



**Owiti v Crescent Tech Limited (Cause 643 of 2016)  
[2025] KEELRC 1866 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1866 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 643 OF 2016  
CN BAARI, J  
JUNE 26, 2025**

**BETWEEN**

**GEORGE OCHIENG OWITI ..... CLAIMANT**

**AND**

**CRESCENT TECH LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Before Court is the Claimant's Memorandum of Claim dated 18<sup>th</sup> April, 2016, wherein, the Claimant seeks the following remedies as against the Respondent:-
  - a. A declaration that the termination of the Claimant from employment was unprocedural and improper and the Claimant is entitled to payment of his compensatory damages;
  - b. An order that the Claimant's salary for February, 2016 be paid;
  - c. An award of Kshs.1,071,428.00 comprising of compensation for unfair termination, February salary, one month notice pay, airtime allowance, a certificate of service, costs of the suit and interests thereon.
2. The Respondent filed a Statement of Response dated 5<sup>th</sup> October, 2016 wholly denying the Claimant's claim. The Claimant filed a Reply to the Respondent's Statement of Response dated 9<sup>th</sup> February, 2017.
3. Although the Claimant was allowed leave to amend the claim, no amended statement of claim has been filed by the time of writing this judgment, hence the judgment is based on the initial claim of 18<sup>th</sup> April, 2016.



4. The Claimant's case was heard on 15<sup>th</sup> October, 2024 when the Claimant Mr. George Owiti (CW1), testified in support of his case. He adopted his witness statement dated 18<sup>th</sup> April, 2016 and produced his list and bundle of documents of even date as exhibits in the matter.
5. The Respondent's case was heard on the same date, with Ms. Elizabeth Mwangi (RW1) testifying in support of the Respondent's case. She adopted her witness statement dated 21<sup>st</sup> February, 2020, and produced her list and bundle of documents of 5<sup>th</sup> October, 2016 as exhibits in the case.
6. Submissions were received from both parties.

#### **The Claimant's case**

7. It is the Claimant's case that he was employed by the Respondent as a Senior Accountant on 19<sup>th</sup> November, 2011 earning an initial salary of Kshs.69,760/= which was reviewed to Kshs.78,102/= vide a letter dated 2<sup>nd</sup> April, 2013.
8. The Claimant avers that on 6<sup>th</sup> January, 2016, he was issued with a letter dated 23<sup>rd</sup> December, 2015 accusing him of unsatisfactory performance and warning him of termination in the event of non-improvement of his performance.
9. The Claimant further claims that he was served with another letter dated 1<sup>st</sup> February, 2016 informing him that he would henceforth be reporting to one Mr. Stephen Macharia. It is his assertion that he responded to both letters vide his letter dated 3<sup>rd</sup> February, 2016 stating that his performance had been impressive in the face of challenges, and further attaching his schedule of work.
10. It is his case that he began reporting to the Respondent's Chief Accountant as instructed, and further argues that the reason behind the request to report to the Chief Accountant, was to render him idle as his key roles had been taken away.
11. The Claimant avers that on 1<sup>st</sup> March, 2016, he received a letter referenced "Termination of Employment' dated 29<sup>th</sup> February, 2016 which he claims did not make reference to his letter dated 3<sup>rd</sup> February, 2016. He contends that his performance was impressive and commendable and that in particular, in the years 2014 and 2015, he managed to collect from the Company's Customers Tax Certificates amounting to Kshs.5,624,364.72/= and Kshs.9,013,272.61/= respectively, most of which were value Added Tax (VAT) Exemption Certificates.
12. The Claimant avers that he in addition, played an important role in collecting Kshs.900,000,000 to Kshs.1.2 Billion annually during his employment.
13. The Claimant avers that he was denied an opportunity to defend himself and no reasons were given for his termination. He avers further, that the Respondent breached mandatory provisions of labour practices, the principles of natural justice and his Constitutional rights to fair labour practices.
14. The Claimant further avers that the Respondent did not have a performance improvement plan to gauge his performance, and did not respond to his letter of 3<sup>rd</sup> February, 2016.
15. It is his case that the Respondent withheld his salary for November, 2015 which it later paid on 23<sup>rd</sup> December, 2015 and subsequently, failed to pay him salary for the month of February, 2016, which was his last employment month upon his clearance.
16. The Claimant prays that his claim be allowed.



## The Respondent's Case

17. The Respondent admits that the Claimant was its employee employed on the terms of the letter of offer dated 19<sup>th</sup> September, 2011. The Respondent avers that Clause 8.3 of the employment Contract provided that it had the right to summarily dismiss the employee without notice or payment in lieu, if in the employer's judgment, such summary dismissal was justified.
18. It is the Respondent's case that in accordance with Clause 12.2, the Claimant was required to comply with the provisions of all the policies of the Respondent relating to discipline, grievances and harassment as well as performance management.
19. The Respondent avers that the Claimant's duties as a credit controller entailed maximizing revenue collections for the company, verification and vetting of credit worthiness of all new customers and establishing their credit terms among other duties.
20. The Respondent denies that the Claimant's salary review was due to his commendable work during his employment period, but that the review was discretionary and was extended to all the Respondent's employees.
21. It is the Respondent's case that it was dissatisfied with the Claimant's services and interactions in the office, and that by a letter dated 4<sup>th</sup> November, 2014, it issued him with a final warning after several verbal warnings and discussions.
22. It avers further, that vide a letter dated 23<sup>rd</sup> December, 2015, the Claimant was issued with notice of dissatisfaction with his performance and further notified him of the specific detailed complaint.
23. The Respondent states that it was necessary to re-direct the Claimant's reporting line due to his aggression and threats to physically harm his female superior Ms. Neelam Ghia, and which issue was raised in a letter dated 4<sup>th</sup> November, 2014.
24. The Respondent states that it wrote to the Claimant on 1<sup>st</sup> February, 2016 directing that he reports to the Chief Accountant. It avers further, that in the same letter, it gave the Claimant time to resolve the pending issues attaching a list of uncollected dues.
25. The Respondent further avers that on 22<sup>nd</sup> February, 2016, the Claimant responded to the letter indicating his inability and challenges in completing the tasks assigned to him.
26. The Respondent avers that the Claimant's employment was terminated vide the letter dated 29<sup>th</sup> February, 2016, and was paid a sum of Kshs.118,959.00 being his February, 2016 salary and one (1) month in lieu of notice.
27. It is the Respondent's case that it gauged the Claimant's performance against the set targets, and that there was open communication between him and his supervisors. It avers that at no time did he indicate challenges in performing his duties or seek intervention of the Respondent.
28. On cross- examination, the Respondent's witness testified that the Claimant was terminated for unsatisfactory performance and was taken through a performance appraisal. The witness however indicated that she had no proof of the said appraisal.
29. It was RW1's further testimony that the Respondent did not have itemized targets signed between the parties, and did not issue the Claimant a notice to show cause letter nor did it invite him to a disciplinary hearing.
30. The Respondent prays that the Claimant's claim be dismissed with costs.



## Analysis and Determination

31. Upon careful consideration of the pleadings, the evidence adduced, witnesses' testimonies and the parties' written submissions, the following issues crystallize for determination: -
- i. Whether the Claimant's dismissal was wrongful; and
  - ii. Whether he is entitled to the reliefs sought.

### Whether the Claimant's dismissal was wrongful

32. The Claimant contends that he was wrongfully dismissed without due process on the premise that he was neither put on a performance improvement plan, issued with a show cause letter nor taken through a disciplinary hearing prior to his summary dismissal from the service of the Respondent.
33. The Respondent maintains that the dismissal of the Claimant from their service was fair, valid and based on his poor performance. The Respondent asserts further, that it was dissatisfied with the Claimant's services and interactions with other employees and had issued him with a final warning letter after several verbal warnings and discussions on his performance.
34. In determining whether an employee was wrongfully dismissed or unfairly terminated, the Court's duty is to interrogate whether or not the employer adhered with the mandatory provisions of the Employment Act in respect of procedure and the satisfaction of the substantive justification test.
35. On procedural fairness, Section 41 of the Employment Act, 2007 states:
- “(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.”
36. The Claimant was issued with a warning letter titled “Official Warning and Notice” dated 23<sup>rd</sup> December, 2015 premised on allegations that his work performance was unsatisfactory based on uncollected dues for 120 days. The Claimant responded to the warning letter vide his letter of 3<sup>rd</sup> February, 2016 addressed to the Respondent's Managing Director, highlighting the challenges and offering reasons for the uncollected dues.
37. The Claimant was subsequently summarily dismissed from the service of the Respondent through a termination letter dated 29<sup>th</sup> February, 2016 on account of unsatisfactory performance.
38. It is not disputed that the Claimant was not issued with a show cause letter, an invitation for disciplinary hearing nor was evidence led to prove that there was a hearing at all. It is also clear that despite the Respondent's allegations of the Claimant's poor behaviour at the workplace and his unsatisfactory performance in his duties, the Respondent did not conduct a hearing in accordance with Section 41 of the Employment Act.
39. It is now settled that even in instances of summary dismissal, an employee is entitled to be informed of the charges levelled against him/her and be accorded an opportunity to make representation in the company of a fellow employee or a union representative.



40. The Court of Appeal in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, set out the bare minimums of a fair process in the following words:-

“Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct. The court stated that four elements must be discernible for the procedure to pass:

- a. an explanation of the grounds of termination in a language understood by the employee;
- b. the reason for which the employer is considering termination;
- c. entitlement of an employee to the presence of another employer of his choice when the explanation of grounds of termination is made
- d. hearing and considering any representation by the employee and the person chosen by the employee.”

41. The Respondent contends that it served the Claimant a letter titled “Official Warning and Notice” dated 23<sup>rd</sup> December, 2015 indicating its dissatisfaction in the performance of his duties, and which the Claimant responded to vide a letter dated 3<sup>rd</sup> February, 2016, following which it resolved to summarily dismiss the Claimant from service on 29<sup>th</sup> February, 2016 without notice.

42. A cursory look at the warning letter issued to the Claimant, is clear indication that it did not expressly set out the specific grounds or allegations to which the Claimant was required to respond. Further, the letter did not at all indicate that the Respondent was considering taking disciplinary action that may include dismissal of the Claimant.

43. I further note that the letter neither required the Claimant to respond to the allegations nor did it afford him reasonable time within which to do so. The letter merely stated that the Claimant was required to improve on his performance and nothing more.

44. A warning letter in my considered view, other than serving as a caution to an employee on the particular subject, does not constitute a valid notice to show cause. In the case of *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* [2017] KEELRC 1599 (KLR), the Court held that:-

“Being warning letters, they cannot meet the standards expected of a show cause notice primarily because a warning letter by itself is a sanction or penalty after a disciplinary process. A warning letter comes after a formal process.”

45. In the upshot, it is obvious that the Respondent did not attempt to adhere with the law in summarily dismissing the Claimant from their service, and which without doubt renders the dismissal procedurally unfair, and so I hold.

46. The second limb in determining the fairness of a dismissal/termination is whether the employer had fair, valid and justified grounds/reasons to dismiss/terminate as stipulated under Sections 43, 45 and 47 of the *Employment Act*, 2007.

47. The Respondent’s position is that it became largely dissatisfied with the Claimant’s performance as well as his interactions at work, and based on the dissatisfaction, it issued him with a warning letter cautioning him of his rude and unprofessional behaviour towards a colleague through a letter dated 4<sup>th</sup> November, 2014.



48. It is the Respondent's assertion that vide yet another letter dated 23<sup>rd</sup> December, 2015, it issued the Claimant another warning expressing its dissatisfaction with the Claimant's performance and enclosing the particulars thereof, and further re-directed the Claimant's reporting line to the Chief Accountant, giving the Claimant time to resolve the pending issues highlighted in the warning letter.
49. The Respondent maintains that it gauged the Claimant's performance against the set targets, and there was open communication between the Claimant and his supervisors and that at no given time did the Claimant indicate the challenges in performing his duties or seek intervention of the Respondent.
50. On his part, the Claimant contends that he performed his duties well despite facing challenges and which challenges, he asserts were fully known to the Respondent. He further avers that he brought the issues facing his performance to the attention of the Respondent and even suggested ways that the company can apply to help him in the collections.
51. In the same letter of response, the Claimant admitted that some VAT exemption certificates had remained outstanding for unusually long periods of time.
52. Section 43 (2) of the *Employment Act*, 2007 states;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
53. The Respondent has cited poor performance as the reason for which it dismissed the Claimant from their employ. There is no doubt that poor performance is a valid and justified ground for termination/dismissal as the primary duty of an employee is to perform work for which he/she is contracted. It is however settled that the employer does not have a right to immediately rescind an employment contract on the ground of poor performance, but is instead, expected to mitigate the impact of an employee's poor performance.
54. To rely on poor performance as the ground for termination, demands that an employer complies with the provisions of Section 45(2) of the *Employment Act*. The burden of proof that poor performance was a fair reason for dismissal rests on the employer, and on this basis, it is the employer's responsibility to put in place corrective mechanisms through employee coaching before any form of disciplinary action can be taken. (See Jane Simba Mukala v. Oltukai Lodge Limited (2013) eKLR).
55. The Claimant's position was that he was not placed on a Performance Improvement Plan (PIP) to help him improve on his performance and which position, the Respondent did not controvert. The Respondent's only argument, is that it gauged the Claimant's performance against the set targets and that there was open communication between him and his supervisors. The Respondent asserts further, that at no time did the Claimant indicate the challenges in performing his duties or seek intervention of the Respondent.
56. The Court of Appeal in Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause No. 823 of 2010(2010)LLR 255 (ICK) held:-
- “.....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...It will not suffice to say that one has been terminated for poor performance as the effort leading to this decision must be established.”



57. In my respectful view, the Claimant evidently had challenges in the performance of his work and which he acknowledged and even suggested to the Respondent ways in which he could be supported.
58. It is also clear that other than re-directing the Claimant's reporting lines, no evidence was led to show that efforts were made to help the Claimant improve on his performance. The Claimant was for instance not placed on a PIP through which he could be closely engaged to develop strategies aimed at improving his performance.
59. In light of the foregoing, I find and hold that the Respondent has not sufficiently established fair and valid reasons upon which it summarily dismissed the Claimant.
60. The Claimant's dismissal was both procedurally and substantively wrongful and unlawful, and so I hold.

**Whether the Claimant is entitled to the reliefs sought.**

61. The Claimant herein, seeks a declaration that his summary dismissal from employment was unprocedural and improper, an order for payment of his salary for February, 2016, compensation for the wrongful dismissal, one month notice pay, airtime allowance, a certificate of service, costs of the suit and interests thereon.  
  
12 months compensation for unfair termination in the amount of Kshs.913,224.00
62. A finding of a wrongful dismissal of employment entitles the Claimant to compensation in accordance with Sections 49 and 50 of the *Employment Act*.
63. Considering that the Claimant had performance challenges and which resulted in his dismissal, I deem an award of 7 months' salary sufficient compensation for the wrongful dismissal.

**February, 2016 salary**

64. It is evident that the Claimant was not paid his salary for the month of February, 2016, and which position the Respondent did not dispute. The claim is allowed at Kshs. 78,102.00.

**One Month's notice pay**

65. It is also evident that the Claimant was summarily dismissed without notice and without payment in lieu of the notice. This prayer is found to have merit and is hereby allowed.

**Airtime allowance**

66. The Claimant did not lead evidence to show that he was entitled to payment of airtime allowance or that it was not paid. The claim fails and is dismissed.
67. In the final analysis, the claim succeeds in terms of the following orders:-
  - a. A declaration that the Claimant's summary dismissal from the service of the Respondent is wrongful and unlawful;
  - b. An award of Seven (7) months' salary as compensation for the wrongful dismissal in the sum of Kshs.546,714/-
  - c. Salary for February, 2016 at Kshs. 78,102/-
  - d. One Month's notice pay in the amount of Kshs. 78,102/-



- e. Costs of the suit and interest from the date of judgment until payment in full.
- f. A Certificate of service to be issued within 14 days of this judgment.

68. Judgment accordingly.

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE, 2025**

**C. N. BAARI**

**JUDGE**

Appearance:

Ms. Mwanja h/b for Mr. Njeru for the Claimant

Ms. Karue h/b for Mr. Chimei for the Respondent

Ms. Esther S - Court Assistant

