



**Musoga v Bota Design Build Limited (Employment and Labour Relations Cause E716 of 2022) [2025] KEELRC 1357 (KLR) (13 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1357 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E716 OF 2022**

**HS WASILWA, J  
MAY 13, 2025**

**BETWEEN**

**PRISCILLA MUSOGA ..... CLAIMANT**

**AND**

**BOTA DESIGN BUILD LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this claim vide a Memorandum of Claim dated 3rd October 2022 on grounds that the Respondent unlawfully terminated her employment contract. She prays for judgment against the Respondent for: -
  - a. This Honourable Court orders that the Respondent to provide the Claimant with a certificate of service for the period worked from 1st July 2020, to 10th March 2021
  - b. This Honourable Court awards the Claimant Kshs 1, 184, 964.00 as 12 months compensation for unfair termination of services and order the Respondent to pay the same to the claimant.
  - c. This Honourable Court do order the respondent to bear the costs of this cause
  - d. This Honourable Court awards the Claimant interests at court rates for prayers (b), (c) and (d) from the date of judgment until payment in full and
  - e. This Honourable Court do Make further orders and reliefs as it may deem fit.

**Claimant's Case**

2. The Claimant states that she was employed by the Respondent on 1<sup>st</sup> July 2020 as a Design Associate on a fixed term renewable contract at a monthly salary of Kshs 98,747.64.



3. The Claimant states that in the year 2020 companies operated under challenging economic environment occasioned by COVID pandemic and it was understandable that the Respondent would seek various survival or cost containment measures , however, the Respondent adopted unfair, illegal, coercive and manipulative tactics leading to her termination from employment.
4. The Claimant states that on 10<sup>th</sup> March 2021 she was unfairly and illegally terminated on an account of poor performance as she was not accorded a fair hearing as required under Section 41 of the [Employment Act](#).
5. It is the Claimant's case that vide the letter of termination dated 12<sup>th</sup> March 2021, the Respondent alluded to her alleged lack of improvement to desired level of productivity, responsiveness and participation but did not specify her culpability.
6. The Claimant states that the Respondent failed to pay her terminal benefits.

### **Respondent's Case**

7. In opposition, the Respondent filed a Memorandum of Response dated 18<sup>th</sup> October 2022.
8. It is the Respondent's case that the employment relationship was terminated due to the Claimant's poor performance and fundamental breach of contract.
9. The Respondent states that the Claimant breached the employment contract by holding a second job with Design Vitality Limited while still employed by the Respondent. Additionally, the Claimant neglected and/or failed to prepare and submit designs on time; submitted wrong designs; failed to obey reasonable instructions; tardiness and sloppiness in performance of her duties; chronic absenteeism; and unavailability during working hours and failing to attend meetings as required.
10. The Respondent states that the Claimant unreasonably blamed personal emergencies and computer problems for the fundamental breaches of the contract.
11. The Respondent states that it issued the Claimant several warnings regarding the fundamental breaches of the contract which exposed it to significant business losses and damaged the cordial business relationships it had established with some key clients.
12. The Respondent states that it informed the Claimant severally of the desired goals and deliverables and measured her performance against key performance indicators but she consistently fell short of the performance thresholds.
13. The Respondent states that performance review meetings were held on the 3<sup>rd</sup> December 2020 and 13<sup>th</sup> January 2021 and it implemented performance improvement procedures to help the Claimant meet the expected deliverables but despite all these efforts her performance did not improve.
14. The Respondent states that the Claimant necessitated the termination by failing without any reason to improve her productivity and committing fundamental breaches.
15. The Respondent avers that the Claimant is not entitled to compensation for unlawful termination as she has failed to discharge the burden of proving that the termination was unfair.

### **Evidence in Court**

16. The Claimant [CW1] adopted her witness statement as her evidence in chief and produced her documents attached to the list of documents dated dated 3<sup>rd</sup> October 2022 as her exhibits.



17. During cross-examination, CW1 testified that she was terminated from employment after working for the respondent for a period of 8 months.
18. She testified that the Respondent was a small company and the major mode of communication was phone calls, emails and physical meetings.
19. The Claimant testified that she was never assigned a computer and used her own device and on various occasions she was unable to submit the work due to a fault on the laptop she was using.
20. She also testified that in the 8 months she worked for the Respondent she did not take 31 days off work.
21. During re-examination CW1 testified that she was terminated vide a letter dated 10<sup>th</sup> March 2021 and was not given any notice.
22. She further stated that she would work both at the office or remotely at home until 2021 and denied working for design vitality.
23. The Respondent's witness [RW1] Bitanya Woldu stated that she is a director of the Respondent.
24. RW1 adopted her witness statement dated 8<sup>th</sup> October, 2022 as her evidence in chief. And adduced into evidence the documents listed in the bundle of documents dated 18<sup>th</sup> October 2023.
25. During cross examination, RW1 testified that the Claimant's employment was terminated due to poor performance.
26. RW1 testified that she implemented the PIPs with the Claimant but did not produce any document to that effect.
27. RW1 testified that during the Claimant's employment, they had a lot of back and forth on designs depending on the client but she later learnt that the Claimant had another job despite being on a full-time engagement with the Respondent.
28. RW1 testified that she held a work review meeting with the Claimant on 8<sup>th</sup> October 2020 and informed her that she required someone who would be at the office physically.
29. RW1 confirmed that she did not issue the Claimant with a show cause letter or a warning letter.
30. During re-examination. RW1 testified that the Claimant was not issued with a warning letter because it was a small company and they worked as a family.

### **Claimant's Submissions**

31. The Claimant submitted on three issues: whether the Claimant's termination from employment was for a lawful and valid cause; whether due process was followed in termination of the Claimant's employment; and whether the Claimant is entitled to the reliefs sought.
32. The Claimant submitted that there are two aspects to be considered to constitute fair termination and she made reference to the case of *Walter Ogal Anuro v Teachers Service Commission* [2013]eKLR:

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination”



33. The Claimant submitted that she was issued with a termination and separation of benefits letter dated 12<sup>th</sup> March 2021 citing reasons for termination as poor performance. However, the Respondent's director convened a meeting without disclosing the meeting's agenda and on conclusion of the Respondent communicated its intention to terminate her employment.
34. The Claimant submitted that she was issued with a termination letter alluding to her lack of improvement to the desired level of productivity, responsiveness and participation but failed to demonstrate the performance benchmarks, key performance indicators or a structured performance improvement plan that the claimant was required to meet.
35. It is the Claimant's submission that the Respondent failed to provide a valid reason for the termination and also failed to follow the outlined procedure as it did not adduce into evidence of the performance reviews, warning letters or performance assessment regarding the deficiencies in her work.
36. The Claimant submitted that the allegation that she was holding a second job while employed by the Respondent was untrue as Design Vitality was a company registered by the Claimant that become operational three months after her termination of her employment.
37. It is the Claimant's submission that the Respondent failed to discharge the burden of proof showing that the Claimant was fairly terminated and urges the court to allow the claim as prayed.

### **Respondent's Submissions**

38. The Respondent in its submission urges the court to take cognizance of the unique operational context of small business in employment and labour disputes.
39. It is the Respondent's submission that it is a micro enterprise with limited administrative resources and lacks infrastructure to implement highly formalized employment related processes and procedures and as a result they are constrained to rely on direct and informal communication.
40. The Respondent submitted that while the procedural and substantive fairness must be observed in employment matters the law does not impose a rigid or inflexible approach in evaluating the procedural and substantive fairness.
41. It is the Respondent's submission that the Claimant was fairly terminated from employment and the letter of termination dated 12<sup>th</sup> March 2021 outlined the reasons for termination as by law required.
42. The Respondent submitted that the procedure for termination of employment adhered in accordance with the provisions of Section 41 of the [Employment Act](#) as the Claimant was informed of her performance issues and a performance review meeting was held on 10<sup>th</sup> January 2021 where the concerns were raised.
43. The Respondent further submitted that discussions on the Claimant's performance further took place on the 3<sup>rd</sup> February 2021 and she was advised to improve and a final meeting was held on 10<sup>th</sup> March 2021 and thereafter a termination letter was issued. The Respondent submitted that it has attached WhatsApp messages and emails reflecting the said discussions.
44. The Respondent submitted that it did not have a written policy on sick leave documentation but the Claimant had a statutory obligation as outlined in section 30 of the [Employment Act](#). Therefore, notification alone without any substantiating document does not grant an automatic entitlement to sick-leave.



45. The Respondent submits that the Claimant was lawfully terminated on the ground of poor performance as such is not entitled to the reliefs sought.
46. I have examined all evidence and submissions of the parties herein. The Respondents terminated the Claimant's employment vide an unsigned letter dated 12/3/2021 in which they alluded to her poor performance. The Respondent's witness indicated that the Claimant's performance was low without improvement despite being placed on a performance improvement plan.
47. The Respondent averred that they issued the Claimant with several warnings on 3/12/2020, 14/12/2020 and 13<sup>th</sup> January, 2021 but that she didn't improve.
48. The Respondent sought to rely on her LinkedIn profile which showed that she was an employee of another company even when working for the Respondent.
49. The Claimant disputed this indicating that the alleged company was her own start up company created even before joining the Respondent.
50. Indeed, from the profile, the Claimant had been at the alleged company since January 2021. Yet she was employed by the Respondent since July 2020. That as it may be, was not the reason for her termination.
51. The Respondent having chosen to terminate the Claimant for poor performance, were obligated to adhere to the Section 41 of the Employment Act which states as follows:-
  41. Notification and hearing before termination on grounds of misconduct
    - 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.
52. The Respondent however admitted that they did not issue the Claimant with any notice nor subject her to any disciplinary hearing. The Respondent in effect breached Section 41 of Employment Act and could therefore not determine whether there were valid reasons to warrant termination of the Claimant.
53. Section 45(2) of the Employment Act 2007 on the other hand states 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 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.



54. The Respondents having not determined that the Claimant performed her duties in a sloppy way and having not taken her through any disciplinary process, I return a verdict that the termination of the Claimant was unfair and unjustified.
55. In terms of remedies, I find for Claimant and award her as follows:-
1. That she be issued with a certificate of service.
  2. The Respondent to pay the Claimant an equivalent of 8 months' salary for unlawful termination =  $8 \times 98,747 = 789,976$  less statutory deductions.
  3. The Respondent to pay costs of this suit and interest at court rates with effect from the date of this Judgment.

**READ, DELIVERED AND SIGNED THIS 13<sup>TH</sup> DAY OF MAY, 2025.**

**HELLEN WASILWA**

**JUDGE**

