



REPUBLIC OF KENYA



**KENYA LAW**  
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**Komen v Ekatera Tea Kenya Plc (Cause E008 of 2024)  
[2025] KEELRC 1862 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1862 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
CAUSE E008 OF 2024**

**J RIKA, J  
JUNE 27, 2025**

**BETWEEN**

**NICKSON KOMEN ..... CLAIMANT**

**AND**

**EKATERA TEA KENYA PLC ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim dated 22nd April 2024. He states that he was employed by the Respondent on 16th September 2013, as a workshop supervisor.
2. He was placed on Performance Improvement Plan [PIP] on 8th February 2023. He successfully completed PIP on 10th May 2023.
3. Upon completion he was transferred to a different tea factory called Kimugu, where he was to be in-charge of machines.
4. He was issued a letter to show cause on 6th September 2023, based on the same issues that had been dealt with, in the PIP. He replied on 8th September 2023.
5. He was invited for disciplinary hearing, which took place on 15th September 2023. He was dismissed on 20th September 2023.
6. He appealed against the decision on 27th September 2023. He was informed on 2nd October 2023, that his appeal was unsuccessful.
7. He avers that the Respondent did not establish valid reason to justify dismissal. He was blamed for other department's failures. He was not provided adequate support by the Respondent in discharge of his duties.
8. He earned a monthly salary of Kshs. 335,788, as at the time of dismissal.



9. His prayers are: -
  - a. Declaration that termination was unfair and unlawful.
  - b. Reinstatement.
  - c. Damages for unfair termination.
  - d. Terminal dues.
  - e. Costs.
  - f. Any other suitable relief.
10. The Respondent filed its Statement of Response dated 5th December 2024. It is conceded that the Claimant worked for the Respondent from 16th September 2013, until 20th September 2023, when he was dismissed for gross underperformance.
11. Even after completion of PIP, the Claimant continued to negligently and poorly perform his duty, compelling the Respondent to issue him a letter to show cause.
12. His response was unsatisfactory, necessitating disciplinary hearing. He was heard and lawfully dismissed. The Respondent urges the Court to dismiss the Claim with costs.
13. The Claimant, and the Respondent's manufacturing manager Everlyn Juma, gave evidence for the respective parties on 6th March 2025, closing the hearing. The Claim was last mentioned on 29th April 2025, when the parties confirmed filing and exchange of their submissions.
14. The Claimant adopted his witness statement, in his evidence-in-chief. It replicates the contents of the Statement of Claim, as summarized above. He also exhibited his documents as contained in his original and supplementary bundle of documents.
15. He was assured, in a letter dated 23rd May 2023 from his line manager, that he had successfully completed PIP. He was then transferred to a new factory, and placed in charge of machines, some which were leaking and not functioning well. He did his best, repairing the bearings and the seals. The machines continued to leak.
16. He requisitioned for new spare parts, but did not have control over the procurement process.
17. The dryer was also faulty. He was directed to fix it by the Respondent. He looked for old radiators from the scrapyards and managed to fix the dryer. There were other challenges, including undersize conveyors.
18. Gerald was head of manufacturing. He identified some challenges, including faulty rollers. The Claimant explained to him that he had already placed an order for rollers. Gerald returned 4 days later and confirmed that the Claimant had developed tools for sharpening the rollers. The Claimant told the Court that he was familiar with his work. He holds a first degree in production engineering.
19. He was not placed on second PIP after transfer. The allegation that he was engaged in acts of insubordination, was not raised in the letter to show cause. He did not exchange words with Everlyn, his line manager.
20. He worked for about 10 years. He did not secure alternative employment. He retreated to his home, after dismissal, where he carries on transport business.



21. Cross-examined, he told the Court that he is an alumnus of Moi University, where he graduated with a Bachelor's degree in production engineering. He previously worked for other manufacturing companies, including mabati limited and corn products limited.
22. He was working initially at the Respondent's 3-line factory. He was transferred to Kimugu, a 1-line factory. His salary did not change with transfer.
23. The letter dated 23rd May 2023 advised the Claimant that he had completed PIP, but if his performance fell within the 3 months, he could be transferred, dismissed or taken through another PIP.
24. The letter to show cause dated 6th September 2023, issued 3 months after the letter dated 25th May 2023. It referred to other issues, not subject matter of the PIP, such as industrial safety.
25. It was alleged that he failed to monitor roller sharpening. The Respondent was being petty. The complaints were somehow similar, to the ones raised on PIP.
26. He supervised others. He assigned them roles. He monitored them. He gave them timelines for delivery. The timelines were not inadequate. He did not have issues with Everlyn. The machines at Kimugu were not new to the Claimant, requiring further training.
27. He responded to the letter to show cause. He attended disciplinary hearing. He was advised on his right to be accompanied by a union representative, or workmate of his choice. He was found culpable. He was advised of his right of appeal. He appealed unsuccessfully.
28. Redirected, he told the Court that Kimugu is an old factory, established in 1956. It operated old machines.
29. Everlyn Juma relied on her witness statement and 17 documents filed by the Respondent, in her evidence-in-chief. The Claimant was dismissed on valid grounds. He did not deliver, and was placed on PIP. He was not focused. He lacked passion as the maintenance manager. The Respondent was concerned about its Employees' safety, and issued the Claimant a letter to show cause. If a machine was unsafe, productivity went down. The Claimant was asked to prepare a workplan with action points. He came up with 23 action points. He gave timelines, by which end, he had only met 1 action point. He never asked for support from the Respondent, in meeting his workplan.
30. Cross-examined, Everlyn told the Court that she joined the Respondent in the year 2021. She was at the same level with the Claimant. She was promoted upon transfer to Kimugu, becoming the Claimant's supervisor.
31. Machines had spillage at Kimugu, but were overall in good condition. The dryer action point was met, but leakage occurred after completion. The Claimant supervised both production and maintenance staff. Head of manufacturing Gerald raised certain concerns. Everlyn had raised issues concerning frequent breakdowns.
32. There is a shift manager. There are safety protocols in operating machines. The Claimant gave 23 action points, but only met 1. He alleged to have met 16 in his response to the letter to show cause. He had control over requisitioning. He could follow up with the store clerks and finance department.
33. He moved from good to moderate in his performance, between 2014 to 2019. 90% mark was below par. 120% was good enough. Insubordination was raised at the disciplinary hearing. It related to instructions given to the Claimant by Gerald. He alleged that he could not meet all the action points because of interruption in electric power supply. Not all actions required power supply. Welding, balkanizing and grinding required electric power. Other actions did not require power supply.



34. Redirected, Everlyn told the Court that Gerald went directly to the Claimant, and not through Everlyn, because the Claimant was the mechanical engineer. Everlyn's role was supportive. During operations, the machine would be under the shift manager. The Claimant worked with the shift manager.
35. The issues are whether, the Claimant's dismissal was procedurally fair under Sections 41 and 45 of the Employment Act; whether it was based on valid reason[s] under Sections 43 and 45 of the Act; and whether he merits the prayers sought.

**The Court Finds: -**

36. The Claimant joined the Respondent on 16th September 2013, as a workshop supervisor. He was dismissed by the Respondent 10 years later, on 20th September 2023 on account of poor performance. He held the position of maintenance manager at the time, earning a monthly salary of Kshs. 335,788.
37. Procedure. The Claimant was placed on PIP for a period of 3 months, between 8th February 2023 and 10th May 2023. He was at the time, a workshop manager at the Respondent's Karuma factory, Kericho South.
38. He was deemed to have acquitted himself well. He received a letter dated 23rd May 2023 from the factory manager, advising him that he had improved to a satisfactory level.
39. He was told that if his performance fell to an unsatisfactory level in the next 3 months, the Respondent could take further actions against him, including: -
  - a. Transfer to another role.
  - b. Demotion.
  - c. Termination of employment on grounds of incapability.
  - d. Enter a new process [PIP] for a maximum of 1 month.
40. The following day, on 24th May 2023, the Respondent issued the Claimant another letter, changing his role from that of workshop supervisor to maintenance manager. The effective date was 1st June 2023.
41. Simultaneously with the change in role, the Claimant was transferred from Karuma factory to Kimugu factory.
42. The change in role and transfer to Kimugu factory cannot have been made pursuant to the letter of the previous day, 23rd May 2023, which states that the Claimant could have his role changed, if his performance fell, within the next 3 months.
43. He had just completed PIP successfully.
44. On 6th September 2023, after he had been transferred, he was issued a letter to show cause. It was alleged that he had failed to perform his duties as outlined in his job description, and that he failed to follow instructions issued to him by head of manufacturing. The Respondent complained that despite various engagements between him and the Respondent, action points remained unattended.
45. He responded on 8th September 2023. He explained that he was barely 2 months at the new station, and that he had acted on all issues raised by Gerald. He had among other actions, placed order for a new gearbox, and bearing blocks. He denied that he had performed his role negligently, and gave his commitment to continue working on the outstanding action points.



46. He was summoned for disciplinary hearing through a letter dated 11th September 2023. Hearing was scheduled for 15th September 2023. He was advised to bring any witnesses, a workmate or a shop steward, at the hearing. He confirmed that he attended the meeting and was heard.
47. A record of the disciplinary hearing, is captured in minutes dated 15th September 2023, signed by all the participants, including the Claimant.
48. The disciplinary committee prepared its findings and recommendations.
49. The Claimant was issued a letter of termination dated 20th September 2023. Detailed reasons were given, justifying the decision.
50. He was advised of his right of appeal. He was informed he could lodge his appeal within 7 days, directed to head of tea plantations.
51. He appealed through a letter dated 27th September 2023. Head of tea plantations, Sylvia Ten Den, wrote to him on 2nd October 2023, advising that his appeal had been considered and found unmerited. Den states that the disciplinary committee observed fair procedure, and arrived at its decision based on valid reasons.
52. The procedure adopted by the Respondent cannot be faulted. It was fair. It was meticulous. It was in conformity with the minimum statutory standards of fairness, prescribed under Sections 41 and 45 of the *Employment Act*.
53. Substantive fairness. The Court is not able to agree with Den, that the Respondent established valid reason [s], justifying termination of the Claimant's contract.
54. Dismissal was on two grounds: that the Claimant performed his work negligently; and that, he failed to follow the instructions of his supervisor.
55. The first observation to be made is that the Claimant was an Employee of the Respondent for 10 years. It is questionable why he would only start having performance challenges, and fail to follow instructions, on the 10th year of his service. Employees with long years of service, familiar with their dockets and with the training in their respective fields, do not start manifesting the kind of lapses attributed to the Claimant, abruptly, without a trigger, or change in the work environment.
56. Between 8th February 2023 and 10th May 2023, the Claimant was placed on PIP. This was while he was at Karuma factory, holding a different designation of workshop supervisor.
57. It was not made clear to the Court what performance issues, arising 10 years after the Claimant, a production engineer, led to the PIP at Karuma.
58. Suffice it to say, he was found to have impressed the Respondent during the PIP, and was advised in a letter dated 23rd May 2023, that his performance had improved, and PIP successfully completed.
59. He was advised that he needed to keep up good performance in the next 3 months, failing which he could be transferred to another role; demoted; dismissed on account of incapability; or subjected to a new PIP.
60. The following day, the Respondent wrote to him advising that his role had been reviewed to maintenance manager. Was the Claimant being transferred to another role within 24 hours, while he was advised he would be transferred to another role, if he did not keep up good performance within the next 3 months?



61. The impression created by the change of role, and actual transfer from Karuma to Kimugu factory, immediately after the Claimant successfully completed PIP, was that the Respondent was acting on its threatened actions against the Claimant, communicated in the letter dated 23rd May 2023, if he did not keep up good performance.
62. There was an element of prejudgment by the Respondent against the Claimant, even as the Respondent changed his role and transferred him to Kimugu.
63. At Karuma, he was at the same level with Everlyn. Everlyn was at the same time transferred to Kimugu, promoted, and made a supervisor to the Claimant. Although the Claimant was in charge of machines, and the production engineer at the factory, engaged directly by head of manufacturing Gerald whenever he visited the factory, Everlyn was made the Claimant's supervisor. It was alleged that this created friction between the Claimant and Everlyn.
64. He was not placed on a fresh PIP at Kimugu. The Respondent opted for the most draconian of its threatened actions- termination of the Claimant's contract. He was barely 2 months at the new station. He would be expected to have a different job description. Everlyn who was not the production engineer, testified somewhat vaguely, that the Claimant lacked passion for his job and was not focused. How did she evaluate the Claimant's passion and focus? She alleged that the Claimant gave a workplan, with 23 action points, but only satisfied 1 action point.
65. The Court does not think that Everlyn the supervisor, was in a position to judge the Claimant's performance. If she was, Gerald would have engaged her, instead of engaging the Claimant directly. Was she a production engineer? What kind of organization would rate an Employee's performance at 90% and allege that this was poor, good performance according to Everlyn being 120%? It is preposterous when good performance, is deemed to be that which exceeds the 100% mark.
66. Within the 2 months the Claimant was transferred to Kimugu, he carried out his role properly. It must be acknowledged that Kimugu was an old factory, established in 1956, with old and rickety machines, which were prone to breakdown.
67. The machines leaked. They were not working well. The Claimant changed bearings. He fixed seals as shown at his exhibit 10. The leakage went on. The dryer was faulty. The Claimant was compelled to excavate the scrapyards for an old radiator. He found one, and managed to repair the dryer. Other mechanical problems persisted. He requisitioned for new parts. Everlyn told the Court that the Claimant could influence procurement by engaging finance and stores clerk. The Court is not persuaded that the Claimant had control over procurement. Once he requisitioned for spare parts, it was for the Respondent to show that it supplied him with the new spare parts, to revive the collapsing machinery.
68. The Respondent did not give the Claimant support, in discharging his role. Without provision of new machinery or new spare parts, in a factory established in 1956, 69 years ago, no mechanical engineer could discharge his role optimally, by reviving the Respondent's machinery, and preventing frequent breakdowns. The Respondent eventually terminated the Claimant's contract, over issues that were of the Respondent's own creation.
69. The charge relating to insubordination, was tied to the main charge of poor performance. The Claimant was alleged to have failed to follow the instructions of head of manufacturing, Gerald. As observed above, and discussed in this Court's decision, *Dede Esi Annie Amanor- Wilks v. Action Aid International* [2014] e-KLR, instructions given by a superior must be reasonable, and capable of being obeyed by the supervisee. Without provision of material support, how was the Claimant to prevent



constant breakdown of the Respondent's outdated production lines? How was he to implement the instructions of the head of manufacturing, which were aimed at reviving old machinery?

70. The Respondent completely ignored the explanation the Claimant gave, first in his response to the letter to show cause, dated 8th September 2023: that he was barely 2 months at Kimugu; that he had done everything humanely possible to restore the Respondent's ailing machinery; he had requisitioned for new spare parts; he had not negligently performed his role; and was committed to continue improving the Respondent's production lines.
71. Ultimately, the Court is not persuaded that, the Claimant relapsed so suddenly after he had successfully gone through a PIP. He is a trained production engineer, and had performed basically the same work, for years. He was a scapegoat for the Respondent's inability to modernize its production systems. He had worked for 10 years without his performance as an engineer, being questioned. He had been promoted over the years. He had worked for only 2 months in a new factory, a new designation, when the Respondent revived issues about his performance.
72. The Respondent did not establish valid reasons, to justify termination, under Sections 43 and 45 of the *Employment Act* 2007. On this ground, termination was unfair.
73. Remedies: The Claimant seeks an order for reinstatement and also, for compensation and unspecified terminal benefits. He does not plead these remedies alternatively.
74. The Court has considered that termination took place on 20th September 2023, less than 2 years ago, at the time of writing this Judgment.
75. Section 49 [3] [a] of the *Employment Act*, allows the Court to grant an order of reinstatement, and treat the Employee in all respects, as if the Employee's employment had not been terminated.
76. Section 12 [3] [vii] of the E&LRC Act, limits the remedy, to within 3 years of dismissal.
77. The Claimant also alludes to the remedy of re-engagement in his prayer for reinstatement. He refers to reinstatement to the same capacity, or similar capacity. An order for return to work in a similar, but not the same capacity, is an order for re-engagement.
78. Courts must keep the remedies of reinstatement and re-engagement alive. Contrary to some decisions, reinstatement is not a rarity, to be granted in exceptional circumstances.
79. In progressive, comparative jurisdictions, reinstatement is indeed considered a primary remedy. In New Zealand, the Employment Relations Amendment Act, 2018 mandates the Court to award reinstatement, regardless of what other remedies it may award.
80. The South African *Labour Relations Act* 66 of 1995, provides that reinstatement is a primary remedy.
81. The remedy is similarly considered a primary remedy in Australia, under the Fair Work Act, 2009, with compensation being awarded only if reinstatement is inappropriate.
82. The reasoning in these jurisdictions, is that reinstatement restores the employment relationship, and protects the Employee's job security, which cannot be said of other remedies, such as compensation, which in our law is capped to equivalent of the Employee's 12 months' gross salary.
83. Section 49 [4] [d] of the *Employment Act*, which equates reinstatement to specific performance, and which is commonly invoked in suppressing the remedy of reinstatement in Kenya, should be read within the context of the whole of Section 49 [4], which requires the Court to take any or all of the specified factors, into consideration, in determining whether to grant the remedy of reinstatement.



84. The common law principle, that there should be no order for specific performance in a contract of service, except in very exceptional circumstances, is to be weighed against the other factors, listed under Section 49 [4] [a - m] of the *Employment Act*.
85. Limitations in granting the remedy of reinstatement include where: 3 or more years have lapsed from the date of dismissal; where the Employee does not wish to be reinstated or re-employed; where there is a clearly established breakdown of trust and confidence between the Employer and the Employee; where dismissal is unfair only on account of procedural lapses; where the Employee was on a fixed-term contract, the expiry of which precedes the finding of unfair termination; or where it is shown that reinstatement would be unreasonable, impracticable or contrary to the law.
86. The prayers of reinstatement or re-engagement are pleaded by the Claimant, at paragraph [b] of his Statement of Claim. The prayer for damages comes second, at paragraph [c]. The Grievant's first wish, is to be reinstated or re-engaged.
87. It is a concern, that due to various Courts' interpretation of Section 49[4] [d] of the *Employment Act*, as limiting grant of the remedy of reinstatement to exceptional circumstances only, the remedy has been reduced to a paper remedy. This provision must be contextualized. Section 49 [4] grants the Court discretion to take into account any or all of the factors listed from [a] to [i]. There is no reason why one factor should be elevated above all the other factors, and applied singularly, to deny Employees the remedy of reinstatement.
88. Under the current constitutional era, it can no longer be argued that there are rare remedies, to be granted in exceptional circumstances only. There is no longer such thing as a rare remedy.
89. Historically, rare remedies were special legal solutions, available in extreme situations, where standard remedies, such as monetary damages and injunctions, were deemed inadequate. Prerogative writs such as certiorari, prohibition and mandamus, were considered extraordinary remedies.
90. With the passage of the *Constitution* of Kenya 2010, these are no longer deemed as extraordinary remedies. They are commonly available, in remedying constitutional violations. Article 23 of the *Constitution* allows the Court to consider the remedies of compensation and prerogative writs, among other remedies.
91. No remedy is characterized as an extraordinary remedy, reserved for extraordinary circumstances, the mandate of this Court being in correcting substantive and procedural injustices, and in enabling wronged parties to access complete, practical and effective remedies, in the administration of industrial justice.
92. Article 23 of the *Constitution*, confers the Court with the mandate to grant appropriate reliefs, in remedying violations. The E&LRC Act, at Section 12 [3] [vii], mandates the Court to grant an order of reinstatement, while Section 12 [3] [viii] adopts the language of Article 23 of the *Constitution*, mandating the Court to grant any other remedy, the Court deems fit to grant. The idea of rare remedies, limited to extraordinary circumstances, is outmoded.
93. Factors that overwhelmingly have persuaded the Court to accede to the prayer for reinstatement, under Section 49 [4] of the *Employment Act* include: it is the wish of the Grievant to be reinstated or re-engaged; he was not shown to have caused or contributed to the circumstances leading to termination; it is practicable to reinstate or re-engage the Grievant; he had served for 10 years in continuity; he was in a permanent and pensionable role, and expected to work until retirement; and, he did not secure comparable or suitable employment, with another Employer.



94. It is primarily ordered that the Respondent shall reinstate the Claimant to his position as maintenance manager, without loss of salaries and benefits.
95. The Claimant as discussed above, also prays for an order of re-engagement. The Respondent shall alternatively, re-engage the Claimant to a position at the same level and remuneration as that of maintenance manager, without loss of salaries and benefits.
96. The Claimant prays for compensation for unfair termination and for terminal benefits. The Court mentioned that the nature of terminal benefits sought is unspecified, and therefore, incapable of grant.
97. As the Claimant has been awarded the orders of reinstatement or re-engagement, it is not reasonable that he is also granted compensation. Employment remedies as held in Court of Appeal decisions, Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR; and D.K. Njagi Marete v. Teachers Service Commission [2020] KECA 840 [KLR], and E&LRC decisions in Oketch v. MMA Engineering Limited [2024] KEELRC; and Wekesa v. Mt. Kenya University [2024] KELRC 538 [KLR], must be reasonable, respecting the principle of proportionality, and fair go all round.

**It is Ordered: -**

- a. It is declared that termination of the Claimant's contract of employment by the Respondent was substantively unfair.
- b. The Respondent shall reinstate the Claimant to the position of maintenance manager without loss of salaries and benefits.
- c. Alternative to reinstatement, the Respondent shall re-engage the Claimant in a position at the same level and remuneration as that of maintenance manager, without loss of salaries and benefits.
- d. Costs to the Claimant.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT KERICHO, THIS 27TH DAY OF JUNE 2025.**

**JAMES RIKA**  
**JUDGE**

