



**Ogero v CCI Kenya Limited (Appeal E008 of 2024)
[2025] KEELRC 524 (KLR) (24 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 524 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E008 OF 2024
NJ ABUODHA, J
FEBRUARY 24, 2025**

BETWEEN

BENARD OMBUI OGERO APPELLANT

AND

CCI KENYA LIMITED RESPONDENT

*(Being an appeal from the Judgment of Hon. Principal
Magistrate B.M. Cheloti delivered on 15th December 2023)*

JUDGMENT

1. Through a Memorandum of Appeal dated 11th January 2024, the Appellant appeals against the whole Judgment of Honourable Principal Magistrate B.M Cheloti.
2. The Appeal was based on the grounds that:
 - i. The Learned Hon Magistrate erred in law and fact in dismissing the suit without considering and taking into account all the relevant facts and law and thus making an erroneous finding.
 - ii. The Learned Hon Magistrate erred both in law and fact in rendering the Judgment without taking into account the appellant's submissions and authorities relied upon thus making erroneous finding.
 - iii. The Learned Hon Magistrate erred in law and fact in finding that the plaintiff had not proved his case on a balance of probabilities.
 - iv. The Learned Hon Magistrate erred in law and fact in failing to distinguish that a performance Improvement Program is not a disciplinary process.
 - v. The Learned Hon Magistrate erred in law and fact for not considering whether the termination process of the claimant met the tenets of natural justice.



- vi. The Learned Hon Magistrate erred in law and fact in arriving at a Judgment without giving the Ratio decidendi/ reasons for her decision.
 - vii. The Learned trial Magistrate erred in law and fact in failing to appreciate the proper effect and purport of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence adduced.
3. The Appellant prayed that the Appeal be allowed with costs, the Judgment of the Trial Court made on 15th December 2023 and consequential orders thereto be set aside and that Judgment be entered in favour of the plaintiff as prayed for in the Statement of Claim dated 21st November 2022.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Gitamo Onsombi & Co. Advocates filed written submissions dated 5th November 2024 and on the issue of whether the Learned Magistrate erred for not considering whether the termination process of the Claimant met the tenets of natural Justice, submitted that the Appellant's termination process did not meet the prescribed tenets of natural Justice. That the Hon Magistrate did not consider the issues raised by the appellant in its submissions in its judgment.
6. Counsel submitted that the Appellant had been placed on PIP and was supposed to be supervised and reviewed by his/her immediate line manager but in this case he was supervised by the head of finance one Joshua Kamwere instead of Dennis Ombeta. That the records of the Performance Improvement Notice and report of the Performance and PIP Review hearing held at Garden City on 31st January, 2022 showed that Joshua Kamwere wore three hats, that is one of supervisor and line manager of the appellant, the complainant and thirdly that of judge in the PIP Review.
7. Counsel submitted that the said Joshua was indicated as the supervisor but at the signing of the same PIN form he signed as manager yet line manager was Dennis Ombeta. That given the different hats he was wearing there was clear violation of the rules/tenets of natural justice.
8. Counsel submitted that the respondent having conducted the PIP review hearing the matter ought to have escalated to a proper disciplinary hearing as contemplated under section 41(1) and (2) of the [Employment Act](#) which did not happen therefore the Appellant did not have a fair hearing before his service was summarily terminated and was never given a chance to call a fellow employee to a properly constituted disciplinary process.
9. On the issue of whether the learned Magistrate erred in failing to distinguish that a PIP is not a disciplinary process counsel submitted that the two processes are separate and distinct from one another. That a PIP is meant to give support to employee to ensure work improvement and should be properly anchored by the employer, and in this case it was not properly anchored.
10. Counsel submitted that a disciplinary process on the other hand is meant to give an employee a chance to state his or her case in line with section 42(1) of the [Employment Act](#) before being terminated or allowed to continue working depending on the outcome. Counsel relied on among others the case of Naumy Jemutai Kirui v Unilever Tea Kenya Limited [2020] eKLR and submitted that upon the end of the PIP process, the employer must allow the employee an internal process to address poor performance before termination.
11. Counsel submitted that upon concluding the PIP review hearing on 31/1/2022, the appellant was informed that the HC will review the KPIs achievement and get back to him with the outcome of



- the performance review. That the outcome was never communicated instead the Appellant was issued with a termination letter dated 10th February 2022.
12. Counsel submitted that the termination letter did not mention whether the Appellant was invited to a disciplinary hearing by way of a show cause letter why his contract should not be terminated in view of the PIP Review outcome. That had the Hon. Magistrate understood the clear distinction between a PIP and a disciplinary process she could have reached a completely different finding.
 13. On the issue of whether the Learned Magistrate erred in finding that the Plaintiff had not proved his case on a balance of probabilities, counsel submitted that the Appellant was never taken through a disciplinary process as envisaged under section 41(1) and (2) of the Act but was only taken through PIP hearing and subsequently unfairly terminated. That the Respondent did not controvert the Appellant's contention that he was never granted a proper disciplinary hearing; no minutes of the disciplinary hearing were produced. That he proved his case on a balance of probabilities.
 14. Counsel submitted that the Appellant was entitled to damages for unlawful and unfair termination, house allowance and service pay.

Respondent's Submissions

15. The Respondent's Advocates Mulanya & Maondo Advocates filed its submissions dated 6th December 2024 and on the issue of whether the Appellant's termination was conducted procedurally, counsel submitted that at the time of employment the Appellant was issued with an employment contract together with the job description complete with key results areas which he was expected to achieve. That the Appellant was expected to deliver on his job description which he failed to do despite being issued with several warnings calling for improvement on his performance at work prompting the Respondent to take him through PIP. That it is stated in the contract that the Respondent was entitled to terminate the Appellant's contract if he willfully neglected to carefully or properly perform duties as per the contract or as stipulated in the job description.
16. Counsel submitted that the termination of the Appellant's employment met the requirements set out under section 41 of the [Employment Act](#) because the Respondent had a valid reason to terminate the Appellant's employment on account of poor performance and the proper procedure was followed. That the Appellant was notified of his poor performance in line with section 41 where he was given a Performance Improvement Notice which notified him of the decision to place him on PIP to track his performance for the purposes of improvement. The Appellant did not disprove of the PIP which he was taken through.
17. Counsel submitted that the Respondent reviewed the Appellant's performance through reviews and also helped him through guidance and supervision by his departmental heads but he failed to do so. That the Appellant was accorded an opportunity to improve, to be heard and to air his grievances through communication and meetings with supervisors and departmental heads.
18. Counsel submitted that the Respondent was constrained to invite the Appellant to a hearing on 31st January 2023 and the Appellant informed the meeting that he was comfortable with the representation provided in the meeting. That the Appellant confirmed in the said Performance hearing that he managed to deliver on some KPIs as best as he could but did not deliver on other KPIs and that he had received support where necessary from Dennis Ombeta and Joshua across the month.
19. Counsel relied on the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010: (2010) LLR 255 (ICK) (September, 2013) and submitted that an employer has to show



the measures that were in place to enable them assess performance of each employee and measures taken to address poor performance once the policy is in place.

20. Counsel submitted that the Appellant alleged that he was taken through the review exercise but not through disciplinary session before termination. That his termination was not for disciplinary reason but for poor performance where hearing was conducted for this purpose and the Appellant expressly admitted having failed to achieve the required results despite having been put on the PIP. Counsel relied on among others the case of *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] KEELRC 496 (KLR) and submitted on the question of poor performance and employee misconduct being different issues.
21. Counsel submitted that the Appellant's services were terminated after the hearing was conducted because of his poor performance. He was issued with a termination letter and his final dues paid. That he occupied a sensitive position which required everybody to be vigilant at their work and the Respondent had a valid reason to terminate his service as per section 45 of the *Employment Act*.
22. On the issue of whether the termination of the Appellant met the tenets of natural justice, counsel submitted that the Appellant was given ample time by the Respondent to make improvements in his performance at work by being given all the necessary support from his department through reviews but failed to improve. That Mr. Joshua Kamwere being the head of finance Department, it was his duty to ensure that every member of his department performed and those who didn't were taken through the PIP.
23. Counsel relied on the case of *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] KEELRC 469 (KLR) and submitted that it is for the employer to determine the best placed person or officer in its establishment to undertake any assessment, appraisal as may be required so as to address the performance of an employee. That the Appellant agreed with the facts captured in the minutes of the performance review hearing and the contents of the performance improvement notice/program by appending his signature on the said document. He acknowledged having received support from Dennis Ombeta and Joshua across the month.
24. Counsel submitted that the Appellant appeared before a panel of 4 people where his performance was discussed and all the KPIs were outlined by the Respondent and the Appellant responded to all KPIs which he had not achieved. That the Appellant was given all necessary support and redemption opportunities to improve but he failed to improve his performance prompting his dismissal. That the Appellant has not provided any evidence to indicate any contrary position from Respondent's position to indicate how his termination was unfair.

Determination

25. The court has considered the pleadings and submissions filed by the parties herein and proceeds to analyse them as follows.
26. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as held in *Court of Appeal for East Africa in Peters –vs- Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;



- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
27. The Judgment of the trial court was that the Appellant's claim was dismissed for lack of merit with no orders as to costs. That the Appellant failed to satisfactorily prove that he had not been provided with a valid reason for termination and that he had not been afforded an opportunity to be heard and that the Respondent adhered to due process as required by law.
28. Having considered the appeal, the evidence in the Record of Appeal and the Submissions on record the court opines that the grounds of appeal which require to be determined to fully resolve this appeal are:
- a. Whether the trial court erred in law and fact in finding that the respondent was justified in dismissing the appellant on account of poor performance and the Court finds in favour of the appellant;
 - b. Whether the appellant was entitled to reliefs sought.

Whether the trial court erred in law and fact in finding that the respondent was justified in dismissing the appellant on account of poor performance

29. The events leading to the termination of employment of the Appellant points out to poor performance as the main reason for the termination of employment. The Appellant was issued with a termination letter stating that he had not met the target in the KPIs after a performance and PIP hearing held on 31/1/2022.
30. Courts have spoken severally to the issue of Poor Performance while stating that merely citing poor performance is not enough. Sections 41, 44 and 45 requires an employer to discipline its employees based on poor performance as the capability of an employee to perform their duties is an essential requirement of the contract of employment. Termination of employment due to poor performance is therefore a valid and fair reason for termination. In the case of Thomas Odol Ojwang vs Kenol Kobil Ltd [2015] eKLR the court set out the principles that the Respondent needs to incorporate in the Performance Development Plans, the Performance Improvement Plan and the capability hearings which tools/practices are to be consistent with section 41 of the *Employment Act* and article 47 of *the constitution* and on fair administrative action.
31. In the case of Periosteum Bheekhoo v. Linksoft Group [2015] eKLR: Cause No.1232 of 2014 at Nairobi it was held that the employer must prove that the employee was aware of performance standards, efforts were made to support improvement, and time was given for the employee to make necessary improvements.
32. This court appreciates that the Appellant was issued with a Performance Improvement Notice (PIN) and then put on Performance Improvement Plan (PIP). These were reviewed through hearing held on 31st January 2022 and his KPI's known to him as per the contract of employment. The Appellant acknowledged and admitted not achieving some of the KIP's and that he had received support from his superiors. The Respondent decided to terminate his services thereafter a vide a letter dated 10th February,2022 on account of poor performance.
33. The court notes that the Appellant stated that the KPI's were achievable and he never raised any issue if anything was hindering him from achieving his KIP's. The court therefore agrees with the trial



- court that the Respondent had valid and fair reasons to terminate the Appellant on account of poor performance.
34. Under section 47(5) of the *Employment Act*, the burden of proof that an unfair termination has occurred is on the employee while the burden of proving reasons for termination is on the employer. The Appellant herein conceded that he was put on PIP and that during the period of PIP he asked for and was accorded the necessary support. The Respondent's case was that failure to meet targets set in the PIP was ground for termination of service of the Appellant. The court is further guided by the case of Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:
- “The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
35. Regarding procedural fairness it is now an established principle that for termination to pass fairness test there should be both substantial and procedural fairness in a number of cases including the cases of Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.
36. Procedural fairness is mandatory even in the event that the employer has a valid ground for termination. The procedure would be as defined under section 41(2) of the *Employment Act* to wit:-
- ‘41(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.’
37. The Appellant disputed the hearing conducted by the Respondent on 31st January, 2022 at Garden City about his performance and stated that he was not given proper disciplinary hearing as stipulated under section 41 of the *Employment Act*. This court agrees with the trial court that the Appellant was terminated following proper procedure. It is not in dispute that the Appellant was heard on his poor performance on 31st January, 2022. The Court takes the view that section 41 of the *Employment Act* is sufficiently adhered to if the employer can illustrate that an employee was heard on allegations at hand and provided a reasonable opportunity to respond to them.
38. The court in the upshot finds and holds that there was procedural fairness before the termination of the Appellant's service.
39. In conclusion this Court upholds the judgment of the trial court and finds the appeal without merit and hereby dismisses the same with costs.
40. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

