



REPUBLIC OF KENYA



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**Soita v Afya Co-operative Savings & Credit Society Limited (Cause  
E005 of 2021) [2025] KEELRC 2084 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2084 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE E005 OF 2021  
MA ONYANGO, J  
JULY 10, 2025**

**BETWEEN**

**NAOMI SOITA ..... CLAIMANT**

**AND**

**AFYA CO-OPERATIVE SAVINGS & CREDIT SOCIETY  
LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is a former employee of the Respondent, a savings and credit co-operative society registered and operating in Kenya, having been employed by the Respondent as a Marketing and Business Development Manager by letter dated 14<sup>th</sup> September, 2023.
2. According to the Claimant's employment contract, her employment was to commence on 15<sup>th</sup> September, 2023 and she would be paid a salary of Kshs. 150,000 per month. The Claimant avers that the salary did not include a component of housing allowance as provided in section 31 of the [Employment Act](#).
3. It is the Claimant's case that without notice or hearing, the Respondent terminated her employment by letter dated 29<sup>th</sup> November, 2023 which did not specify the reasons for termination. That the termination was thus both unlawful and unfair as the Respondent neither had a fair reason to terminate her employment nor did it follow a fair procedure as required under the Act.
4. That the reason given in the letter of termination being poor performance, the Claimant ought to have been placed on a performance improvement plan which was never done.
5. The Claimant prays for judgment against the Respondent as follows:
  - a. A declaration that the termination of the Claimant's Employment Contract was wrongful, unfair, and in breach of the [Employment Act](#) 2007.



- b. A declaration that the actions of the Respondent violated the Claimant's constitutional right to fair labour practices.
  - c. Damages of KES 100,000 for breach of the Claimant's right to fair labour practices.
  - d. 12 months compensation amounting to KES 2,007,000 being damages for the unfair termination of the Employment Contract. This includes a component of the unpaid housing allowance.
  - e. Unpaid housing allowance of KES 67,500 being the amount that ought to have been paid for the 3 months that the Claimant was in service.
  - f. Interest at court rates on the sums in prayers c, d and e. until payment in full.
  - g. Costs of this claim.
6. The Respondent filed a response dated 18<sup>th</sup> April, 2024 in which it states that the Claimant was appointed as the Marketing and Business Development Manager for a period of 6 months via a letter of appointment letter dated 14<sup>th</sup> September. The Respondent stated that the Claimant's total remuneration package was a fixed contract, and the sum as per the agreed-upon terms of the employment contract dated 14<sup>th</sup> September 2023 was a consolidated salary, which included-inter alia a component for housing allowance. The Respondent asserted that by mutually agreeing to the consolidated salary, the Claimant waived her right to Separate house allowance payments pursuant to Section 31 of the [Employment Act](#) 2007.
  7. The Respondent denied that the Claimant's employment was terminated without notice and avers that the termination was carried out in strict compliance with the contractual terms signed and agreed upon by the parties at the initiation of employment, which provided for such termination.
  8. Further, the Respondent avers that on 29<sup>th</sup> November, 2023 a letter of Notice of termination of contract was issued to the Claimant and in the aforesaid letter she received one month's written notice from 1<sup>st</sup> December 2023 to 31<sup>st</sup> December 2023 and at the end of December, 2024 she was paid salary for the aforesaid month. The Respondent avers that the letter of termination dated 29<sup>th</sup> November provided a substantial reason for termination, which is fully compliant with section 35(1)(c) and (5) of the [Employment Act](#), 2007.
  9. The Respondent maintains that the reason for terminating the Claimant's employment was stipulated in the termination letter, is in accordance with the law and in line with the Claimant's performance and organizational operational requirements, which satisfy the threshold of a valid termination under Section 45 of the [Employment Act](#), 2007.
  10. The Respondent denies that the Claimant has suffered loss or damage. It avers that the Claimant is not entitled to compensation for unlawful termination or for any other pecuniary or otherwise damages or any of the orders sought in the Memorandum of Claim.
  11. The case was heard on 9<sup>th</sup> October, 2024 when the Claimant testified on her behalf as CW1 and the Respondent called one witness Jane Atieno Ongondo, a Marketing Officer of the Respondent who testified as RW1. Parties thereafter filed and exchanged submissions.
  12. The Claimant adopted her witness statement and produced her documents filed with the Claim. Under cross examination the Claimant testified that her contract was subject to performance appraisal in the first 6 months. Referring to Clause 2.2.1 she agreed that her performance was below the accepted



level. She admitted that the performance indicators were clearly outlined in her contract under the key roles.

13. The Claimant testified that she was given 2 assistants to help her achieve her targets and there was an agreed number of members to be recruited per month which was 100 members. She stated that the document at pages 5 to 9 of the Respondents bundle is a report prepared by herself and her assistants. The Claimant testified that she was aware her performance was below the expected numbers. She further stated that she was aware she was on probation.
14. The Respondent's witness RW1 adopted her witness statement dated 16<sup>th</sup> September, 2024 and the statement of Emily Rotich whom she stated had since retired. She adopted the bundle of documents dated 18<sup>th</sup> April, 2024 and supplementary list of documents dated 27<sup>th</sup> May, 2024 which she produced.
15. Under cross examination RW1 stated that the salary paid to the Claimant was the total compensation, that the salary was fixed at Kshs. 150,000 per month.
16. She stated that the termination letter was issued to the Claimant on 29<sup>th</sup> November, 2023. That the report titled "Summary Report for Naomi Soita" is dated 12<sup>th</sup> March, 2024. That the Report was written and signed by General Manager, Marketing, Emily Rotich more than 3 months after the termination of the Claimant's contract of employment. She stated that she was not aware the Claimant was not given a hearing before termination.
17. Under re-examination RW1 testified that she was aware the Claimant was paid one months' salary in lieu of notice and did not work to 31<sup>st</sup> December, 2023.
18. She stated that the Claimant's letter refers to fixed salary which was consolidated and did not have a breakdown. She stated that the summary report was prepared for internal purposes.

### **Claimant's Submissions**

19. In the Claimant's submissions dated 25<sup>th</sup> October, 2024 the issues identified for determination are:
  - a. Whether the Respondent had fair and valid reason to terminate the Claimant's employment;
  - b. Whether the Respondent followed a fair procedure in terminating the Claimant's employment;
  - c. Whether the Claimant is entitled to the reliefs sought.
20. On the first issue it was submitted that the reason for termination of the Claimant's employment was alleged poor performance yet the Respondent admittedly did not comply with any mandatory steps for termination as has been held by courts. Reliance was placed on the decisions of the Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR where the court held that if poor performance is alleged as a reason for termination the employer must inter alia, show that there was in place an employment practice on how to measure good performance against poor performance and the measures taken to address poor performance.
21. It was submitted that the Respondent herein did not prove that it complied with the said mandatory requirements.
22. It was further submitted that the report produced by the Respondent was prepared after the termination of the Claimant's contract, a confirmation that the Respondent did not prove valid reason for termination as required under section 43 of the *Employment Act*.



23. Reliance was further placed in the decision in *Kamau v Kevian Kenya Limited* (Cause 467 of 2019) [2023] KEELRC 627 (KLR) where the court held that without evidence of performance measuring systems it is not possible for the court to determine the performance goals the Claimant was expected to meet.
24. It was submitted that the Respondent having failed to prove reasons for termination the termination must be deemed to be unfair as was held in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR.
25. On the second issue whether the Respondent complied with fair procedure in terminating the Claimant's employment, it was submitted that the Claimant was not subjected to the procedure in section 41 of the Act with reliance placed on the decision in *Pius Machafu Isindu v Lavington Security Guards Limited* (civil Appeal 301 of 2015) [2017] KECA 225 (KLR) where the Court of Appeal held that "a mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination."
26. It was submitted that based on the foregoing the Claimant is entitled to the reliefs sought in her claim.

### **Respondent's Submissions**

27. For the Respondent the issues for determination were distilled as follows in its submissions:
  - a. Whether the termination of the Claimant's employment was lawful and procedurally fair;
  - b. Whether the Claimant is entitled to the reliefs sought.
28. The Respondent submitted that the Claimant's employment was terminated according to clause 2.1 of the employment contract which allowed either party to terminate the contract by one month's notice or pay in lieu. That the Claimant was issued with notice dated 29<sup>th</sup> November, 2023 and the termination was effective on 31<sup>st</sup> December, 2023. That the Claimant was also paid December salary in full. That the termination was in compliance with section 35(1) of the Act.
29. On substantive justice the Respondent submitted that the Claimant's contract permitted termination for unsatisfactory performance. That section 45(2) permits termination for valid reason. That the Claimant admitted during the hearing that she understood the terms of her contract and the performance standards set at the time of accepting the contract. That she further admitted that she was provided with the necessary resources including two assistants to help her meet the performance targets.
30. It was further submitted that the Claimant admitted that she submitted a report of her performance to the Marketing Manager which would be used to measure her performance against expected targets.
31. It was submitted that the Respondent's unchallenged evidence was that the performance of the Claimant was below average as she recruited 65 members with no new accounts or loan applications which the Claimant did not dispute. It was submitted that the Claimant cannot feign ignorance of her performance standards which were clearly outlined in her role as Marketing and Business Development Manager.
32. It was submitted that the Respondent complied with both section 41 and 43 of the Act as the Claimant was notified of concerns and given an opportunity to improve before termination. That under section 43(2) the reasons for termination are those that the employer believes to exist and which caused the employer to terminate employment.



## Analysis and Determination

33. Having considered the pleadings, evidence adduced and the submissions of the parties, the issues for determination are whether there was valid reason for the termination of the Claimant's employment, whether the Respondent complied with fair procedure and if the Claimant is entitled to the reliefs sought in her claim.

### whether there was valid reason for the termination of the Claimant's employment

34. The Claimant's contract states that the duration thereof was 6 months and that the contract was subject to conversion to an open ended contract subject to performance. Essentially, the contract was used by the Respondent as a probationary period to gauge the ability of the Claimant before she could be employed on what is popularly referred to as permanent terms of employment.
35. The Claimant's key roles were defined in the contract as follows:
- a. Developing and implementing communication strategies.
  - b. Managing products development initiatives.
  - c. Driving initiative achieve at 5% increase membership done the previous years performance i.e,  $37,000 \times 5\% @ 6 \text{ months} = 600$
  - d. Complaints and compliment management
  - e. Improve public image 0073.
  - f. To grow membership to 62,000
  - g. Build the cooperate image/brand of the society.
  - h. To inculcate a savings culture for the entire membership
  - i. Integrate the marketing of all society products and service.
36. Some of these were targets that were verifiable. The Claimant prepared reports of her performance. The reports reflected that she was not achieving the targets and she admitted she was aware of this at the hearing. She stated she was supposed to recruit 100 members per month which she did not achieve. She stated at the hearing that she was aware her performance was below the expected number. The Respondent thus had valid reason to terminate the employment contract of the Claimant on grounds of poor performance.
37. On the procedure used the Respondent did not adduce evidence that it had a disciplinary process as provided in section through which employees were before termination. Section 12 of the [Employment Act](#) provides:
12. Statement on disciplinary rules
    - (1) A statement under section 10 shall—
      - (a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;



- (b) specify the person to whom the employee may apply—
    - (i) if dissatisfied with any disciplinary decision relating to the employee; and
    - (ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and
  - (c) where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.
- (2) Subsection (1) shall not apply to rules, disciplinary decisions, grievances, or procedures relating to health or safety at work.
  - (3) This section shall not apply where, as at the date the employee starts work the employer has employed less than fifty employees.
38. The disciplinary process established under section 12 must conform with the provisions of section 41 which provides that 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.
39. The Respondent was expected to at least refer to some document with a policy on termination of employment, which document should provide for termination of probationary contracts and the procedure for such termination.
40. The Claimant was not taken through any form of disciplinary process. Section 42(1) provides that the provisions of section 41 shall not apply where a termination of employment terminates a probationary contract. I am however aware that some courts have held that this section is discriminatory of employees on probation. Good practice required the Respondent to at least notify the Claimant of the intention to terminate her employment on grounds of poor performance before issuing the letter of termination. Since the law has not been amended to reflect these good practices the Respondent cannot be deemed to have violated any provisions of the law. For this reason I would decline to find the termination procedurally unfair.
41. I will now turn to the remedies sought in the Statement of Claim. The first is a declaration that the termination of the Claimant’s employment contract was wrongful, unfair and in breach of the *Employment Act*.
42. In view of the provisions of section 41(1) and 42(1) which expressly state that a probationary contract is not subject to the provisions of section 41, and the fact that the Claimant’s contract was clear on the performance requirement including termination on grounds of non-performance, I decline to make this declaration.



43. The second prayer is for a declaration that the actions of the Respondent violated the Claimant's right to fair labour practice. I declare so in view of the fact that the Claimant was not given an opportunity to explain her case before the termination.
44. The third prayer is for damages of Kshs. 100,000 for breach of the Claimant's right to fair labour practice. It is my view that there is no justification for this prayer as the Claimant did not demonstrate any loss she suffered as a result of the termination of her employment having admitted that she was aware that her performance was below expectation. Further, as correctly pointed out in the Claimant's submissions, *the Constitution* does not define unfair labour practice as a specific wrong whose breach would attract damages separate from the compensation provided for in section 49 of the *Employment Act*.
45. The Claimant prayed for compensation equivalent to 12 months' salary as damages for unfair termination of employment. Section 49(4) of the *Employment Act* provides for parameters to be considered by the court in awarding compensation, among them length of service and the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination.
46. In this case the Claimant was on a probationary contract of 6 months and there was proof that she was aware that she was not performing to the standards set out in the contract. There was valid reason for the termination. Section 42(4) of the *Employment Act* provides that:
- (4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.
47. The Respondent gave the Claimant one month's notice which is more than anticipated by the law. It is my view that the Claimant is not entitled to this prayer under the circumstances of this case.
48. The Claimant further prayed for unpaid house allowance. Section 31 of the Act provides for housing as follows:
31. Housing
- (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
- (2) This section shall not apply to an employee whose contract of service—
- (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
- (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).
49. The Claimant's contract provided as follows:

#### 4.0 Compensation and terms of Payment



1. Your compensation shall comprise a fixed salary of Kshs. 150,000 (one hundred Fifty thousand only) payable monthly.
50. In my view the wording of the contract was explicit that the Claimant's only compensation would be a fixed salary of Kshs. 150,000. There is no doubt that both the Claimant and the Respondent understood this to mean the salary was consolidated. The prayer is declined.
51. The upshot of the foregoing is that the Statement of Claim herein is unsuccessful and is accordingly dismissed. Each of the parties shall bear its costs to the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 10<sup>TH</sup> DAY OF JULY 2025**

**MAUREEN ONYANGO**

**JUDGE**

