



**Onyango v KCB Football Club (Cause E828 of 2022)  
[2025] KEELRC 2006 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2006 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E828 OF 2022**

**HS WASILWA, J  
JUNE 30, 2025**

**BETWEEN**

**FRANK OUNA ONYANGO ..... CLAIMANT**

**AND**

**KCB FOOTBALL CLUB ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this claim vide a Statement of Claim dated 11<sup>th</sup> June 2022 and prays for judgment against the Respondent for:
  - a. A declaration that his termination was unlawful.
  - b. Terminal dues as tabulated:
    - Compensation for unfair termination (12\*170,000) -kshs. 2,040,000
    - One month pay in lieu of notice – kshs 170,000
    - Accrued leave 12 days – kshs. 68,000
    - Leave allowance - kshs. 5,000
    - Win allowance
  - c. Costs of this claim
  - d. Certificate of service.

**Claimant’s Case**

2. The Claimant avers that he was employed by the Respondent vide an employment contract dated 11<sup>th</sup> October 2018 for a period running from 11<sup>th</sup> October 2018 to 30<sup>th</sup> June 2020. The contract’s key



condition was that he ensures performance in order for the team to finish in top 9 in one year in the premier league, to advise management of all technical issues that needed to be addressed from time to time and that the Claimant would be subjected to quarterly reviews.

3. The Claimant avers that at the end of the first quarter, in January 2018, he was issued with a warning letter alleging raising concerns that his performance was below the expected standards.
4. It is the Claimant's case that he had prepared a report dated 22<sup>nd</sup> February 2019 summarising the team's performance on its first leg and the challenges faced which were: injuries of some team members; lack of key players for key positions in a game; and some challenges which were beyond the team's control. However, the report was hopeful that with time and creation of synergies between him and his team, improvement will be noted.
5. The Claimant avers that on 25<sup>th</sup> April 2019, he was issued with a termination letter without any due process being followed and without being accorded an opportunity to address the allegations in the letter.
6. The Claimant avers that he was never issued with a show cause letter to enable him respond to any queries raised by the Respondent and that the Respondent acted in a rushed and inconsiderate manner.
7. It is the Claimant's case that he was unlawfully and wrongfully terminated from employment by the Respondent.

#### **Respondent's Case**

8. In opposition to the Claim, the Respondent filed a Reply to Memorandum of Claim dated 20<sup>th</sup> December 2022.
9. The Respondent admitted that the Claimant was its employee under the terms of agreement mutually executed between the parties.
10. However, he was lawfully dismissed from his position as provided by law and for breach of the terms of the contract, inability to perform the duties of his position and failure to achieve the agreed contractual obligations.
11. The Respondent avers that it afforded the Claimant sufficient notice by way of a warning letter but despite that, he failed to make good his breach of contractual obligations under the agreement or provide reasonable justification thereof.
12. It is the Respondent's case that this court lacks jurisdiction in the matter, the subject hereof being a dispute between a football coach and a club and where the provisions of the KCB Constitution and the FKF Constitution apply.
13. The Respondent avers that the Claimant has not exhausted the available remedies in the platforms provided in the said documents and the present action is premature in the circumstances. It urges the court to strike out the entire claim in limine.

#### **Evidence in Court**

14. The Claimant (CW1) adopted his witness statement dated 11<sup>th</sup> June 2022 as his evidence in chief and produced her filed documents dated even date as his exhibits.
15. During cross-examination, CW1 testified that his contract of employment had specific performance targets, one being that the team finishes the league at top 7, however, they finished at number 10.



16. CW1 testified that in his performance review report, he undertook to get to the finish of the Sportpesa Cup but the team only got to the semi-finals.
17. CW1 testified that he admitted in his report dated 22<sup>nd</sup> February 2019 that he did not meet the targets. Clause 7 of the contract stated that if he did not meet the target, the club had a right to terminate him.
18. CW1 testified that the Respondent issued him with two notices dated 20<sup>th</sup> January 2019 and 25<sup>th</sup> April 2019 and informed he will be terminated if the dismal performance continued. Ultimately, his employment was terminated on 6<sup>th</sup> June 2019.
19. The Respondent's witness Bramwel Simiyu (RW1) testified that he works as a Chairman for the Respondent Club and adopted his witness statement dated 9<sup>th</sup> August 2024 as his evidence in chief and produced the list of documents dated 3<sup>rd</sup> September 2024 as his exhibits 1-7.
20. During cross-examination, DW1 testified that the Respondent has not presented any quarterly reports to show that the club was underperforming.
21. RW1 testified that it was the Claimant's responsibility to recruit players if there was persistent injuries.
22. RW1 testified that Claimant was not issued with a notice to show cause before termination. He will also not issued with a certificate of service.
23. RW1 testified that there is no evidence in court corroborating that it spent over Kshs. 1.5 million to recruit players.

#### **Claimant's Submissions**

24. The Claimant submitted on two issues: whether the Claimant's termination on account of poor performance was fair and lawful; and whether the Claimant is entitled to the reliefs sought.
25. On the first issue, the Claimant submitted that it is trite law that for a termination of employment to be said to be fair and lawful, there must be both substantive justification and procedural fairness; as echoed in the case of Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR where the Court held that;

“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.”

26. The Claimant submitted that in the 1<sup>st</sup> half of the season, the Respondent managed to get 19 points, but in the 2<sup>nd</sup> half of the season they managed to get 26 points, for the same number of games played, that cannot be said to be poor performance; to the contrary that's a major improvement
27. The Claimant in the decision of Rika J in Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures (Cause No 273 of 2010) as follows:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.....In the case now before me, it is evident that the Claimant was not provided with any particulars of poor performance nor was he afforded any opportunity to improve. The result is that the



termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation”

28. It is the Claimant's submission that the Respondent neither pleaded nor testified that they had put in place an employment policy or practice on how to measure good performance as against poor performance. To the contrary, during cross examination he confirmed that for the previous 2 seasons they were playing the National Super League, having been demoted from the Kenyan Premier League in the 2014-2015 season. He also was unable to explain how they came up with the requirements of how many points must be attained so as to view the coach as having performed well and/or what they based the same on.
29. The Claimant submitted that the burden to prove the grounds lies with the employer as poor performance falls under categories of gross misconduct under the *Employment Act*. The Respondent ought to prove this reason and show it existed with regard to the Claimant.
30. It is the Claimant's submission that the reason for termination was unfair and unlawful as the Respondent did not controvert the Claimant's case and the reasons in the termination letter do not demonstrate any employment policy put in place to measure good performance or that if the allegations be true, that the Claimant was given time to improve.
31. On procedural fairness, the Claimant submitted that the employee's right to be heard whenever an employer is contemplating termination under Section 41 of the *Employment Act*, cannot be taken away through the invocation of a termination clause. He relied in the case of *Gabriel Kariuki Chomba v Insight Management Consultants Ltd* [2017] eKLR where it was held:

“It is not sufficient that an employment contract provides for a termination clause; the law requires that before any termination can take effect and be found to be justified, reasonable and fair, the employee must be taken through the mandatory provisions of section 41 of the *Employment Act*.”
32. On the reliefs sought, the Claimant submitted that he suffered unfair and wrongful termination and urged the court to find merit in his case and award him the reliefs sought.

### **Respondent's Submissions**

33. The Respondent submitted that the law on unfair termination and on termination on grounds of poor performance was summarised by the Court of Appeal in *National Bank of Kenya v Samuel Nguni Mutonya* [2019] KECA 404 (KLR) as follows:

“The reason advanced by the Bank for terminating the respondent'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.”

- 34. On the validity of the termination, the Respondent submitted that the grounds of termination of the Claimant’s contract were valid. The Claimant conceded both in his report and evidence in cross examination that he did not achieve the set targets and key results that had been agreed upon. Additionally, the termination letter dated 6<sup>th</sup> June 2019, set out these targets and that they had not been achieved by the Claimant in the first season and with the time agreed upon.
- 35. The Respondent submitted that the Claimant’s reports shows that only 6 out of 30 players suffered injuries and were out for a maximum of two weeks during the entire season of one year. Therefore, there was no basis of non-performance apart from the Claimant’s incompetence and inability to perform. Further, this did not explain why even after their return from injuries, the team did not perform for a whole season yet it had won a championship the year before he took over.
- 36. The Respondent submitted that allegation that it lacked key players is concede by the Claimant as he was the one who recruited key players he needed. This is undisputed y the letter by the bank dated 21<sup>st</sup> August 2019 showing the club and its sponsor had availed him all the required resources necessary to recruit the over 20 players from different countries that he brought to the club,
- 37. Therefore, the Respondent submitted that the termination was based on valid grounds and was substantively fair as the Claimant failed to achieve clearly set targets that had been agreed and documented.
- 38. On procedural fairness, the Respondent submitted that the requirement of the law is for the employee to be heard in his defence in whatever format or forum and not necessarily upon issuance of a notice to show cause. The obligation of the employer is to give clear notice of its intention to terminate the contract and hear representations made by the employee in this regard before termination is made.
- 39. It is the Respondent’s submission that the Section 45 (2) of the *Employment Act* does not create a technical requirement to issue a NTSC but rather a substantive inquiry as to whether notice in whatever form was issued and the employee was heard before termination. In the instant case, the Respondent did in fact gave notice and hear the Claimant before a termination was made as evidenced by the Respondent’s letters dated 3<sup>rd</sup> January 2019 and 25<sup>th</sup> April 2019.
- 40. It is the Respondent’s case that the Claimant was notified of the grounds for intended dismissal and required to respond where he did a formal written report which was not satisfactory leading to his dismissal.
- 41. I have examined all the evidence and submissions of the parties herein. The claimant’s case is that he was dismissed without due process. The respondent admit that the claimant was their employee but



failed to deliver on his mandate and hence the dismissal. The claimant agreed he did not meet the target he was given but it was due to injuries of players amongst other reasons.

42. The respondents in their evidence indicate that the claimant did not meet the targets given to him and that the claimant was supposed to be subjected to quarterly reviews which depended on 8 matches.
43. DW1 admitted that the claimant was given a letter of 10<sup>th</sup> December 2018 after first playing 5 matches and this was not a quarterly report as part of the contract. He also indicated that on the letter of 25/4/2019, there were 9 matches remaining in the season of 2018/2019 and out of the 9 matches the respondents lost only 1. He admitted that they terminated the claimant before the season ended.
44. RW1 also admitted that they did not issue the claimant with a notice to show cause and neither did they issue him with a certificate of service. From the evidence above, it is clear that the claimant was not subjected to any fair disciplinary hearing as envisaged under section 41 of the Employment Act 2007 which states as follows:
- (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.
45. It is also admitted that the claimant was not subjected to a fair hearing and the reasons for dismissal was not validly proved as per section 43 of the Employment Act which states as follows:
- In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
46. I therefore find for the claimant and I award him as follows:
1. 1-month salary in lieu of notice = kshs 170,000/-
  2. Compensation for unfair termination and pegged on the fact the he was denied any hearing and his certificate of service, I find 8 months' salary as adequate = 8x170,000=kshs 1,360,000/-  
Total Kshs 1,530,000/- Less statutory deduction.
  3. The claimant be issued with a certificate of service.
  4. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgement.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> OF JUNE, 2025.**

**HELLEN WASILWA**

**JUDGE**

