The Claimant's case hinges on the allegation that she was not accorded a chance to defend the 2023 Performance Appraisal report and the respondent did not consider the fact that she was on maternity leave for 3 months of the period under review.
27. According to the respondent, the Claimant knew that her employment was dependent on performance, had targets to meet did not meet them, attended an appraisal meeting on 7<sup>th</sup> December 2023 with other colleagues but declined to defend her performance and the respondent was thus justified in terminating her employment in the manner it did.

The issues that commend themselves for determination are: -

- i. Whether termination of the Claimant's employment was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
28. Concerning termination of employment, it is trite law that for the same to pass the fairness test, it must be proved that the employer had a valid and fair reason to terminate the employee's employment and conducted it in accordance with a fair procedure.
29. The foregoing elements of termination of employment are encapsulated in Section 45 of the *Employment Act* and were exquisitely expounded by Ndolo J. in *Walter Ogal Anuro V. Teachers Service Commission* (2013) and the Court of Appeal in *Naima Khamis V. Oxford University Press (EA) Ltd* (2017) eKLR.
30. It requires no emphasis that poor performance is one of the valid grounds on which an employer may terminate the employment of an employee.
31. In determining whether the employer has established that the employees performance was wanting, the court must be satisfied that the employer had an established policy, framework or practice of determining an employee's performance and rating.
32. In determining whether the respondent had a valid and fair reason to terminate the Claimant's employment, the Court is guided by the sentiments of Mbaru J in *Jane Samba Mukala v Ol Tukai Lodge Ltd* (2013) eKLR as follows: -

“This is important to note as where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under Section 8 of the *Employment Act* to show that in arriving at this 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. Section 5 (8) (c) further outline the Policy



and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.

Therefore, 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 applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise it would be an easy option for abuse.

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

The court in agreement with these sentiments.

33. A panoramic view of the evidence availed by the respondent reveals that it had implemented some semblance of framework or practice of performance appraisal where employees and their supervisor agreed on targets and evaluation took place at the end of the year, though the same was not captured in any document and not rating was provided.
34. The only reference on performance was clause 7 of the Employment contract dated 19<sup>th</sup> December 2016 which expressly provided that continued employment and renewal of the contract would largely depend on performance, whose effect was to put the Claimant on guard that her performance would be critical in her retention as an employee of the respondent and the Claimant does not appear to have had any performance challenges until the end of 2023.
35. The single performance appraisal form on record for 2023 reveals that the Claimant assessed herself and was assessed by the Supervisor, Mr. Michael Owino, RWI, but neither of them signed the document and there is no indication that the appraisal report was discussed between the two and the way forward agreed upon.
36. From the brief minutes dated 7<sup>th</sup> December, 2023, it is discernible that the respondent held a review meeting for all staff jointly under the leadership of a consultant.
37. The Claimant intimidated that she was not ready to continue with the interview and stated that domestic obligations were affecting her performance as a Business Development Officer.
38. It is unclear to the court why the respondent conducted a group appraisal of staff in a single sitting yet employees reported to different supervisors and had different challenges and performance was bound to vary.
39. The communal appraisal appears insensitive to the needs and unique challenges of staff and hence to the need to address individual cases.
40. At any rate, as targets were individualized so ought to have been evaluation. Using a consultant to conduct a performance appraisal denied employees the opportunity to discuss their individual performance and in particular those whose performance was likely to be found wanting.



41. Performance appraisals or evaluation or assessment are by their very nature individual and cannot be conducted communally where employees stand up to explain their history and performance before a consultant and some members of the Board who are not involved in the ordinary operations of the organization.
42. As RW1 confirmed on cross-examination, the Claimant was not accorded an opportunity to discuss her performance with the supervisor as she was not ready to disclose the domestic challenges she was facing in the presence of her colleagues.
43. The court is left wondering why the respondent's appraisal committee could not afford the claimant an opportunity to explain herself and defend her performance, having clearly indicated that she had domestic challenges which she had not cited in previous years and in any case had no warning letter or anything suggesting that her performance in previous evaluations was wanting.
44. Closely related to the foregoing is the respondent's acknowledgment and confirmation that it was aware of the Claimant's pregnancy and granted her leave from April to August 2023, a duration of almost 4 months, a fact it did not consider in the appraisal as confirmed by RW1.
45. A typical performance review or appraisal has a provision on the challenges impacting upon the employees performance and how to address them to enhance performance including where assistance may be sought.
46. A performance appraisal is contextual in nature and cannot be dealt with otherwise and no two cases are similar unless their contexts are similar. Clearly, the Claimant's context was different from her colleagues and ought to have been considered as such.
47. Strangely the appraiser made no recommendation on the way forward notwithstanding the five (5) options provided by the form.
48. The Supervisor did not rate the Claimant. Clearly, the Respondent failed to apply itself in the manner it was obligated by law in determining whether the Claimant's performance was wanting or not.
49. The fact that the performance was not discussed in light of the totality of the surrounding circumstances rendered the same inconclusive and unfair to the Claimant.
50. Puzzlingly, the minutes of the Joint Board meeting held on 19<sup>th</sup> December 2023 misrepresented the minutes of the Appraisal Committee meeting held on 7<sup>th</sup> December 2023, in that while the minutes of the committee are explicit that the Claimant "clearly informed the committee" that domestic obligations were affecting her performance and as such could not continue with the interview, minutes of the Board meeting state that the Claimant refused to be interviewed.
51. As adverted to elsewhere in this Judgment, the respondent's appraisal tool, had no rating.
52. Rating employees as target achieved, average, above average or none, as was the case of Pauling Atieno Ochieng, without any scores or rating yet the appraisal relates to different variables could expose employees to unfair assessment.
53. The terms average, above average or poor must be grounded on figures derived from raw data, which was not the case in this instance.
54. How did the Claimant's supervisor arrive at the conclusion that the Claimant's rating below average performance?



55. The respondent admitted that it did not avail a copy of the Appraisal form to the Claimant before the Appraisal meeting on 7<sup>th</sup> December 2023 and the letter of termination of employment makes no reference to the document, but makes reference to the committee as the appraiser. Similarly, the letter has no score or rating or how the claimant was appraised.
56. From the foregoing, it is the finding of the court that the respondent has failed to prove on a balance of probabilities that it had a valid and fair reason to terminate the claimant's employment.
57. It condemned the Claimant before discussing her performance and explaining ways on how the performance could be improved or place her on a performance enhancement or improvement or acceleration plan.
58. On procedure, which is mandatory as obligated by Section 41 of the [Employment Act](#), and as affirmed by the Court of Appeal in Pius Machafu Isiritu V Lavington Security Guards Ltd (20170 eKLR, it is clear that the respondent did not act in accordance with the [Employment Act](#) as there is no evidence of any invitation of the claimant to a hearing or minutes of any hearing or evidence that she attended a disciplinary meeting in the presence of a colleague of her choice.
59. Such invitation would have outlined the agenda of the meeting, the charges, the Claimants was facing and the right to be accompanied by a colleague and to adduce evidence in addition to cross-examining witnesses and avenue and time too.
60. Contrary to the respondent's counsel's argument that the provisions of Section 41 of the [Employment Act](#) were complied with, the court respectfully disagrees as the meeting held on 7<sup>th</sup> December 2023 was a staff Appraisal meeting for all staff and not a disciplinary meeting.
61. Evidently, the Appraisal Committee did not recommend termination of the Claimant's employment and she was not invited for the Board meeting held on 19<sup>th</sup> December 2023 which made the decision to terminate her employment.
62. In the words of Mbaru J. in Jane Samba Mukala v Ol Tukai Lodge Ltd (Supra):

“Where the termination of an employee is based on the reasons of poor performance, the employer must comply with the provisions of Section 41 of the [Employment Act](#) which require that such an employee should receive an explanation as to such a reason in the presence of another employee of their choice... Where this procedure as set under Section 41 of the [Employment Act](#) is not followed, when a termination that arises from it will be procedurally placed. It is procedurally irregular. This holding was similarly held in the case of Avril Elizabeth Home for the mentally Handicapped Commission for conciliation mediation and Arbitration & others (2006) ILJ 1644 (LC) that an employee is charged with poor performance, it must be clearly set out and differentiated between what is a misconduct and incapacity both conceptually and practically.”
63. Having found that the provisions of Section 41 of the [Employment Act](#) were not complied with, the irresistible conclusion is that termination of the Claimant's employment was procedurally unfair.
64. From the foregoing, it is discernible that termination of the claimant's employment by the respondent was unfair.

Reliefs

I. Declaration



Having found that the respondent has failed to demonstrate that it had a valid and fair reason to terminate the Claimant's employment and did not comply with the provisions of Section 41 of the [Employment Act](#), a declaration that the termination of employment was unfair is merited.

II. General damages for unlawful dismissal.

The Claimant adduced no evidence to prove entitlement to general damages for dismissal from employment. More significantly, "it is trite law that general damages are not awardable for unlawful termination" See Kenya Broad Casting Corporation V. Geoffrey Wakio (2019) eKLR Alfred Githinji V. Mumais Sugar Co. Ltd, Civil Appeal No. 194 of 1991, Central Bank of Kenya V. Julius Nkonge (2002) eKLR among others. The claim is dismissed.

III. Salary for the remainder of the contract

While it is true that the Claimant's employment contract was terminated before the date it was scheduled to lapse, the Claimant is not entitled to the salary for the unexpired period of the contract of employment as the salary has not been earned or become payable as provided by the provisions of Section 17 (1) of the [Employment Act](#) and thus the claim is one for anticipatory earnings. The claimant did not prove the legal basis of the claim.

Equally, the employment contract had an exit clause and either party could terminate the same by giving the other a one (1) months' notice or salary in lieu of notice.

The claim is unsustainable and is declined. See DK Njagi Marele V. Teachers Service Commission (2020) eKLR Engineer Gachuri V. Energy Regulation Commission (20120 eKLR and Elizabeth Wakanyi Kibe V Telkom Kenya Ltd (2014) eKLR among others.

IV. 3 months salary in lieu of notice.

This claim is unsustainable and is for dismissal on account that it has neither a factual nor legal basis. Clause 10 of the Employment Contract made the contract terminable by either party giving the other one (1) calendar months' notice or salary in lieu of notice.

Similarly, the Claimant admitted on cross-examination that she was paid for the month of December 2023 and January 2024 and was thus paid one month's salary in lieu of notice. The claim lacks merit.

V. Leave allowance for 7 years Kshs. 159,600.

It is unclear to the court whether this claim relates to leave allowance properly so called or payment for unutilized leave days which the claimant claimed to have although the number remained undisclosed.

The figure translates to Kshs. 22,714 per year.

It is unclear to the Court how the figure was arrived at as leave allowance is a contractual sum payable by the employer when an employee is proceedings for annual leave or at the end of the leave year for those who did not proceed on annual leave. The amount payable is fixed by the employer and is generally a small fraction of the monthly salary.

The Claimant's employment contract makes no provision for leave allowance.

In the absence of evidence to prove that the allowance was denied and how much it was per year, the claim is declined.



However, the Claimant is entitled to payment for unutilized leave days for 2023, 2022 and 2021. This entitlement is informed by the fact that the respondent led no evidence to demonstrate that the claimant took all the 25 working days leave for any of the years worked.

Certificate of service

- VI. The Claimant is entitled to a certificate of service by dint of section 51 of the *Employment Act*.
- VII. Compensation for unfair termination of employment.
65. Having found that termination of the claimant's employment by the respondent was unfair for want of a substantive justification and procedural propriety, the Claimant is entitled to compensation by dint of Section 49 (1) (c) of the *Employment Act*.
66. In determining the level of compensation, the court has taken into consideration the following parameters:
- i. The Claimant was an employee of the respondent for a total of Seven (7) years which is not too long and served diligently.
  - ii. The Claimant did not express any wish to remain in the employment of the respondent and did not appeal the decision to terminate her employment.
  - iii. The Claimant had no recorded warning or misconduct.
  - iv. The Claimant contributed to the termination of employment by her performance, the fact that she was not accorded an opportunity to explain notwithstanding.

In the circumstances, the equivalent of three (3) months gross salary is fair compensation.

67. In the upshot, Judgment is entered in favour of the Claimant against the Respondent in the following terms:
- a. Declaration that termination of employment was unfair.
  - b. Equivalent of three (3) months gross salary Kshs. 68,400.
  - c. Unutilized leave days for 2021, 2022 and 2023.
  - d. Certificate of service.
  - e. 50% of the costs of this suit.
  - f. Interest at Court rates from the date hereof till payment in full.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 22<sup>ND</sup> DAY OF JANUARY, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

