



**Luseno v Izon Future Sysstems (Cause 1440 of 2017)  
[2025] KEELRC 1282 (KLR) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1282 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1440 OF 2017**

**K OCHARO, J**

**MAY 6, 2025**

**BETWEEN**

**JOANNE LUSENO ..... CLAIMANT**

**AND**

**IZON FUTURE SYSYSTEMS ..... RESPONDENT**

**JUDGMENT**

1. Contending that she was an employee of the Respondent at all material times, whose employment was terminated unfairly, the Claimant herein sued the Respondent seeking declaratory and compensatory reliefs.
2. The Statement of Claim was filed with the Claimant's Witness Statement and documents she intended to rely on as documentary evidence supporting the claim.
3. Upon being served with the summons to enter the appearance, the Respondent entered the appearance and filed its Answer to the Claimant's Statement of Claim on 13<sup>th</sup> December 2017, denying the Claimant's claim and entitlement to the reliefs sought, in toto.
4. After hearing the parties on their respective cases, this Court directed them to file their submissions. They obliged the directions, and their submissions are on record.

**The Claimant's case.**

5. The Claimant stated that she entered the Respondent's employment as a Business Development Executive on February 28, 2017. Her monthly salary was agreed at KShs. 120,000. The Respondent was to issue her a written agreement; however, they ultimately did not do so.
6. On July 3, 2017, Margaret Muchua, a Director of the Respondent, called her into the office and orally informed her [the Claimant] that her employment had been terminated due to poor performance.



7. She asserted that the Respondent and she did not discuss, formulate, or agree on performance targets for her at any point.
8. Notwithstanding her requests for an explanation regarding the termination, the Respondent neglected to provide any justification. She was forced to compose an email to the Director; however, it did not yield any response.
9. Instead of issuing her with a formal termination letter, the Respondent informed its other employees that the Claimant's employment had been terminated.
10. The Respondent's actions were arbitrary, unconscionable, unmeritorious and unfair and caused her immense anguish and psychological torture. The Respondent withheld her employment contract despite promising that she would issue it to her. They terminated her employment abruptly and without notice.
11. Further, unjustifiably, the Respondent failed to pay her terminal dues and issue her a certificate of service.
12. The Claimant asserted that in the circumstances, she is entitled to;
  - a. A declaration that she has a right to formal communication of the termination of her employment.
  - b. A declaration that the refusal to so communicate the termination of her employment formally amounted to unfair labour practices.
  - c. An order compelling the Respondent to issue her a certificate of service.
  - d. Payment of her terminal dues.
  - e. Two months' salary in lieu of notice.
  - f. General damages for the unfair termination of her employment, twelve months' gross salary, KShs. 1,440,000.
  - g. General damages for unfair labour practices.
  - h. Cost of this suit.
  - i. Interest on f, g, h, and i from the date of filing the claim till full payment.
13. During her cross-examination by Counsel representing the Respondent, she testified that at the time she was leaving her employment, she had not provided the Respondent with the original degree certificate for the Information Technology degree she holds.
14. She admitted that, although she promised to provide the original academic certificates to the Respondent several times, she never did so.
15. The Respondent didn't issue her a show-cause notice. Her employment was terminated on July 6, 2017, and she was paid her salary up to that date.
16. Contrary to the Respondent's assertion, she was never invited to a meeting on 3<sup>rd</sup> July 2017, to explain why her employment could not be terminated. She was only called into a meeting where she was orally informed that her employment had been terminated.
17. Before employing her, the Respondent sought information from the Claimant's former employer, which they were given.



18. In her evidence in re-examination, she testified that during the interview process, she explained to the Respondent why she didn't have the original academic certificates. She had lost them to a fire incident, and she was in the process of getting others processed for her from the various institutions. They allowed her time to process them. However, they didn't fix any timelines.

### **The Respondent's case.**

19. The Respondent presented a witness, Ms. Margret Muchua, its Director, to provide testimony on its behalf. The witness indicated that on 28 February 2017, the Claimant participated in two in-person interviews with the Respondent, concluding that she was a potential candidate for the position of Business Development Executive based on the documentation she provided and the references submitted.
20. After the interview, the Claimant was verbally asked to report to work on 1<sup>st</sup> March 2017, on which date she was required to provide the Respondent with the originals of her academic and professional documents. She didn't. Subsequently, she was reminded on several occasions to provide the documents, but she never did.
21. The Respondent's policy is that each employee undergoes a compulsory three [3] months' probation and a further three [3] months performance evaluation period before being offered a permanent employment contract, and the Claimant's case was no exception.
22. The Claimant's performance was dismal during the entire probationary period. She often could not undertake tasks that were expected of her role as the Business Development executive.
23. On or about the last week of June 2017, the Respondent decided to terminate the Claimant's employment because she had failed to provide her original academic and professional documents. The Respondent could not risk engaging an employee whose qualifications it wasn't sure of.
24. On July 3, 2023, the Respondent summoned the Claimant to show cause why her employment could not be terminated on account of her failure to provide the documents and poor performance.
25. The Claimant was thereafter disengaged and relieved of her duties for failing to provide her qualification certificates based on the Respondent's perception that it was risky to employ an unqualified person.
26. The Respondent had not issued the Claimant with an employment letter, and as such, her allegations that she was unfairly terminated are without basis since she had not been confirmed into employment but was on probation, during which period her performance was not up to the Respondent's expectations. During this period, she failed to comply with the standard requirements for employment.
27. Cross-examined, the witness reiterated that the Respondent didn't give the Claimant any formal appointment letter.
28. She was expected to be with the documents when she first turned up for the interview. However, she turned up without. The Respondent indulged her following her undertaking to avail them before reporting on duty.
29. The witness, by email dated 3rd July 2021, invited the Claimant to show why disciplinary action could not be taken against her.
30. The witness remembered that at one point, she sat down with the Claimant, set her performance targets, and agreed to them.



## Analysis and determination.

31. From the pleadings, evidence on record and the submissions by the respective parties, the following issues present themselves for the determination:

- a. Was the dismissal of the Claimant substantively and procedurally fair?
- b. Whether the Claimant is entitled to the reliefs sought.
- c. Who should shoulder the cost of the suit?

Was the dismissal of the Claimant substantively and procedurally fair?

32. The assertion made by the Respondent, that it did not provide the Claimant with a written agreement and, as a consequence, there cannot exist any basis for a claim of unfair termination, is fundamentally incorrect. This argument overlooks the stipulation within the *Employment Act*, which imposes upon the employer the obligation to prepare an employment contract for the employee's execution. In my assessment, should the employer neglect to comply with this legal requirement, they may be estopped from attempting to derive a situational advantage from such negligence, thus causing prejudice to the employee while favouring themselves. Moreover, it is pertinent to note that an employment contract may exist in either written or oral form.
33. In its attempt to establish that the Claimant was, at all material times, an employee serving a probationary period, the Respondent contended that it was its policy that any employee who joined its ranks would be under a probationary period of three months, and serve a further three months of performance evaluation before being confirmed into employment. According to this Court, the Respondent was obligated to prove this assertion on a balance of probabilities under section 10[7] of the *Employment Act*. In my view, the assertion remained unproven and was merely a bald assertion. The Respondent's witness didn't support it with any form of evidence. Was the policy embodied in a policy document? Was it explained to the Claimant? The Respondent's witness's evidence needed to address these questions, but it did not.
34. This unsupported position by the Respondent can only be seen as an attempt geared towards enabling them to benefit from the lacuna that existed in section 42 of the *Employment Act*, which didn't provide adequate protection for employees under probation until that portion, which expressly took away the protection, was declared unconstitutional in the case of *Monica Munira Kibuchi & 6 others v Mt. Kenya University; the Attorney General* [Interested Party][2022]eKLR, cited by Counsel for the Respondent..
35. By reason of the foregoing premises, I am not persuaded that the Claimant was under probation during the period he served the Respondent. Consequently, she was entitled to the protections and rights that the *Employment Act* provides to employees. Having found as I have, this Court doesn't need to consider the point raised regarding the retroactivity of court decisions, specifically regarding the *Monica Munira Kibuchi* [supra] and the dismissal of the Claimant.
36. Section 41 of the *Employment Act* 2007 provides for the procedure to be followed by an employer before terminating an employee's employment or summarily dismissing an employee from employment. The procedure is mandatory and embodies three components: the information/notification component— the employer must notify the employee of his or her intention to act against him or her and the grounds prompting this intention. Second is the hearing component — the employer must provide the employee with an adequate opportunity to prepare and make a representation regarding the grounds. This component also allows the employee the right to



accompaniment, either by a colleague if he or she is not a member of a trade union, or by a union representative if he or she is a member. Lastly, the consideration component requires that the employer consider the representations made by the employee and/or the colleague or union representative, as the case may be, before making a decision.

37. In *Hema Hospital v Wilson Makango Marwa* [2015] eKLR, the Court of Appeal stated;

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“20. As Radido, J observed in *Mary Mutundwa v Ayuda* [2013] eKLR:

“The *Employment Act*, in a radical departure from the position which obtains under the common law and in Kenya prior to 2<sup>nd</sup> June 2008 has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever his /her termination is under contemplation by the employer if the ground for the termination relates to the employee’s misconduct, poor performance or physical incapacity. The employee is, by law, even entitled to have a representative present”.

21. This Court in *CMC Aviation Limited vs. Mohammed Noor* [2015] eKLR also reaffirmed that the dismissal of an employee in that case without according him an opportunity to be heard amounted to unfair termination.”

38. Similarly, in the case of *Walter Ogal Anuro vs Teachers Service Commission* (2013) eKLR, the court held:

“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 the establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer to effect the termination”

39. The Respondent asserted that, through an email dated 3rd July 2017, the Claimant was invited to attend a meeting to show cause why disciplinary action could not be taken against her for failing to avail herself of her academic certificates and poor performance. I have scanned through the Respondent's pleadings and the evidence by their witness and, without hesitation, point out that none of them set out when the meeting occurred, if it ever did. Further, no document was placed before this court, for instance, the minutes, to show that there was a disciplinary hearing. Inexplicably, there was no termination letter issued to the Claimant to convey the alleged decision by the Respondent to terminate her employment, and the reasons for the termination.

40. For the foregoing premises, I find no difficulty concluding that the Respondent did not adhere to the procedure contemplated under section 41 of the *Employment Act*. The termination of the Claimant’s employment was procedurally unfair.

41. Section 43 of the Act mandates that an employer involved in a dispute, such as this one, must establish the reasons for termination. Failure to do so will result in the termination being regarded as unfair under section 45. Additionally, it’s crucial to note that the employer must prove the reasons and demonstrate that these reasons are fair and valid, as stipulated in section 45 (2) of the *Employment Act*.

42. Given the requirement to prove the reasons, it is insufficient for the employer to merely claim that the employee was dismissed for a specific reason. The employer must provide satisfactory and truthful evidence demonstrating that the reasons genuinely existed.



43. The Respondent asserted that they summarily dismissed the Claimant from her employment first, on the account of failure to produce her original academic certificates, and second, poor performance.

44. Section 44 [3] of the *Employment Act* provides;

“Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has, by his conduct, indicated that he has fundamentally breached obligations arising under the contract of service.”

As such, summary dismissal can only be lawful and justifiable if the conduct resulting in dismissal falls within the Act’s definition of gross misconduct.

45. For this reason, Section 44[4] provides a catalogue of acts of omission or commission on the part of the employee that will amount to gross misconduct to justify the sanction of summary dismissal by the employer. I have agonised over the alleged infraction by the Claimant – failure to provide the certificates, and the circumstances that she was allowed to be interviewed and consequently employed without the original certificates, following her explanation to the Respondent that she had lost them to fire and that she was processing issuance of fresh ones from various institutions [the respondents did not deny this fact] and come to an inescapable conclusion that the conduct does not fit into any of the categories set out in the provision. Further, in my view, it cannot be said to be of the same gravity as those listed in the section.

46. The Respondent didn’t assert that they set timelines, and demanded that the timelines be met to produce the documents, otherwise the Claimant’s employment would be terminated. Having allowed her to be interviewed and employed as mentioned above, under the circumstances, they did, without timelines set for the production of the original certificates, a sudden dismissal of the Claimant from employment, without a show cause notice, warning and termination letter, deprives of the dismissal, the character of one based on a fair reason.

47. The reason advanced by the Bank for terminating the Claimant’s employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK)* (September, 2013) the court observed as follows;

“(a). Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

(b). It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

(c). Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.



(d). In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

48. Besides merely stating that the Respondent had a policy and a performance evaluation period thereunder for every new employee, the Respondent’s witness didn’t go beyond this assertion to give details of the policy and show its true existence.
49. The Claimant asserted that there were no discussed, set and mutually agreed upon performance targets. Therefore, the issue of poor performance as a ground for a summary dismissal couldn’t arise. Cross-examined by Counsel for the Claimant, the Respondent’s witness admitted that she had nothing to demonstrate that there were set performance targets for the Claimant. However, this Court hasn’t lost sight of the fact that in her evidence under cross-examination, all she said was that she remembers there was a meeting where the targets were discussed. I am certain this was not helpful to the Respondent’s case.
50. By reason of the foregoing and the general circumstances of the instant matter, I take a clear view that the Respondent failed to establish the conditions set out in the above-stated case, the decision of which was cited with approval by the Court of Appeal in the case of *National Bank of Kenya v Samuel Nguru* [2019] KECA 404[KLR].
51. In the upshot, this Court finds that the summary dismissal against the Claimant was procedurally and substantively unfair.

Whether the Claimant is entitled to the reliefs sought or any of the reliefs.

#### **Compensation for the unfair termination.**

52. The Claimant sought compensation for the unfair termination. The authority to make this award flows from section 49[1][c] of the *Employment Act*. However, it is imperative to point out that the authority is discretionarily exercised depending on the circumstances of each case. I have considered the fact that the dismissal of the Claimant was both procedurally and substantively unfair, that there was no equity and justice in the same when one considers the alleged transgression and the sanction [summary dismissal], the length of the period of engagement at the Respondent’s place of work, and that the unexplained reason[s] why the Respondent didn’t issue a formal termination letter, setting out the reasons for the dismissal even after the Claimant asked for it, an act that passes for unfair labour practices, and conclude that the compensatory award and to an extent of two [2] months gross salary as compensation for the unfair termination, thus Kshs. 204,000.

#### **Salary in lieu of Notice.**

53. The Claimant’s employment was terminable by a twenty-eight-day notice under section 35 of the *Employment Act*. Where the notice contemplated under this provision could not be issued, she was entitled to salary instead of notice, under section 36 of the Act. Undeniably, neither the notice was issued nor payment in lieu of notice was made. I find that she is entitled to notice pay.
54. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:
  - i. A declaration that the summary dismissal against the Claimant was both procedurally and substantively unfair.



- ii. Two [2] months' gross salary, compensation for unfair termination under section 49 [1] [c] of the *Employment Act*.....Ksh. 204,000.00.
- iii. Cost of the suit
- iv. Interest on the awarded sum in [ii] above, at court rates from the date of this judgment till full payment.

**READ, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6<sup>TH</sup> DAY OF MAY 2025.**

**OCHARO KEBIRA**

**JUDGE.**

