



AWG & another v Rsm Eastern Africa LLP & another (Cause E439 & E428 of 2020 (Consolidated)) [2025] KEELRC 1336 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1336 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E439 & E428 OF 2020 (CONSOLIDATED)**

**B ONGAYA, J
MAY 9, 2025**

BETWEEN

AWG 1ST CLAIMANT

JNW 2ND CLAIMANT

AND

RSM EASTERN AFRICA LLP 1ST RESPONDENT

ELVIS OGETO 2ND RESPONDENT

JUDGMENT

1. The 1st claimant filed the Statement of Claim dated 27.08.2020 through Gicheha Lewis and Company Advocates and Mr Weru Advocate appeared in that behalf. The claimant prayed for judgment against the respondent for:
 - a. A finding that the respondent illegally discriminated the 1st claimant based on her pregnancy status to avoid granting her paid maternal leave.
 - b. A finding that the termination process on barefaced allegations of poor performance was unprocedural, hence unfair.
 - c. Payment for unlawful and unfair termination (12 months' salary) KES 250,000*12 months = KES 3,000,000.
 - d. Payment in lieu of notice for the one month not taken into consideration by the termination letter KES = 250,000.00.
 - e. Exemplary damages for discrimination on account of pregnancy.
 - f. Costs for the claim.



- g. Interests on (iii-vi) above from the date of filing of the suit until payment in full.
 - h. Any other orders that this honourable court will deem necessary and fit.
2. The Statement of Response dated 22.09.2021 was filed through Anne Babu & Co Advocates for 1st respondent. The 1st respondent prayed that the suit be dismissed with costs.
 3. The 1st claimant's case was that she was employed by the 1st respondent as a Senior Auditor through a contract of employment dated 15.03.2018.
 4. The 1st claimant states that one Elvis Ogeto a partner at the 1st respondent tried to persuade her to resign, to which she declined.
 5. On 29.07.2020 the 1st claimant was handed a termination letter dated 01.07.2020, which indicated that her employment would terminate as of 31.09.2020. The respondent issued the claimant a two months' notice instead of three months' notice indicated in the contract of employment.
 6. The 1st claimant states that she was shocked to read that the termination of employment was on the basis of poor performance, yet she had never received any notice or warning letter and had in fact received salary increments and bonuses in the previous years.
 7. The 1st claimant contends that she was not afforded an opportunity to respond to the allegations and defend herself, and that her termination was on account of discrimination for being expectant.
 8. On the part of the 1st respondent, it is pleaded that the 1st claimant was employed by the respondent as an Audit Senior 1 by a contract of employment dated 27.01.2016.
 9. As an Audit Senior 1, the 1st respondent states that the claimant was expected to exhibit a high level of competence and professionalism.
 10. The 1st respondents' structure of performance review included the following:
 - a. Job by the job evaluation which is undertaken by the employee's immediate reviewer;
 - b. Quarterly assessments;
 - c. Mid-year reviews; and
 - d. End year reviews.
 11. The 1st respondent states that the 1st claimant failed to perform her roles and responsibilities in a satisfactory manner and the following concerns were noted regarding her performance and conduct:
 - i. Poor project management skills.
 - ii. Poor management of engagement economics.
 - iii. Inability to submit work within agreed timelines.
 - iv. Submitting work which had not been reviewed by a partner to the client.
 - v. Submitting incomplete work.
 - vi. Submitting sub-standard work.
 - vii. Failure to update clients on the progress of their work.
 - viii. Failing to prioritise tasks.



- ix. Despite having access to e-learning tools and being cognizant of the requirement to undertake at least 13 e-learns, the claimant did not complete any e-learns in 2019 and 2020. The lack of learning manifested in the audit quality as well as quality of the financial statements;
 - x. Failing to submit performance appraisals and job by the job evaluations on a timely basis. In 2018, one job evaluation form was not submitted. In 2019, three job by job forms were not submitted. In 2020 one was not submitted.
 - xi. Failing to communicate honestly.
 - xii. Non-compliance with office administrative matters, for example completion of timesheets on a timely basis.
 - xiii. Failing to exhibit team work by not coaching staff working under her and assisting the engagement managers in engagement completion and reporting.
 - xiv. Failing to prepare files for archive within 60 days of approval of the financial statements.
12. The 1st respondent pleaded that some of the comments which were noted in the claimant's performance reviews were as follows:
- a. The 1st claimant should:
 - i. Research more when handling clients on full IFRS.
 - ii. Improve on picking up issues.
 - iii. Improve on project management.
 - iv. Improve on handling key issues with clients.
 - v. Ensure that all queries are addressed on a timely basis.
 - vi. Be more proactive on assignments given.
 - b. Her work was below average.
 - c. Even when additional time was given by a client for completion of an assignment, the claimant did not complete it within the agreed time.
13. In the 1st claimant's 2018 end-year review, it was noted that she needed to improve on technical aspects of her work, time keeping, meeting deadlines and communication with managers. The 1st claimant commented on the form that she needed to be more focussed and efficient.
14. The 1st respondent pleaded that according to the 1st claimant's 2019 end year review, it was noted, inter alia, that she needed to improve on her project management skills, adhering to client timelines and improving on financial statements preparation. The 1st claimant commented on the form that she would work hard to reshape her career path.
15. As a result of the 1st claimant's performance and conduct, the 1st respondent alleged that its business interests were placed at harm's way as follows:
- i. Client's requirements were not met.
 - ii. Clients were disappointed and frustrated due to delays occasioned on audits.
 - iii. There were engagement inefficiencies.



- iv. There was loss of value to the 1st respondent occasioned by poor project management resulting in overruns that could not be recovered from clients.
16. The 1st respondent further pleaded that on 18.12.2019 the claimant was invited for a feedback meeting to discuss her performance as at that date. That during the meeting it was noted that the 1st claimant needed to improve on the following:
- a. Project management skills.
 - b. Adhering to client timelines.
 - c. File closure.
 - d. Closing up file queries.
 - e. Improving on picking up issues.
17. The 1st respondent's case was that on 24.04.2020 the 1st claimant was invited for another feedback meeting and it was noted that the claimant needed to:
- a. embrace honest communication;
 - b. take responsibility;
 - c. improve her project management skills; and,
 - d. improve on closing up file queries.
18. The 1st respondent urges that the normal requirement is to achieve a 90% score for a quality audit. The 1st claimant, throughout the duration of her employment, never achieved a score of 90% and only on 4 occasions did she achieve a score of 80+%.
19. On 29.04.2020 the 1st claimant was invited for yet another feedback meeting during which the expectations regarding her performance, going forward, were laid out.
20. The 1st respondent states that some of the performance issues which had been noted previously, recurred on assignments undertaken after 29.04.2020. They included the following:
- i. The 1st claimant did not submit a performance appraisal in respect of one assignment. The appraisal which she submitted was submitted late and after follow up by the manager.
 - ii. Delays in completion of assignments, for example, as follows:
 - a. An audit which commenced during the week of 09.03.2020 was not completed as at 26.05.2020.
 - b. Failure to deliver work on time despite a scheduled client board meeting. There was negative feedback received from the client on the claimant's poor audit service delivery.
 - iii. Lack of team participation by failing to respond to queries raised by the partner following review of financial statements, to the extent that the tasks had to be undertaken by the manager.
 - iv. Charging time to a client despite lack of evidence of work done.
 - v. Submission of work for review without collection and collation of adequate audit evidence in line with the RSM Audit methodology.
 - vi. Not undertaking any e-learns in the year 2020.



21. The respondent pleaded that despite giving the 1st claimant several opportunities to improve, the claimant's performance remained extremely wanting thereby leaving the respondent with no choice but to terminate the employment relationship which it did vide a letter dated 01.07.2020 in accordance with the terms of the 1st claimant's contract of employment.
22. The 1st respondent pleaded that the salary increments which the 1st claimant received were based on inflation and were awarded to all employees in the 1st claimant's department for achieving the set financial target. The performing employees were promoted while underperformers, like the 1st claimant, only received the increment.
23. The 1st respondent further pleaded that the 1st claimant was the only employee who was never promoted in her department, evidencing her underperformance.
24. The 1st respondent maintains that the 1st claimant's termination was based solely on her poor performance and that the same was not on account of her pregnancy or that she was discriminated against on account of her pregnancy.
25. The 1st respondent urged that it had many female employees whose pregnancies are routinely celebrated as was done when the claimant gave birth to twins in 2019.
26. The 1st claimant and 1st respondents filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows:
 - a. There is no dispute between the parties that they were in a contract of service and the 1st issue for determination is answered accordingly. The employment was by the contract dated 27.01.2026 and revised by the one dated 15.03.2018. The monthly gross pay was Kshs.250,000.00 as Audit Senior 1.
 - b. There is no dispute that the employment was terminated by the letter dated 01.07.2020. The letter informed the claimant that her employment with the respondent would terminate effective 31.09.2020. The reason for termination was stated thus, "In your evaluation in June 2019, as well as your end-year evaluation for December 2019, we had discussions with you regarding the several areas that required improvement in the assignments you handled, and you were informed that your performance would require improvement. There have been significant development areas noted during this period including various improvements required on audit files and audit finalization and adhering to timelines. Hence, your performance has not been as expected to warrant promotion to next level."
 - c. The letter of termination further stated, "At our meeting of 29th April 2020, you were informed that despite encouragement and regular coaching from your managers there was no improvement in your performance. Based on this and in line with Clause 24 (a) of your employment contract, we hereby give you notice that your contract will be terminated within three months from the date of this letter, that is on 31st September 2020." The cited Clause 24(a) provided for, after confirmation, termination of the contract by either party giving three (3) months' written notice or paying salary in lieu of such notice.
 - d. The claimant appears to have received the letter of termination on 09.07.2020 by endorsing thereon and signing accordingly.
 - e. To answer the 2nd issue for determination, the Court returns that the contract of employment was terminated per the letter of termination dated 01.07.2020.



- f. To answer the 3rd issue, the Court returns that the respondents has established that prior to termination and as per the letter of termination, there existed unsatisfactory performance on the part of the claimant. The claimant testified and confirmed as follows:
- i. As per exhibit at page 24 of the respondent’s trial bundle, there had been a valid complaint about the manner the claimant had handled a client.
 - ii. Michael, the Audit Supervisor, by the email of 25.06.2020 stated that he was disappointed with the claimant’s poor performance in the claimant’s testimony, she admitted validity of the concern, qualifying it by stating that all staff got similar comments during the audit process. Material to the Court’s finding is that the claimant does not deny the veracity or credibility of the comment.
 - iii. The email of 16.05.2020 at page 26 of the respondent’s trial bundle was another complaint about the claimant’s performance.
 - iv. The claimant confirmed that she received several complaints about her performance such as was in exhibit at page 36 of the respondent’s bundle being a complaint of 16.09.2018 and further testified, “I confirm I received such complaints – but not often”.
 - v. The claimant testified and confirmed that at various meetings such as on 18.12.2019, 23.07.2019, 24.09.2020, and 29.04.2020 areas of performance requiring her improvement were identified and brought to her attention, accordingly.
 - vi. The claimant testified and confirmed that during job evaluation, it was found that she had not efficiently worked and she had not documented the work done or in some instances no work had actually been done and as per exhibit at page 46 of the respondent’s bundle. She confirmed that per page 48 of the bundle she had scored 38% as duly evaluated in that assignment. Further per page 69 of the bundle, the annual evaluation of areas for improvement were identified and had signed per page 39 of the bundle.
- g. In view of the 1st claimant’s own testimony, the Court finds that poor performance has been established against the 1st claimant as was stated in the letter of termination and the same existed as at the time of termination per section 43 of the Employment Act, 2007.
- h. To answer the 4th issue, the Court returns that in light of the poor performance, the 1st respondent nevertheless opted to give the 1st claimant a soft landing by terminating the contract of service per the agreed termination clause. The Court returns for the 1st respondent that the procedure adopted to terminate the contract of employment was not unfair because it was per the contractual termination clause and the poor performance having been established, the Court considers that the 1st claimant fully contributed to the termination.
- i. To answer the 5th issue, the Court finds that the 1st claimant has offered no evidence to show that the termination was on account of her pregnancy as was alleged. The allegation of discrimination on account of pregnancy is not established at all and the same will fail together with the claim for compensation in that regard.
- j. To answer the 6th issue, the claimant testified that she was paid the three months’ salaries but after the filing of the suit. All the other claims including that of unfair termination having



collapsed and in the consideration of the belated payment, there will be no orders on costs of the suit between the 1st claimant and the 1st respondent.

27. The 2nd claimant filed the statement of claim dated 26.08.2019 against the 1st and 2nd respondents and through Gicheha Lewis & Company Advocates. The 2nd prayed for judgment against the jointly and severally against the 1st and 2nd respondents for orders as follows:

- a. A finding that the 2nd respondent infringed upon the 2nd claimant's rights by subjecting her to sexual harassment which the 1st respondent failed to remedy even upon complaint.
- b. A finding and declaration that the claimant's termination was unprocedural hence unfair.
- c. Payment for unlawful and unfair termination 12 months x Kshs.190, 000.00 gross monthly salary Kshs. 2, 280, 000.00.
- d. Payment of an additional one month in lieu of notice Kshs. 190,000.00.
- e. Exemplary damages for sexual harassment and discrimination by the 2nd respondent.
- f. General damages for unfair termination.
- g. Costs of the claim.
- h. Interest on c to f above from the date of filing the suit till payment in full.
- i. Any other orders that the Honourable Court will deem necessary and fit.

28. The 2nd claimant pleaded as follows:

- a. She was employed by the 1st respondent as an Audit Senior 2 per contract dated 15.03.2018. She served diligently as employed and assigned and earned salary increments.
- b. On 27.07.2020 she received a backdated letter dated 01.07.2020 being a termination letter effective 31.09.2020. The letter referred to performance evaluation for 2019 and failure on the part of the claimant to improve upon identified areas of performance. It also stated that after a performance review at the meeting of 29.04.2020 and regular coaching by her managers, she had failed to improve. Thus, the letter notified her of termination within three months effective 31.09.2020 per clause 24(a) of her contract of service – being that either party could terminate by giving three months' notice or pay in lieu of such notice.
- c. The 2nd claimant pleaded that she had never been notified of the alleged poor performance and the termination was therefore procedurally unfair.
- d. Further, prior to termination letter of 01.07.2020, in 2018 and 2019 she had challenges dealing with the 2nd respondent because the 2nd respondent had been advancing sexual harassment which started with calls, sexual glances, requests for hugs and at the climax a request to bear him a child and seductive comments and escalated to physical sexual harassment.
- e. On 14.01.2019 the 2nd claimant wrote to the 2nd respondent an email stating that she was very disturbed with the indecent incident of 10.12.2018. She further stated that she was uncomfortable with the 2nd respondent's comment that the 2nd claimant was "irresistible" which came shortly after the incident of 10.12.2018. In the email the 2nd claimant requested to be allowed not to be at any time and place where only the two of them were lonely or in an enclosed place. Further, the claimant pleads that she proceeded to report the matter to Mr. Ashif Kassam, Executive Chairman of the 1st respondent who promised to handle the issue. She



states that she also reported the matter to the 2nd respondent's supervisor and thereafter the 2nd respondent called the 2nd claimant intimidating her for "snitching" on him to his supervisors. But she found no reason to so resign.

- f. The 2nd claimant continued to work and on 29.04.2020 the 2nd respondent called her to a meeting and asked her to resign from employment of the 1st respondent. Subsequently on 27.07.2019 she received the termination letter dated 01.07.2019.
 - g. The termination was on account of poor performance but no notice or warning on poor performance had been issued. The termination was at the backdrop of advances of sexual harassment by the 2nd respondent as pleaded.
 - h. The 2nd claimant alleges unfair termination and violation of Articles 27(1) and (5), 41(1) and (2) (b) of *the Constitution* of Kenya, discrimination for denial of right to fair labour practices by failing to follow statutory procedure for termination on account of poor performance.
29. The 1st respondent filed the statement of response dated 22.09.2021 through Anne Babu & Company Advocates. The 1st respondent prayed that the suit be dismissed with costs. It was pleaded for the 1st respondent as follows:
- a. The 1st respondent employed the 2nd claimant as Audit Senior 2 by letter dated 15.01.2018 revised 15.03.2018 effective 01.03.2018.
 - b. The 2nd claimant was provided written outline of duties and responsibilities.
 - c. The 2nd respondent was the partner responsible for Human Resources and also a partner in the Audit Function.
 - d. The 2nd claimant was required to work professionally per professional standards and was subject to job by job evaluation undertaken by an immediate job reviewer; quarterly assessment; mid-year reviews; and end-year reviews. The 2nd claimant failed to submit work within agreed timelines; failed to attend scheduled meetings; was unresponsive to clients and failed to pick telephone calls; failed to complete job evaluation within timelines (failing to submit forms for three jobs in 2018, in 2019 out of 10 jobs she scored 88% in one job and all others submitted job evaluation forms late thus not evaluated, and in 2019 out of 4 jobs she failed to submit forms for 2 jobs); failing to deliver jobs per agreed scope; failing to submit appraisals within timelines; integrity issues in charging time to clients; poor work quality; poor direction and execution of assignments; failure to consult experts such on tax matters as required; failure to inform partners on communication to clients as required; failure to keep and cultivate client trust and satisfaction through delays in delivery of jobs; failure to undertake all parameters of assignments; failure to collect sufficient evidence for the audit assignments; and poor documentation and referencing of work done.
 - e. In 2018 end year review she was required to improve on time management. She signed evaluation forms agreeing to improve. In 2019 end year review she was required to improve on clearing issues on time; engagement efficiency , and improving on client management relationship. The 2nd claimant's failures caused the 1st respondent's business to suffer such as client disappointment and frustration; engagement inefficiencies; belated proposals thus low success rates on submitted proposals; and lack of involvement of 1st respondent's senior team to manage risks and to promote efficiency.



- f. On 29.04.2020 the 2nd claimant attended a feedback meeting. The partners and managers in the 1st respondent's Audit Department attended. The finding was that the claimant had failed to improve despite comments on areas of improvement during 2019 evaluation. Throughout her service she had never attained 90% score for quality audit. On assignments after 29.04.2020 previously noted comments on her performance recurred such as failure to submit appraisal forms for one job; submission of work for review without collection of relevant supporting evidence; failure to involve the 1st respondent's senior team; failure to undertake prescribed e-learns in 2020.
 - g. The termination by letter of 01.07.2020 received on 27.07.2020 when the three months' notice started to run was issued in view of the 2nd claimant's failure to improve in her performance. She was paid all her terminal dues on 14.09.2020 inclusive salary in lieu of notice.
 - h. The 2019 salary increment was inflationary as awarded to all the employees and irrespective level of performance. The 2nd claimant never earned a promotion. There was an error in the termination notice so that effective date was 31.09.2020 and not 27.07.2020 per the letter. The alleged unfair termination was denied and termination was solely upon the established poor performance. Per section 49(4) (b) and (k) of the *Employment Act*, 2007 the Court should examine the manner the 2nd claimant contributed to her termination.
30. The 2nd respondent filed the statement of response dated 24.09.2021 through Ongoya & Wambola Advocates and learned Counsel Mr. Wambola Advocate appeared in that behalf. The 2nd respondent pleaded as follows:
- a. The 2nd respondent denied engaging in acts of sexual harassment as pleaded, alleged, and, particularised for the 2nd claimant.
 - b. The email referred to in that respect by the 2nd claimant in her statement of claim was self-generated and a fabrication to unfairly implicate the 2nd respondent as alleged. The email was manufactured most likely in anticipation of the looming termination.
 - c. The 2nd claimant purports to rely on manufactured screenshot WhatsApp messages in circumstances that the 2nd respondent issued no communication in that respect.
 - d. Even if the 2nd respondent received the messages as alleged by the claimant and send to 2nd respondent unilaterally by the 2nd claimant that by itself would not establish that the 2nd respondent sexually harassed the 2nd claimant as was alleged. All alleged particulars of sexual harassment are contained in the 2nd claimant's unilateral and sole communications and not any other collaborative evidence is provided.
 - e. The 2nd claimant has sued the 2nd respondent upon misconceived position that it was the 2nd respondent who caused the termination of the 2nd claimant's contract of service. The alleged sexual harassment has been pleaded to suggest the 2nd respondent caused the termination whereas the 2nd respondent had no authority in that regard. The 2nd claimant failed to address issues of the poor performance and instead picked upon the 2nd respondent as a vulnerable person to advance her case.
 - f. The claim against the 2nd respondent cannot confer the 2nd claimant reliefs as claimed and prayed for in absence of evidence of sexual harassment. Claims of sexual harassment are grave and must be strictly proved.



- g. The suit against the 2nd respondent by the 2nd claimant be dismissed with costs.
31. The Court has considered the material on record and returns as follows with respect to the suit by the 2nd claimant:
- a. There is no dispute that the parties were in a contract of service and which was terminated by the letter of 01.07.2020 delivered on 27.07.2020. The 1st issue is answered accordingly.
- b. The Court finds that by her own testimony the 2nd claimant confirmed that issues were raised about her performance per email of December 2019 at page 22 of the respondent's bundle. She confirmed that per summary of evaluations exhibited at page 69 and 65 of the respondent's bundle she had never achieved a score of 90% for her service from 2018 to 2020. Further, at the meeting of 29.04.2020, the leaders of the Audit Department were present and areas for her improvement were identified. The 2nd claimant testified that at that meeting of 29.04.2020 the entire leadership of the audit team was present and together they decided that the 2nd claimant had areas to improve upon. While testifying that it was a meeting the leadership team complimented her and identified areas for her to improve, in a contradictory manner, the 2nd claimant testified thus "...I say meeting was not for appraisal. It was to ask us to resign..." he Court has considered the 2nd claimant's testimony and finds that first, the claimant had substantially failed to ever attain a score of normal or satisfactory performance of 90% and further, despite an opportunity to improve and areas of improvement being identified, the 2nd claimant failed to improve. In light of that unsatisfactory performance, the 1st respondent correctly opted to invoke the contractual termination clause on three months' notice or pay in lieu of notice. While there was a mix up in the termination notice or termination letter, the 2nd claimant confirmed that she received her full monthly payment until 31.10.2020. In such circumstances the Court finds that the 1st respondent adopted a fair procedure being service of the three months' notice and for which the 2nd claimant was fully paid. The Court finds that as envisaged in section 45 of the *Employment Act*, 2007, the 1st respondent adopted a fair procedure and invoked a fair reason to justify the termination of the 2nd claimant's contract of service. To answer the 2nd issue the Court finds that the termination was not unfair both in procedure and substance.
- c. To answer the 3rd issue, the Court returns that in the circumstances of the instant case the 2nd claimant has failed to establish the alleged sexual harassment and claims of discrimination and unfair labour practices in that respect. The court has considered the following materials in arriving at that finding, thus:
- i. The 2nd claimant testified and confirmed that at the meetings of 24.04.2020 and 18.12.2020 the leadership of the Audit Department were present and the 2nd respondent was as well present. She then further testified thus, "Nothing was discussed outside my performance." The 2nd claimant also testified that as at October 2020 it was a year and 9 months since she had raised the issue with the 2nd respondent and then with the global leadership of the 1st respondent (sometimes in January 2019). It appears to the Court that the claimant had opted not to pursue the allegation, if at all it was valid, and especially that at the meeting of 29.04.2020 she had not raised the issue at all.
- ii. During cross-examination by Mr. Wambola, the 2nd claimant testified thus, "Good afternoon Mr. Wambola. Prior to filing claim I instructed Advocate to do demand letter of 03.08.2020. I set out all allegations in the case. That is correct. I stated whatever I needed done so I do not go to Court. Had demands in the demand letter met I



could not have filed suit. In the entire demand letter there was no mention of sexual harassment. I confirm in the letter I do not demand any relief on sexual harassment. I see emails and screenshots produced. They were expunged from record. I recall. I confirm I have not produced any evidence I reported issues of sexual harassment to the employer. I did not report or no evidence filed. As I attend Court today no evidence on sexual harassment against me by 2nd respondent. I do not have evidence to prove sexual harassment.”

- iii. By that extensively reproduced testimony by the 2nd claimant, it is obvious that the allegations of sexual harassment by the 2nd claimant were purely an afterthought. It appears to the Court that as urged for the respondents and more so for 2nd respondent, upon the 2nd claimant being unable to explain the established unsatisfactory performance and in the face of the termination of contract upon the contractual clause on notice, the 2nd claimant in a misconceived design, implicated the 2nd respondent purportedly to show that the non-existent sexual harassment have triggered the termination. Sexual harassment is not established at all and it was not the trigger of the separation. The Court finds accordingly.

32. The Court has considered the mixed grill circumstances of the termination of the claimant’s respective contracts of service. It is found that on the one hand the unsatisfactory performance has been established to have existed as at termination per section 43 of the Act. The claimants while urging that section 41 of the Act on notice and a hearing in view of the unsatisfactory performance ought to have been invoked, in the instant case and by their own testimonies, they at all material times prior to the termination knew about the poor performance and areas needing their improvement but they had as well failed to improve. It appears to the Court that in the circumstances the 1st respondent correctly opted not to invoke the dismissal on account of unsatisfactory performance and accorded the claimants a soft landing by invoking the termination with notice or pay in lieu of notice. The Court has therefore found that the respondent adopted a fair procedure and a fair reason in terminating the employment. Nevertheless, in view of the mixed grill circumstances, it will be fair that there be no orders on costs.

In conclusion judgment is entered for the respondents for dismissal of the two suits herein filed for the claimants with no orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 9TH MAY, 2025

BYRAM ONGAYA

PRINCIPAL JUDGE

