



**Oduor v Umba Technology Limited (Cause E382 of 2023)
[2025] KEELRC 1005 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1005 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E382 OF 2023
SC RUTTO, J
MARCH 28, 2025**

BETWEEN

ALICE ANYANGO ODUOR CLAIMANT

AND

UMBA TECHNOLOGY LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim which was filed on 16th May 2023, the Claimant avers that she was employed by the Respondent with effect from 14th November 2022 as the Head of Growth. According to the Claimant, the Respondent head hunted her from her stable job at Bento Valleys Limited with an annual gross salary of Kshs 10,337,364.00.
2. It is the Claimant's case that during her employment, she satisfactorily performed her duties and at no given time did she receive any warnings, oral or written, from the Respondent. That she diligently served the Respondent until 13th January 2023, when the Respondent, vide WhatsApp phone call dubbed as a catch-up call and through its Chief Financial Officer, wrongfully, unlawfully and unfairly terminated her employment without any valid reasons and without adhering to the statutory procedural fairness. The Claimant further contends that at no point was she given a chance to respond to the termination.
3. It is against this background that the Claimant has prayed for the following reliefs:
 - a. A declaration that the termination of the Claimant's employment on account of the purported poor performance was unjustified, unfair, wrongful and unlawful.
 - b. A declaration that the Respondent breached the Claimant's rights under Articles 29, 41 and 47 of *the Constitution*.



- c. Compensation for unfair, wrongful and unlawful termination of employment on account of the alleged poor performance equivalent to 12 months' pay as particularized under paragraph 18 hereinabove.
 - d. An order directing the Respondent to issue the Claimant with a certificate of service in compliance with Section 51 of the *Employment Act*, 2007.
 - e. Damages for breach of Claimant's rights for protection against cruel, inhuman and degrading treatment guaranteed under Article 29 of *the Constitution*.
 - f. Damages for breach of the Claimant's right to fair labour practice guaranteed under Article 41 of *the Constitution*.
 - g. Damages for breach of the Claimant's right to fair administrative action guaranteed by Article 47 of *the Constitution* of Kenya.
 - h. Damages for breach of the Claimant's legitimate and reasonable expectation.
 - i. Interest at court rates.
 - j. Costs of the suit.
4. The Respondent opposed the Memorandum of Claim through a Statement of Response dated 15th June 2023. The Respondent has averred that the Claimant's employment was terminated during the probationary period after it was determined that she was not a good fit following numerous assessments of her performance vis a vis her contractual obligations, responsibilities, job description and expected output which highlighted the Claimant's lack of alignment with the Respondent's expectations.
 5. In the Respondent's view, the termination of the Claimant's employment was not driven by any malicious intent but rather was on legal and valid grounds and that it followed the appropriate termination procedure, acting in accordance with the right to terminate the employment as set out in the contract. On the basis of the foregoing, the Respondent has asked the Court to dismiss the Claim with costs.
 6. The matter proceeded for hearing on 10th December 2024, during which both parties called oral evidence.

Claimant's Case

7. The Claimant testified in support of her case as CW1. For starters, the Claimant adopted her witness statement and the list and bundle of documents filed alongside the Memorandum of Claim to constitute her evidence in chief.
8. It was the Claimant's testimony that during her tenure with the Respondent, her employment was marred by a myriad of frustrations.
9. The Claimant further averred that the Respondent's Chief Financial Officer barred her from updating her LinkedIn profile to reflect that she was now working for the Respondent. In the Claimant's view, this shows that the Respondent hired her with the intention of siphoning as much competitor information that she was privy to as a former employee of their competitor companies and had no intention of retaining her as an employee.
10. That further, the Respondent's Chief Financial Officer would not review and/or approve work/tasks allocated to her unless she constantly followed up with him, thereby slowing down her execution of tasks and responsibilities.



11. The Claimant further averred that in some instances, she would offer her opinion on growth and strategy to the Respondent as per her job requirements, but the same would be ignored, notwithstanding that she is an expert and is well-versed with the Respondent's product segment and local market.
12. According to the Claimant, the Respondent would mostly engage her only when they were interested in the operations of their direct competitors, Bento Ltd and Workpay Ltd, companies which she had previously worked in senior positions.
13. The Claimant further stated that the Respondent's Chief Financial Officer would assign her work late at night (8:00 pm Kenyan time) but would not give her time to work on it. He would instead handle the tasks himself before the following morning, therefore frustrating her workflow.
14. That the Respondent would at times embarrass her before her juniors in that they would assign them work and/or seek their opinion notwithstanding that the issues in question were well within her role and knowledge.
15. The Claimant further stated that the Respondent had very little respect for her position. She cited an instance where the Respondent would task her with hiring staff and while in the middle of this duty, the Respondent would bring in a Human Resource Consultant to perform the same task, thereby embarrassing her in the eyes of the job applicants and internal hiring team.
16. The Claimant further averred that on 6th January 2023 in the presence of the Chief Executive Officer and in the presence of the Chief Financial Officer, and the customer success executive, she explained the frustrations she was experiencing with the constant interference of her work. During the said meeting, they also agreed on a clear way forward, only to be terminated 5 working days later.
17. The Claimant added that at all material times, she used her expertise and her contacts to better the workforce in the Respondent in that she personally headhunted and recruited individuals (sales executives, product managers and their Human Resource Manager) with both knowledge and expertise in the Respondent's field of business.
18. That further, during the course of her employment, she created and built the first phase of the product for the Kenyan and Nigerian markets. She also revamped the Respondent's outdated sales materials and tools of trade. She also sourced through her contacts who were directly in competition with the Respondent for market sensitive information of their operations and ended up upgrading the Respondent's operations.
19. According to the Claimant, the termination of her employment therefore came as a surprise to her since she had put all her efforts into bettering the Respondent.
20. That during the WhatsApp call when her employment was terminated, she was not given a chance to respond and the Chief Financial Officer repeated that that was a final decision and that there was nothing that she could say or do to make them reconsider.
21. The Claimant further averred that the Chief Financial Officer made mention of the fact that the termination decision was made in December 2022, which was barely 4 weeks into her employment, but they had stalled.
22. She averred that at the time of the termination call, she was actively engaged in a work meeting and also had other work meetings scheduled on the same day.



23. The Claimant further stated that shortly after her wrongful, unlawful and unfair termination, the Respondent immediately proceeded to lock her out of all work accounts, including her work email address.
24. That the verbal termination was followed up with a written letter of termination dated 17th January 2023(sic), which was forwarded via her personal email on the same day.
25. She added that she had personally engaged the Respondent's Chief Financial Officer to discuss the Company's expectations of her role, which meeting in her view went very well since they came up with a clear way forward. She was therefore surprised to be fired 15 working days later.
26. It was the Claimant's view that her termination was manifestly unjustified, unlawful and unfair.

Respondent's Case

27. The Respondent called oral evidence through Mr. Tierman Kennedy, who testified as RW1. He identified himself as the Respondent's Chief Executive Officer. Similarly, he sought to rely on his witness statement, as well as the list and bundle of documents filed on behalf of the Respondent, to constitute his evidence in chief.
28. RW1 stated in his testimony that as per Clause 5 of the Claimant's Employment Contract, she would be on probation for a period of 6 months, during which time the Respondent would assess her progress and performance and if satisfactory, confirm the continuation of her employment in writing.
29. That on 17th January 2023, the Respondent terminated the Claimant's employment during the probation period.
30. RW1 averred that the Claimant's termination was based on the determination that she was not a good fit following numerous assessments of her performance vis a vis her role, job description and expected output, which highlighted a lack of alignment of the Claimant with the Respondent's expectations.
31. He further averred that the Claimant was not able to meet her targets even when he (RW1) and the Chief Financial Officer gave clear direction. According to RW1, there were several open tasks/ tickets that she was not able to complete despite several reminders.
32. It was RW1's view that the Respondent exercised their discretion reasonably in evaluating the Claimant's performance based on their needs and the job requirements for her role, which she was aware of.
33. RW1 averred that the Respondent maintained open lines of communication with the Claimant by offering regular feedback on her performance and was readily available to give guidance and answer any questions and concerns regarding the role's expectations.
34. That the Respondent on several occasions had meetings with the Claimant to try to help her understand her job role and to assist her where she had challenges. That one of those meetings was held with the Chief Financial Officer, Barry O' Mahony, on the 20th of December 2022.
35. RW1 further stated that the Respondent followed the due process for termination of probationary contracts under Section 42 of the *Employment Act* by giving her the appropriate seven-day notice of termination and even explaining to the Claimant the reason for termination.
36. That during a meeting held on the 13th of January 2023, the Claimant had been informed of the intended termination and was duly informed of the reasons why she was deemed not to be a good fit



for the company, which all circled back to the numerous meetings and conversations that had taken place previously regarding her performance.

37. RW1 further averred that in an effort to address the Claimant's poor performance, the Respondent conducted multiple meetings and conversations with the Claimant, providing her with ample opportunity to present her perspective. However, the Claimant gave unsatisfactory excuses for her non-performance and was unwilling to make changes or even put in place measures and systems to support her role.
38. RW1 further stated that the Claimant was paid all her dues up to the date the Claimant's employment was terminated, including payment of seven days in lieu of notice. That the Respondent is therefore under no obligation to make further payments as claimed.

Submissions

39. The Claimant submitted that her termination from employment was unfair and unlawful since the Respondent did not have valid reasons to do so. In the same vein, the Claimant argued that the Respondent failed to prove the reason for her termination, thus rendering the termination unfair.
40. It was further submitted by the Claimant that the Respondent did not prove the existence of the alleged reasons, and no evidence was produced to corroborate the purported examination of her performance. In support of the Claimant's submissions, reliance was placed on the case of *Jane Samba Mukala v Oltukai Lodge Limited* [2010] LLR 225.
41. In the Claimant's view, a non-existent reason for termination can neither be related to nor based on anything, except malice on the part of the employer who acts on the nothingness thereof.
42. It was the Claimant's further submission that no evidence was availed to this Court to prove that she had been accorded a fair hearing prior to the termination. To this end, the Court was urged to hold that the Respondent has failed to prove that a fair procedure was followed before termination of the Claimant's employment on account of poor performance.
43. In further support of the Claimant's position, the Court was invited to consider the cases of *Okumu v Good Man Agencies Limited* (Cause 1895 of 2017) [2022] KEELRC 13514 (KLR) (9 December 2022) (Judgment), *Kenya Building Construction Timber Furniture Industries Employees Union vs Aegis Construction Ltd (Employment and Labour Relations Cause E704 of 2020)* [2024] KEELRC 1206 (KLR) (14 May 2024) (Judgment) and *Harrison Okallo Alinda vs Double Delight Restaurant & Supermarket* [2016] eKLR.
44. On its part, the Respondent argued that the Claimant admitted during the hearing that she was on probation. In the Respondent's view, the purpose of the probationary period was to assess the Claimant's performance, as explicitly stated in Clause 5.1 of her employment contract. In support of this position, the Respondent sought to rely on the case of *John Muthomi Mathiu V Mastermind Tobacco (K) Ltd* [2018] eKLR.
45. It was further submitted that at the time of terminating the Claimant's contract, the Respondent was aware of Section 42(1) of the *Employment Act* does not apply to probationary contracts because the same still appears in the Act despite being declared unconstitutional in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR.
46. According to the Respondent, it convened a virtual meeting with the Claimant on 13th January 2023. In its view, the meeting was labeled a "catch-up call," not a termination call, demonstrating that the termination was not predetermined.



Analysis and Determination

47. Flowing from the pleadings, the evidence on record as well as the submissions, it is clear that the Court is being called to resolve the following questions: -
- 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; and
 - iii. Is the Claimant entitled to the reliefs sought?

Justifiable reason?

48. As can be discerned from the record, the Claimant was terminated on grounds related to her performance. In this regard, the Claimant was notified by the Respondent that after examining her performance, together with the company expectations of her role, the Respondent had determined that she might not be a good fit for the company at the time.
49. In terms of Section 43(1) of the *Employment 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. Further to that, Section 45 (2) (a) and (b) 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 the operational requirements of the employer.
50. Based on the foregoing statutory provisions, it is evident that the Respondent's duty with respect to proof of reasons is clear-cut. This Court is therefore called to determine whether the Respondent has proved on a standard of probabilities that it was justified to terminate the Claimant's employment on the basis of her performance.
51. It is the Respondent's case that the Claimant's contract of employment was terminated following numerous assessments of her performance vis a vis her contractual obligations, responsibilities, job description and expected output, which highlighted her lack of alignment with its expectations.
52. It is notable that the assertions by the Respondent were not supported by any evidence. With respect to this, the Respondent did not lead evidence in whatever form or manner to demonstrate that the Claimant's performance was evaluated and if so, against which targets.
53. In a bid to support its case, the Respondent exhibited screenshots of conversations between RW1 and the Respondent's Chief Financial Officer in which the two discussed the Claimant's performance and expressed their respective frustrations. What is not clear from the record is whether at that point in time, the Claimant was aware of her targets and what was expected of her in her role as the Head of Growth in the Respondent company.
54. The Respondent further exhibited email correspondence exchanged between the Chief Financial Officer and the Claimant on 21st December 2022, following a meeting between the two.
55. As can be discerned from the email conversation, the Respondent's expectations from the Claimant were agreed upon and documented on that date. It is however unclear whether beyond 21st December 2022, the Respondent evaluated the Claimant's performance against the documented expectations. This is noting that the Claimant was terminated from employment on 18th January 2023. This was approximately three weeks after 21st December 2022.



56. In view of the foregoing, I cannot help but question how the Respondent was in a position to determine on 18th January 2023 that the Claimant was not a good fit for the company based on her performance in the absence of a performance evaluation.
57. Needless to say, the Respondent was enjoined to demonstrate the effort leading to the conclusion that the Claimant had performed poorly in her role as the Head of Growth hence was not a good fit for the company.
58. On this issue, the Court adopts the decision in the case of Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September 2013) that it does not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established. This position was reiterated by the Court of Appeal in the case of National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR.
59. What's more, the Respondent did not lead evidence to prove that it had put in place a policy or practice on how to measure good performance against poor performance. Such a policy would entail the manner in which targets are set and agreed upon, the manner of assessment of an employee's performance against such targets, and key performance indicators.
60. As the above prerequisites were not evident in this case, it follows that the determination that the Claimant was not a good fit for the company based on her performance was not based on an objective assessment.
61. In sum, as the Respondent has not proved that it conducted a performance evaluation against the Claimant's targets over a specified period of time prior to concluding that her performance was not as per its expectations hence rendering her unfit for the company, the Court finds that the Claimant's termination from employment was unjustified hence unfair.

Procedural fairness?

62. With respect to procedural fairness, Section 45 (2) (c) of the *Employment Act* places the burden on the employer to prove that termination of employment was in line with a process that is fair. Further to this, Section 41 makes specific requirements regarding the process to be complied with by an employer. This process entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
63. In this case, the Respondent has maintained that the Claimant was terminated during her probationary period in line with Section 42(1) of the *Employment Act*.
64. Section 42(1) of the *Employment Act* (now declared unconstitutional) provides as follows:

“The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.”
65. It is worth pointing out that prior to 30th July 2021, which is the date Section 42(1) 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 the termination from employment was effected during the probationary period. In this regard, the only requirement was the issuance of a seven-day notice prior to termination of the employment.



66. In the instant case, the Claimant was terminated from employment on 18th January 2023, hence it follows that as of then, the Respondent was enjoined to comply with the procedural requirements under Section 41 of the *Employment Act*.
67. According to the Claimant, she was terminated from employment on 13th January 2023 vide a WhatsApp call by the Respondent's Chief Financial Officer. This was later followed by a letter of termination dated 18th January 2023. In support of her case, the Claimant exhibited a screenshot of a message sent to her by the Chief Financial Officer in which he addresses her as follows:
- “Hi Alice,
- As discussed on Friday please see attached letter of termination. We can start the 7 day clock today as it is required in writing to you by contract...”
68. As it is, there is no evidence from the record that the Claimant was put on notice that the Respondent was contemplating termination of her employment on the basis of her performance. Coupled with that, there is no evidence that the Claimant was given an opportunity to give her explanation and defend her performance prior to being terminated from employment.
69. What therefore manifests from the record is that the Claimant's termination from employment was procedurally flawed. This was aggravated by the fact that the said termination was initiated verbally vide a WhatsApp call.
70. Notwithstanding the duration of her employment, the Claimant did not deserve to be terminated from employment in such a cavalier manner.
71. Regardless of the fact that the Claimant was still on probation, she was insulated from unlawful termination.
72. I also find it imperative to underscore that the provisions of Section 41 of the *Employment Act* are mandatory hence it follows that anything short of that process is unprocedural and unfair. This position was reiterated by the Court of Appeal in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR.
73. The total sum of my consideration is that the Claimant's termination from employment was procedurally unfair within the meaning of Section 45 (2) (c) as read together with Section 41 of the *Employment Act*.
74. All in all, the Claimant's termination was unjustified in all respects.
75. That said, I now turn to consider the appropriate reliefs to be awarded in this case.

Reliefs?

76. As the Court has found that the Respondent has failed to prove that the Claimant's termination from employment was substantively justified and in accordance with fair procedure, the Court awards her compensatory damages equivalent to three (3) months of her gross salary. This award takes into consideration the length of the employment relationship, which was considerably short, as well as the circumstances under which the Claimant was terminated from employment.

Orders

77. In the final analysis, the Court enters Judgment in favour of the Claimant against the Respondent as follows:



- a. A declaration that the Claimant's termination from employment was unfair and unlawful.
 - b. The Claimant is awarded compensatory damages in the sum of Kshs 2,875,000.00 being equivalent to three (3) months of her gross salary.
 - c. Interest shall apply on the award at (b) above at court rates from the date of Judgment until payment in full.
 - d. The Claimant shall also have the costs of the suit.
78. As the employment relationship is admitted, the Respondent shall issue the Claimant with a Certificate of Service within 30 days from the date of this Judgment.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of March 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Kamau

For the Respondent Ms. Moturi

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.

