



Nyawira v Pharmaccess Foundation (Employment and Labour Relations Cause E907 of 2021) [2025] KEELRC 1543 (KLR) (27 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1543 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E907 OF 2021**

**HS WASILWA, J
MAY 27, 2025**

BETWEEN

CATHERINE NYAWIRA CLAIMANT

AND

PHARMACCESS FOUNDATION RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Memorandum of Claim dated 25th October 2021 based on unfair and unlawful termination of her employment and the Respondent's failure to pay her terminal benefits and accrued dues. She prays for an award of this court against the Respondent amounting to a total of Kshs. 4,026,369.80 itemised in the Claim.

Claimant's Case

2. The Claimant avers that vide a letter dated 1st August 2013, she was employed by the Respondent as a Quality Officer under supervision of the Senior Programs Manager at a monthly salary of Kshs. 130,000.
3. The Claimant avers that due to her exemplary performance, she rose through the ranks to the position of Regional Manager and eventually to the position of Business Advisor.
4. The Claimant avers that on various dates in March 2021, she was asked by the Respondent to sign a Performance Improvement Plan. She then sought audience with her immediate supervisor for clarification as she was concerned as she was the best performing employee at the Respondent's own admission, however, her efforts were frustrated by the Human Resource Department who maintained she either signs the Performance Improvement Plan or resigns.



5. Subsequently, on 5th May 2021, she received a call from the Respondent's Human Resource Department to urgently report to the office as she was still working from home due to the Covid 19 pandemic; she reported to work and was issued with a summary dismissal letter.
6. It is the Claimant's case that the Respondent placed her on a performance improvement plan with unrealistic targets with the sole intention of finding her incompetent and terminating her services should she fail to meet the target under the prevailing economic hardship brought about by the Covid 19 pandemic.
7. The Claimant avers that the Respondents unlawfully and unfairly terminated her without any justifiable cause and contrary to Section 41 of the Employment Act.
8. The Claimant avers that at the term of termination of her services, she was earning a monthly salary of Kshs. 211,914.20.

Respondent's Case

9. In opposition, the Respondent filed a Response to Memorandum of Claim dated 29th December 2021.
10. The Respondent avers that at the time of termination of her employment, the Claimant held the position of Business Advisor.
11. The Respondent avers that after review of her performance for the year 2019 with her supervisor, the Claimant was put on a Performance Improvement Plan in the year 2020 as she failed to achieve the targets set for previous year. The Claimant's poor performance had been discussed between her and her supervisor on diverse dates before she was put on the Performance Improvement Plan.
12. The Respondent denies that the Claimant was summarily dismissed summarily as alleged and avers that the Claimant was issued with a one month's notice of termination of employment in accordance with the law and the terms of her employment contract.
13. It is the Respondent's case that Clause 14 of the employment contract, required the Claimant to achieve requisite performance standards set by the Respondent for the position she held. She was put on a Performance Improvement Plan in 2020, however, during the performance review she did not improve, therefore, she was once again put on a Performance Improvement Plan for a period of three months effective 25th January, 2021. Similarly, she made no improvement in her performance for the first quarter of the year 2021.
14. Having registered poor performance since 2019, the Respondent terminated the Claimant's employment in accordance with clause 14.3 of her employment contract.
15. The Respondent avers that performance reviews were conducted in the presence of the Claimant by her supervisor and the allegations that she was neither heard nor her representations considered are false.

Evidence in Court

16. The Claimant (CW1) adopted her witness statement dated 25th October 2021 as her evidence in chief and produced her list of documents dated 25th October 2021 as her exhibits.
17. During cross-examination, CW1 testified that during her employment with the Respondent she was expected to adhere to certain performance standards and under the contract, she could be dismissed for unsatisfactory performance.



18. CW1 testified that she was the best performing employee in 2019 and she still performed well in 2020 until she lost her father and brother and she could not achieve due to mourning.
19. CW1 testified that the PIP was after review of her 2019; and that she agreed during the performance review of 2019 she would do better in 2020.
20. CW1 testified that she did not meet her target in 2020 but she was the best performing that year. She was placed on PIP in March 2021 for her 2020 performance.
21. CW1 testified that she was moved from one-year contract to an open contract due to her good performance.
22. CW1 testified that in May 2021, she was called for a meeting with Human Resource without her supervisor. She told them what she was going through and she was given 3 months to improve, her performance was not discussed.
23. CW1 testified that when she was terminated with one-month notice. She had not utilised her leave as in 2020 no one went on leave as they were working from home and she also did not go on leave in 2021.
24. CW1 testified that she was a member of NSSF.
25. The Respondent's witness (RW1) Kennedy Okong'o, stated that he works as a Supervisor at the Respondent Company. He adopted his witness statement dated 28th June 2024 as his evidence in chief and produced the Respondent's filed documents dated 16th February 2024 and 28th June 2024 as his exhibits 1-10 respectively.
26. During cross-examination, RW1 testified that the Claimant was expected to do 500 million disbursements, however, she only achieved 199 million. During her performance review, she was asked to give reasons why she did not achieve but she failed to do so.
27. RW1 testified that during the Claimant's termination in 2021, she informed them that she lost 2 relatives during covid. Further, the Claimant's supervisor was not present but the Human Resource and County Director was present.

Claimant's Submissions

28. The Claimant submitted she was a permanent employee of the Respondent having worked for the company for about 8 years. Further, the fact that she was issued with a termination letter means she was considered as a permanent employee capable of being terminated.
29. The Claimant submitted that she did not misconduct herself but had she had reservations of signing the performance improvement plan. If her performance was poor then her salary increment would not have been considered and she would never have been promoted to the position of Regional Manager and eventually Business Advisor at the Respondent organization.
30. It is the Claimant's submission that the Respondent management unilaterally decided to summarily dismiss her employment vide a letter dated 5th May 2021. Upon inquiry, the Claimant later found out that she was the only one issued with a termination letter based on the performance improvement plan.
31. The Claimant submitted that she was denied the opportunity to defend and explain herself in violation of her right to administrative action provided under Section 47(1) of *the Constitution*.



32. The Claimant submitted that she neither accorded a fair hearing to defend herself nor given any warning letter or show cause letter to explain why her employment should not be terminated as required by the law. Further, to date, none of her dues have been paid.
33. It is the Claimant's case that no proof has been adduced to support the allegation that she retained the office laptop. The Respondent failed to produce employment records for the 8 years she worked for the company which would have assisted the court in determining her character and show if she had any previous disciplinary issues.
34. The Claimant submitted that the Respondent never paid her dues after dismissal as corroborated by the Respondent's witness who states that the Claimant was lawfully terminated for alleged poor performance and was not entitled to any pay.
35. The Claimant submitted that the Respondent did not pay her accrued leave days, whereas, she did not go on leave for two years due to the fact that the Respondent stated she did not deserve leave because she worked from home. This was corroborated by the Respondent's testimony that the Claimant was not entitled to any money.

Respondent's Submissions

36. The Respondent submitted on two issues: whether the Claimant's employment was unfairly and unlawfully terminated by the Respondent; and whether the Claimant is entitled to the orders sought.
37. On the first issue, the Respondent submitted that Clause 14 of the Claimant's employment contract stated that the Respondent would conduct performance reviews and performance checks on a regular basis and if an employee fails to achieve the requisite performance standards the employee would be required to undergo further training.
38. The Respondent submitted that the Claimant's performance review for the year 2019 was below the required standards and she indicated in the performance review that she would onboard more facilities and thus improve on her portfolio. Subsequently, the Respondent gave the Claimant an opportunity to improve and put her on the PIP. However, the Claimant's performance failed to improve and she was once again put on the PIP for three months in January 2021 before her employment was eventually terminated in May 2021.
39. It is the Respondent's submission that during the performance reviews, the Respondent explained to the Claimant that her performance was unsatisfactory and she needed to improve.
40. The Respondent further submitted that the Claimant confirmed during cross examination that she was called to a meeting by the Country Director and the Human Resource Manager towards the end of April 2021 where her performance was discussed. She also confirmed that she was given an opportunity to defend herself at the said meeting.
41. It is the Respondent's submission that the absence of the Claimant's supervisor did not invalidate the meeting as the issue for discussion was her performance which was deducible from documents relating to the Claimant's employment.
42. The Respondent submitted that the reasons for termination of the Claimant's employment were valid as she failed to meet the performance standards required on her as per the contract.
43. On the second issue, the Respondent submitted that the Claimant's termination letter dated 5th May 2021 indicated that the same served as a formal one month notice and she is therefore not entitled to notice pay.



44. The Respondent submitted that the Claimant's pending leave days were from 1st to 5th of June 2021 and the four days were computed and the sum of Kshs. 41,837.80 was paid to her in June 2021. Additionally, the Claimant did not state how many leave days she was entitled to and only asks for payment for annual leave; it is the Respondent's submission that she utilized her leave days and was compensated for the 4 days leave for the month of June.
45. The Respondent submitted that during cross-examination, the Claimant testified that she was a member of NSSF and that the Respondent made remittances to NSSF on her behalf during her employment as supported by the payslips produced in court. Being a member of NSSF and by virtue of Section 35 (6) (d), the Claimant is not entitled to service pay.
46. The Respondent submitted that it had valid reasons to terminate the Claimant's employment and it followed due procedure as required by the law. Further, the Claimant contributed to the termination of her employment as she failed to meet the required performance standard despite being given an opportunity to do so. Therefore, the Claimant is not therefore entitled to compensation for unfair termination.
47. I have examined all the evidence and submissions of the parties herein. Following on the facts of this case at the time of termination, the Claimant was serving the Respondent as a Business Advisor serving on an open ended contract. Her gross salary was 211,914.20/= as at May 2021.
48. Sometimes on 25th November 2019, the Claimant was placed on a performance improvement plan (PIP) for 3 months.
49. On 23/1/2020, before the 3 months period, she was informed that she was being placed on yet another PIP for another 3 months her performance having not changed.
50. In January 2021, she was assessed again and informed that her performance were below the required standards but she signed against this performance on 8/3/2021.
51. On 25/1/2021, she was again placed on a 3 months PIP and she signed the PIP on 8/3/2021.
52. On 5/5/2021, she was now served with a termination letter with the Respondents citing her poor performance as the reason.
53. I have analysed the chronology of events above to show that though the Claimant was placed on a PIP, she was not given a breather. She would be placed on a 3 months plan and be assessed within a month or 2 months period before the 3-month season was over. The case in point is the PIP of 28th November 2019 which was 3 for months, but she was re-assessed on 23/1/2020.
54. On 25/1/2021, she was placed on another 3 month PIP which she signed on 8/3/2021, but 2 months later, she was terminated.
55. The Respondents may have had evidence that the Claimant was performing below the expected target, they were however expected to grant her enough time before re-assessing her. It is however evident that the Respondents kept pushing and pushing the Claimant without considering timelines placed on her.
56. Section 41 of the *Employment Act* 2007 provides as follows:
- 41.
- (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.

57. There is no evidence that the Claimant was subjected to any disciplinary hearing and her poor performance tested and to be given chance to defend herself. This being the case, the termination of the Claimant was unfair and unjustified as provided for under section 45 (2) of the Employment Act 2007 which provides as follows:-

- (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 employees 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.

58. In term of remedies, the Claimant sought to be paid a month salary in lieu of notice of which I find from her = 211,914.20.

59. I also award her payment of 8 months salary as compensation for the unfair termination = 8 x 211,914.20 = 1,695,313.60.

60. I also find for Claimant and award her 2 years leave admitted not as not given because she was working from home = 2 x 211,914.20 = 423,828.40.

61. Prayer for payment of service pay is not payable on the Claimant was a member of NSSF and as provided for under section 35(5) and (6) of the Employment Act 2007 which states as follows:-

- (5) An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
- (6) This section shall not apply where an employee is a member of-
- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d) the National Social Security Fund.

62. Total awarded = 2,331,056.20 less statutory deduction. The Respondents will pay cost of suit and interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH OF MAY, 2025.

HELLEN WASILWA



JUDGE

