



**Ndaire v Fast Choice Ltd (Cause 1558 of 2018)
[2025] KEELRC 1646 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1646 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1558 OF 2018
CN BAARI, J
JUNE 5, 2025**

BETWEEN

EDITH DIANA NDAIRE CLAIMANT

AND

FAST CHOICE LTD RESPONDENT

JUDGMENT

1. In a Memorandum of Claim dated 27th November, 2018, and filed on even date, the Claimant seeks the following reliefs as against the Respondent: -
 - a. A declaration that her termination was unfair and unlawful
 - b. Compensation in the sum of Kshs. 1,183,200/-, comprising of salary in lieu of notice and damages for wrongful dismissal.
 - c. Interests on (b) above at Court's rate
 - d. Costs of the suit
2. The Respondent filed a Memorandum of Defence dated 17th July, 2019 and filed on the same date, denying that the Claimant's termination was unfair.
3. The Claimant's case was heard on 14th December, 2023, when the Claimant testified in support of her case. She adopted her witness statement and produced the documents filed therewith as her exhibits in the matter. The Respondent's case was subsequently heard on 18th February, 2025. The Respondent presented one Anne Wangare Kiarie, their Managing Director who testified in support of their case.
4. Both parties thereafter filed written submissions on the matter.



The Claimant's Case.

5. The Claimant states that she was employed by the Respondent on 23rd April 2014 as a Personal Assistant Strategic Business Development on a monthly salary of Kshs. 40,000/-.
6. It is her case that during her employment with the Respondent, she worked in various positions including Personal Assistant/Strategic Business Development Administrator, Personal Assistant/Operations Manager, and Human Resources & Manager, Fleet Information technology, Credit Control Manager and Acting General Manager.
7. She avers that after a successful interview where she was the sole candidate, the Respondent through a letter dated 1st October 2017 appointed her to the position of Acting General Manager.
8. It is her case that the letter appointing her stated that the initial Six (6) months of her appointment would be on a probationary basis where she would work closely with the Managing Director for mentorship and coaching on the Respondent's business processes.
9. The Claimant states that the Respondent was further expected to provide her with additional support by offering specialized external trainings once every month, and that her performance was to be evaluated on a monthly basis and feedback provided.
10. The Claimant states that in the new position, the company was to provide airtime, a company laptop and a company car and her gross monthly salary was reviewed to Kshs.87,000/= and commission was payable under the existing Credit Control Commission policy.
11. The Claimant states that she continued to hold the position of the Credit Control IT and fleet Manager until March, 2018, when the Respondent appointed another person to take up the said position. That immediately after the appointment of the person to take up the position of Credit Control IT and fleet manager, the Respondent stopped paying the Claimant Commission under the Credit Control policy.
12. The Claimant states that she commenced her work as the Acting General Manager and performed her duties diligently until sometime in May, 2018, when the Respondent's Managing Director started questioning her performance and which questions she duly responded to.
13. It is her case that the questions about her performance were raised by the Managing Director who was supposed to mentor and coach her as stipulated in the letter of appointment, but which duty she never carried out. The Claimant states that the Respondent further failed to provide specialized external trainings once every month and to evaluate her performance on a monthly basis as was provided in her letter of appointment.
14. The Claimant avers that sometime in July, 2018, she informed the Human Resources Manager that she would not be able to report to work as she was not feeling well, and that this did not go down well with the Managing Director who as a punishment, extended her leave to the 16th July 2018 through WhatsApp messaging service.
15. The Claimant states that the Managing Director on 12th July 2018 called and informed her that she needed to see a Psychiatrist before reporting back to work on 16th July, 2018 and further gave her contacts to a Dr. Caroline Rarieya with instructions that she should call the doctor and book an appointment.
16. She avers further that the Managing Director did not inform her of the reason for the said appointment with the psychiatrist , and upon the Claimant calling the said Psychiatrist to confirm why she was referred to her, she also stated that she did not know the reason for the reference.



17. It is her case that the Managing Director further extended her leave verbally and informing her to report back to work on 19th July 2018.

She further states that it came as a shock to her when on 24th July 2018, the Respondent without conducting any appraisal of her performance and four Months after the period of probation as provided in the letter of appointment, purported to demote her from her then position as a General Manager back to her initial position as the Credit Control Manager.
18. The Claimant states that she raised her concerns on the turn of events and expressed her reservations about taking up the position of the Credit Control Manager as instructed by the Respondent by appealing against the said decision through her letter of 26th July 2018, and further due to the fact that the said position had now been filled.
19. That the Respondent in response to the letter of 26th July 2018, wrote a letter dated 31st July 2018 to the Claimant reiterating the contents of their letter of 24th July 2018.
20. The Claimant states that the Respondent issued her with a notice to show cause dated 8th August 2018 asking her to show cause why disciplinary action should not be taken against her for being absent from work, to which the Claimant Responded on 10th day of August 2018.
21. She avers that the Respondent without taking into consideration her response to the notice to show cause, invited her to attend a disciplinary hearing on 17th August 2018, after which the Respondent proceeded to summarily dismiss her from employment through their letter dated 23rd August 2018.
22. It is her case that the Respondent further proceeded to issue her with an undated Certificate of service and a computation of her final dues claiming that she owed the Respondent Sixty thousand Five Hundred Seventy-Six Shillings and Ninety-two Cents (Kshs.60,576.92).
23. She states that at the time of termination, the Respondent owed her eighteen (18) days of leave not taken.
24. The Claimant further states that all correspondences referred to her as the General Manager and not Acting General Manager.
25. On cross-examination, the Claimant confirmed that she held the position of General Manager for 9 months, where she gave an action plan and was given performance indicators.
26. The Claimant avers that she did not go back to the position of credit control manager, and further denied absconding duty. She confirmed receiving a notice to show cause letter, which she told court that she responded to by email.
27. The Claimant further told court that she did not attend the disciplinary hearing because she did not see how the disciplinary hearing would help.
28. It is her position that the Respondent was to offer her specialized training with regards to the actions she pointed out in her action plan. She contends that she was not given the training on soft skills.
29. She avers that the Respondent referred her to a psychiatrist without giving her the context of the referral. It is her case that she was dismissed even before the disciplinary hearing and that she did not refuse to go back to work.
30. The Claimant told Court that she received an invitation to attend a disciplinary hearing, but since she had already instructed her lawyer, she did not attend and that she wrote to the Respondent indicating that she will not attend the hearing.



31. The Claimant contends that her contract of employment was terminated without any valid reasons and that the proper procedure set out in Section 41 (1) of the [Employment Act](#) No. 11 2007 was not followed.
32. It is her prayer that her claim be allowed.

The Respondent's Case.

33. The Respondent states that the Claimant was appointed as an acting General Manager on 1st October 2017 earning a gross monthly salary of Kshs.87.000/=.
34. It is the Respondent's case that on 20th February 2018, the Respondent's Managing Director wrote an email to the Claimant expressing her concerns with how she was conducting her work, and noting that she was negligent in her supervisory role.
35. It avers that on 21st February 2018, the Claimant was required to do a self-assessment of her performance since her appointment on 1st October 2017, and upon completing the self-assessment, she highlighted areas she needed to improve on.
36. The Respondent states that Claimant was given an opportunity to improve on her performance, but on 3rd May, 2018 she was reprimanded for delay in concluding the Respondent's transactions by failure to follow up on payment. That the Claimant was also reprimanded on 18th May 2018 for a number of violations of her duties as the Respondent's General Manager.
37. It states that on 23rd July, 2018, the Claimant was invited to a performance review meeting where her performance was discussed and where she and managers under her supervision were given an opportunity to comment on her performance.
38. The Respondent states that the Claimant's performance as Acting General Manager was found unsatisfactory, and the Respondent decided to redeploy the Claimant back to her previous position of Credit Control Manager. That the same meeting also resolved that the position of General Manager was unnecessary in the Respondent's structure.
39. The Respondent states that the Claimant did not agree with the redeployment terming the same a demotion, despite the fact that she had never been confirmed as the Respondent's General Manager and when she was informed that the Respondent's decision to redeploy her to her previous position stood, the Claimant decided to unprocedurally take leave which leave was not approved.
40. The Respondent states that it undertook disciplinary processes against the Claimant for desertion of duty and upon being invited to disciplinary hearings twice to discuss the desertion, the Claimant refused to attend, leaving the Respondent with no option but to summarily dismiss her.
41. The Respondent states that the disciplinary panel concluded that the Claimant was culpable for gross misconduct and recommended that she be summarily dismissed, which decision was communicated to the Claimant vide a summary dismissal letter dated 23rd August 2018, which clearly stated the reasons thereof.
42. The Respondent avers that the Claimant's terminal dues were tabulated and paid, and was also issued with a Certificate of service.
43. The Respondent prays that the Claimant's suit be dismissed with costs.



Analysis and Determination.

44. I have considered the pleadings, the witness' oral testimonies and the submissions by both parties. The issues that present for determination are: -
- i. The position the Claimant held at dismissal
 - ii. Whether the Claimant was unfairly terminated
 - iii. Whether she is entitled to the reliefs sought

The position the Claimant held at dismissal.

45. It is not disputed that the Claimant was appointed to the position of General Manager in an acting capacity and on a six (6) months probationary period from 1st October 2017.
46. The Respondent's position is that on 23rd July, 2018, the Claimant was invited to a performance review meeting where her performance was discussed and where she and managers under her supervision were given an opportunity to comment on her performance, and that it was upon this alleged review of the Claimant's performance, that a resolution was reached to re-deploy her to the position of Credit Control Manager, which she held prior to her said acting appointment. The said resolution was then communicated to the Claimant on 24th July, 2018.
47. For starters, the Claimant's probation period was stated to be six months, which means the same terminated by 30th March, 2018. No communication was issued on the Claimant's confirmation to the post of General Manager or the lack thereof within or immediately after the six months lapsed. By law, a probationary contrary can be extended once and the employee must be informed of such an extension.
48. For an employee to be placed on probation, means that she was to be confirmed to the post substantively at the lapse of the probation period, and for reason that the Claimant's probation was for six months, and the probation was not extended, I hold that the Claimant was deemed confirmed to the position of General Manager by operation of law effective 1st April, 2018.
49. Further, the Claimant's assertion that her replacement was hired in March, 2018 was not controverted, and which is confirmation that indeed, the position of Credit Control Manager was no longer available/vacant.
50. Having been so confirmed, the Respondent's assertion that it redeployed the Claimant to her previous position, which in any event was already filled in March, 2018, does not hold.
51. In light of the foregoing, I find and hold that the Claimant was dismissed from the position of General Manager and not Credit Control Manager.

Whether the Claimant was unfairly terminated.

52. The Claimant's position is that after a successful interview where she was the sole candidate, the Respondent through a letter dated 1st October, 2017 appointed her to the position of Acting General Manager and placed her on a 6 months' probation.
53. She avers that the Respondent without taking into consideration her response to the notice to show cause, invited her to attend a disciplinary hearing on 17th August 2018, after which it proceeded to summarily dismiss her from employment through their letter of 23rd August 2018.



54. Although the issue subject of the Claimant’s purported demotion revolved around her performance in the post of Acting General Manager, her eventual dismissal was premised on allegations of absconding duty.
55. For a dismissal/termination to be considered fair, the employer is obligated to demonstrate adherence to the provisions of Sections 41, 43, 45 and 47(5) of the *Employment Act*, on procedure and substantive justification for the dismissal.
56. On the issue of procedure, Section 41 demands that an employer considering termination/dismissal on account of misconduct, poor performance or physical incapacity, must inform the employee in a language the employee understands the reasons for which the employer is considering the termination/dismissal and must have a representative present during the explanation.
57. In the instant case, the Respondent issued the Claimant with a show cause letter spelling out the charges against her, and later sent her an invitation to attend a disciplinary hearing.
58. The Claimant’s position is that she responded to the show cause letter via email, but declined to attend the hearing on the basis that she already had instructed counsel on the issue.
59. The Respondent then proceeded to issue the Claimant with a letter of summary dismissal after inviting her a second time for the hearing, but which again, she declined.
60. In *Philip Kimosop v Kingdom Bank Limited (2022) eKLR*, the Court opined that the Respondent’s action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing constituted fair procedure. The Court emphasized that all these steps taken by the Respondent prior to terminating the Claimant’s employment qualified as following due procedure as contemplated by Section 41 of the *Employment Act*.
61. The Court further addressed the issue of fair process in the case of *Silvester Malei Kyengo v Kenya Meat Commission (2019) eKLR* where it opined,

“In this case the Claimant was first served with a show cause letter stating the charges against him, interdicted pending investigation, accorded on oral hearing in the company of another employee of his choice and finally served with a termination letter confirming that his defence was considered but his services terminated for reasons cited in the letter. Such procedure in view passes the test of procedural fairness and I so hold”.
62. From the chronology of events herein, the Respondent no doubt complied with the tenets of procedural fairness, and the Claimant squandered an opportunity to present her side of the case and/or defence to the allegations of absconding duty.
63. I therefore, find and hold that the Respondent adhered to the tenets of fair process espoused in Section 41 of the *Employment Act*, hence the Claimant’s dismissal is procedurally fair.
64. On whether the Respondent had valid and fair reasons to dismiss the Claimant, I note that though both parties agree that the Claimant had performance challenges, the Claimant was not dismissed on the ground of poor performance, but for absconding duty.
65. The Respondent’s position is that upon being redeployed to her previous position, the Claimant applied for leave, and though the leave was not approved, she left any way, and never returned back to work until her dismissal.



66. On her part, the Claimant contends that concerns about her performance were raised by the Managing Director of the Respondent who was supposed to mentor and coach her per the letter of appointment, but which she did not do. It is her further contention that the Respondent failed to provide specialized external trainings once every month and to evaluate her performance on a monthly basis as was provided in her letter of appointment.
67. The Claimant maintains that she was shocked when on 24th July 2018, the Respondent without conducting any appraisal of her performance and four Months after the lapse of the probation period, purported to demote her from her then position as a General Manager back to her initial position as the Credit Control Manager.
68. The Claimant states that she raised her concerns with the turn of events and expressed her reservations about taking up the position of the Credit Control Manager as instructed by the Respondent by appealing against the said decision through her letter dated 26th July 2018, and further due to the fact that the said position had by then been filled.
69. The record indicates that there was active communication through exchange of correspondences between the parties herein, between May and August, 2018 bordering mainly on the Claimant's performance and the subsequent allegation of absconding duty.
70. In her response to the show cause letter, the Claimant raised concerns and expressed reservation on her demotion from the position of General Manager to that she previously held of credit Control Manager.
71. In *British American Tobacco (K) Ltd v Kenyan Union of Commercial Food and Allied Workers (Kucfaw)* [2019] eKLR which quoted with approval the decision of *Anthony Mulaki V Addax Kenya Limited*, Cause No. 822 of 2012 the Court held as follows: -

“In examining validity of reasons, the court was correctly directed by the Respondent to the case of *BRITISH HOME STORES LTD v BURCHELL* (1980) LC.R. 303 E.A.T. where it was held that for the court to uphold the decision by the employer as being fair, it must be shown that: -

- a. The employer must believe at the time of termination, that the employee is guilty of the allegations against him/her
- b. The employer had reasonable grounds upon which to sustain that belief; and
- c. The employer carried out as much investigation as reasonable in the circumstances the employer need only be satisfied on the balance of probability.”

72. Further, the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR held thus: -

“..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”



73. In the case of *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR the Court stated,
- “It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment.”
74. The Claimant applied for leave which the Respondent contends was not approved. The Respondent has not led any evidence to show that indeed, it rejected the Claimant’s request to proceed on leave, and the reasons for the rejection.
75. Further, the court record is a wash with an exchange of correspondences where the Claimant sought to know why she was demoted without an appraisal or at least, being placed on a performance improvement plan (PIP). The Respondent evidently steered clear of addressing the reason for the demotion and clung on the allegation of absconding duty.
76. It is also clear that the Claimant was appraised by managers serving under her, which no doubt demeaned her and negatively affected her defence of her performance. The Respondent clearly mishandled the Claimant’s performance appraisal which ended in her dismissal, and further occasioning confusion on whether she was dismissed for poor performance or for reason of absconding duty.
77. Section 45 of the *Employment Act*, provides that: -
- (2) a termination of employment by an employer is unfair if the employer fails to prove-
- a. the reason for termination is valid:
 - b. that the reason for the termination is a fair reason (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer. And
 - c. that the employment was terminated in accordance with fair procedure:
78. In my considered view, the Respondent has not proved that it dismissed the Claimant for valid and fair reasons, and I thus hold the Claimant’s dismissal substantively unfair.

Whether the Claimant is entitled to the reliefs Sought.

79. The Claimant’s claim is for a declaration that her dismissal from service was unfair and unlawful, salary in lieu of notice, 18 days of leave, damages for wrongful dismissal, interests and costs.
80. The finding that the Claimant’s dismissal is unfair entitles her to compensation for the unfair dismissal. The Claimant was dismissed in a most inhumane manner. However, considering that she admitted to some level of underperformance, hence contributing to her own dismissal, and further considering that she declined to participate in the disciplinary hearing, which would have accorded her an opportunity to ventilate her case, I deem an award of Seven (7) months’ salary sufficient compensation for the unfair and wrongful dismissal.
81. Nothing shows that the Claimant was issued with notice nor paid in lieu of notice. Her claim in this respect is merited and is allowed as prayed.
82. The Respondent did not controvert the Claimant’s claim for 18 days of leave despite being the legal custodian of employee records. The leave forms produced in evidence only show the number of days applied for and not the balance of leave days. The claim is therefore, similarly awarded as prayed.



83. In whole, the Claimant's claim succeeds and orders granted as follows: -

- a. A declaration that the Claimant's dismissal was wrongful and unfair.
- b. That the Respondent pays the Claimant 7 months salary as compensation for the unfair dismissal at Kshs. 609,000/-
- c. Payment on account of 18 days of leave not taken at Kshs. 52,200/-
- d. One month salary in lieu of notice at Kshs. 87,000/-
- e. Costs of the suit shall be borne by the Respondent.
- f. Interest on (b), (c) & (d) at court rate from the date of this judgment until payment in full.

84. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 5TH DAY OF JUNE, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Webale present for the Claimant

Ms. Itumo h/b for Mr. Musyoki for the Respondent

Ms. Esther S-C/A

