



**Kibui v Kenya Orient Life Assurance Limited (Cause 422 of 2018)
[2024] KEELRC 70 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 70 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 422 OF 2018
JK GAKERI, J
JANUARY 30, 2024**

BETWEEN

LUCY HALILI KIBUI CLAIMANT

AND

KENYA ORIENT LIFE ASSURANCE LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 26th March, 2018 claiming several remedies for unfair termination of employment by the Respondent.

The Claimant’s case is pleaded as follows;

2. The Claimant avers that she was employed by the Respondent on 13th February, 2017 as a Unit Manager under a written contract which set out the terms and conditions of the relationship including a 6 months probationary period.
3. That the Claimant was supposed to meet certain performance expectations and she discharged her duties diligently.
4. It is the Claimant’s case that the summary dismissal on the basis of unsatisfactory performance was unfair as she was not accorded an opportunity to be heard.
5. That Respondent’s Manager acted unreasonably and disproportionately by failing to take into account the Claimant’s conduct and had other sanctions at his disposal.
6. In sum, the Claimant faults both the reason for termination of employment and the procedure employed by the Respondent and prays for:
 - i. A declaration that termination of employment by the Respondent was unfair.



- ii. General damages for unfair termination.
- iii. Payment of the Claimant in consideration of earnings she was entitled to by virtue of her employment till retirement age.
- iv. Costs of this suit.
- v. Any other relief the court deems fit to grant.

Respondent's case

7. The Respondent admits that the Claimant was its employee from 13th February, 2017 to 6th September, 2017 and her employment was terminated during probation as she had no confirmation letter as provided for under clause 6 of the Employment Contract.
8. It is the Respondent's case that termination of employment during probation does not require a hearing and in any case the Claimant was notified of the reason for termination and paid all her dues including salary in lieu of notice.
9. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

10. As her evidence, the Claimant rehashed the contents of the written statements and was cross-examined.
11. The Claimant confirmed that the contract had a probationary clause and performance appraisal.
12. The Claimant denied that there was a performance review on 22nd August 2017 as she was unwell on that day but confirmed that she had signed a Balanced Score Card (BSC) and the copy on record showed that her overall rating was 1.33% for the period February – August 2017.
13. The witness confirmed that she was on probation when she was dismissed from employment and was paid terminal dues.
14. On re-examination, the Claimant testified that she had not been informed of the reasons of termination before it took place and the BSC on record was never discussed.

Respondent's evidence

15. Mr. Jackson Mulei Mul confirmed that his predecessor authored the summary dismissal letter dated 6th September, 2017 and the Claimant's BSC was signed by one Florence Makanga who was still an employee of the Respondent, though the Claimant's supervisor was one Tom Owiti.
16. The witness told the court that he had an evaluation signed by the Claimant which he did file in court.
17. RWI could not tell on what grounds an employee was liable for dismissal by the Respondent as the organization had no handbook and no evaluation period had been provided for.
18. The witness confirmed that clause 5 of the employment contract made no reference to performance.
19. According to the witness, the appraisal took place on 22nd August, 2017 and only one evaluation was filed.
20. The witness confirmed that he had no record of any meeting or session between the Claimant and the supervisor and was not an employee of the Respondent then.



21. RWI testified that the Respondent did not issue show cause letters or conduct hearing for employees on probation.
22. That the BSC on record had targets and actuals.
23. According to the witness, termination of employment was the most appropriate remedy.

Claimant's submissions

24. As to whether the Claimant was an employee of the Respondent, counsel submitted that she was as evidenced by the documents on record.
25. As to whether termination of employment was unlawful and unfair, counsel submitted that it was in that the Claimant was not given an opportunity to be heard as provided by law and had pleaded the particulars.
26. Reliance was made on the provisions of Sections 41, 43 and 45 of the *Employment Act*, 2007 as well as the sentiments of the Court of Appeal in *CMC Aviation Ltd V Mohammed Noor* (2015) eKLR to urge that the reasons for dismissal given by the Respondent were not sufficient and the Claimant was not given a chance to explain her case.
27. Sentiments of the court in *Jane Nyandiko V Kenya Commercial Bank Ltd* (2017) eKLR were also cited to buttress the submission on the essence of procedural fairness.
28. Counsel urged the court to consider the contract of employment in the context of relevant provisions of *the Constitution* of Kenya, 2010 and the *Employment Act*, 2007 as emphasized in *Kenya County Government Workers Union V County Government of Nyeri & another* (2015) eKLR and *Air-India Statutory Corporation V United Labour Union* cited in *VMK V CUEA* (2013) eKLR.
29. Counsel further submitted that the probationary period had already lapsed and the Respondent had neither extended the same nor given a confirmation letter, which courts have characterized as an unfair labour practice aimed at frustrating the employee.
30. Decisions in *Benjamin Nyambati Ondiba V Egerton University* (2014) eKLR and *Esther Njeri Maina V Kenyatta University* were cited to reinforce the submission on the need to confirm an employee on completion of the probationary period.
31. Reliance was also made on the sentiments of the Court in *Joseph Kareko Gikonyo V County Government of Lamu & 2 others* (2022) eKLR where the court cited the decision in *Monica Munira Kibuchi & 6 others V Mount Kenya University* (2021) eKLR on the import of Section 42(1) of the *Employment Act*, 2007.
32. As regards the reliefs sought, counsel submitted that the Claimant was entitled to compensation for unfair dismissal under Section 49 of the *Employment Act*, 2007.
33. That the Claimant was not allowed to make a response to the appraisal or discuss the results with the supervisor and the Respondent did not file the Claimant's performance review reports.
34. As regards general damages, counsel urged the court to consider the position the Claimant held and flawed the termination process.

Respondent's submissions

35. By 15th December, 2023 when the court retired to prepare this judgement, the Respondent had not filed its submissions.



Findings and determination

36. The issues for determination are:
- i. Whether the Claimant was serving on a probationary contract when her employment was terminated by the Respondent.
 - ii. Whether the Claimant's summary dismissal was unlawful and unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
37. As to the nature of employment as at the date of summary dismissal, the home port are the relevant provisions of the *Employment Act, 2007*.
38. Section 2 of the *Employment Act, 2007* defines a probationary contract as;
- “A contract of employment which is of not more than 12 months' duration or part thereof, is in writing and expressly states that it is for a probationary period”.
39. It is common ground that the Claimant's employment contract had a probation clause.
40. Clause 6 provided inter alia;
- “You will be on probation for a period of six (6) months, or such extended period as the company may decide at its own option, until such a time as a letter of confirmation is issued.”
41. Clearly, the Claimant's probationary contract was for a duration of 6 months but could be extended as the Respondent could do so suo motu.
42. Similarly, Section 42(2) of the *Employment Act, 2007* provides that;
- A probationary period shall not be for more than 6 months but it may be extended for a further duration of not more than 6 months with the agreement of the employee.
43. Evidently, the Claimant could not have been on probation if the 6 months had lapsed and no decision had been made to extend the same and the Claimant notified for his concurrence.
44. It is not in contest that the Respondent employed the Claimant on 13th February, 2017 and was summarily dismissed on 6th September, 2017, a duration of about 7 months.
45. The Claimant's probationary contract of employment lapsed on 13th August, 2017 by which date the Respondent ought to have evaluated the Claimant and shared the outcome with her in preparation for a consultative meeting to discuss the results and the way forward.
46. Strangely, although the Respondent's evidence is exclusively that the Claimant was serving on probationary terms as at 6th September, 2017, it adduced no evidence to demonstrate that the Claimant's probationary period had been extended by the Respondent on its own motion as ordained by clause 5 of the employment contract.
47. The absence of a board or management resolution extending the probation period or a letter to that effect would appear to suggest that the Respondent had not extended the Claimant's probationary contract.
48. RWI adduced no evidence to affirm his allegation that the Claimant was still serving the probationary period.



49. From the documentary evidence on record, it is evident that the Claimant's probationary contract commenced on 13th February, 2017 and ended 6 months later in August 2017.
50. Since the *Employment Act*, 2007 restricts the duration of a probationary contract, an extension ought to be formal as it must specify the duration of such extension.
51. Intriguingly, the Respondent's witness was not its employee when the Claimant was in employment. Indeed, he admitted on cross-examination that one Ann Florence Makanga or Tom Owito would have been better witnesses on the issues before the court.
52. In the absence of credible evidence that the Claimant's probation was extended, it is the finding of the court that as at 6th September, 2017, the Claimant's employment was not probationary.
53. The foregoing finding is consistent with relevant judicial authority cited by the Claimant's counsel to the effect that where an employer fails and/or refuses or neglects to confirm an employee after probation, the employee is confirmed by operation of law as was held in Benjamin Myambati Ondiba V Egerton University (Supra) that;

“The effect of the respondent's action in deferring the confirmation of the claimant unilaterally and failing to review and confirm his employment was that he became constructively confirmed as of 31st December 2011 . . . The failure must be interpreted to the benefit of the employee, the claimant in this case. He effectively became permanent and pensionable as under the applicable CBA . . .”

54. These sentiments apply on all fours to the facts of the instant case.
55. As to whether the summary dismissal of the Claimant was unlawful, the homeport are the provisions of Section 43, 45(2) 47(5) and 41 of the *Employment Act*, 2007.
56. Both the foregoing provisions and judicial articulations are consistent that for a termination of employment to pass muster, it must be proved that the employer had a substantive justification for the termination and it was conducted in accordance with fair procedure.
57. As held by the Court of Appeal in Naima Khamis V Oxford University EA Ltd (2017) eKLR, a termination of employment may be unfair for want of a substantive justification or procedural propriety or both.

Reason for termination

58. The summary dismissal letter dated 6th September, 2023 relies on the Claimant's performance as the reason for dismissal.
59. RWI testified that the BSC on record was signed by Ann Florence Makanga yet the supervisor was Mr. Tom Owiti.
60. According to the witness, performance could lead to summary dismissal yet the witness availed no documentary evidence of any categorization of the grounds of dismissal.
61. Puzzlingly, the copy of the BSC on record has no indication as to when it was signed or when the evaluation was conducted and has no comments of either signatory which is atypical of BSC's.
62. According to RWI, the evaluation took place on 22nd August, 2023 and only one evaluation report was filed and the Respondent did not file the agreed Key Performance Indicators (KPI).



63. The principles governing poor performance as a ground for termination of employment were articulated by Mbaru J. in *Jane Samba Mukalla V Ol Tukai Lodge Ltd (2013) eKLR* that;
- “ . . . Where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* . . . they had put in place an employment policy or practice on how to measure good performance as against poor performance . . . including having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance . . . and further what measures they have taken to address poor performance once the policy or evaluation system has been applied . . . Beyond having such an evaluation measure and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared there they would be in essence be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and in the presence of another employee of their choice, the reasons for termination shares and explain to such an employee . . . ”
64. It is common ground that the Respondent had a policy or practice on how to measure performance by institutionalizing the Balance Score Card (BSC) which is essentially an agreement between the employee and the supervisor on performance targets based on the employee’s job description.
65. The Respondent availed a copy of the Claimant’s BSC for February 2017 to August 2017.
66. However, the Claimant is identified as the appraiser as opposed to the Appraisee.
67. More significantly, it is unclear as to when the copy of the BSC on record was concluded between the parties as an employee cannot be evaluated or appraised on the basis of targets not agreed upon between the appraiser and the appraisee.
68. It is axiomatic that a BSC consists of the agreement between the parties and the evaluation both signed by both parties and the latter includes a self, supervisor’s evaluation agreed score and attendant comments. RWI testified that he had no agreed KPI’s on record.
69. Arguably, the rating of 1.33 on the BSC lacks a context.
70. In the court view, the Respondent had no justification not to confirm the Claimant in her position contrary to the recommendation of the General Manager’s letter to the Human Resource Department dated 23rd August, 2017.
71. In addition, RWI confirmed that he did not file a performance evaluation signed by the Claimant’s supervisor and the Respondent provided a single copy of the BSC and thus a single evaluation. Based on the evidence on record, the court is not persuaded that the Respondent had reasonable grounds to genuinely believe that the Claimant’s performance was wanting as ordained by Section 43(2) of the *Employment Act, 2007*.
72. In sum, it is the finding of the court that the Respondent has failed to establish on a balance of probabilities that it had a valid and fair reason to terminate the Claimant’s employment.

Procedure

73. It requires no belabouring that Section 41 of the *Employment Act, 2007* prescribe the mandatory procedure to be complied with before an employee’s employment is terminated or the employee is summarily dismissed. (See *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*).



74. Similarly, in *Jane Samba Mukalla V Ol Tukai Lodge Ltd (Supra)*, Mbaru J. observed as follows:

“Where the termination of an employee is based on the reasons of poor performance, the employer must comply with the provisions of Section 41 of the *Employment Act* which require that such an employee should receive an explanation as to such a reason in the presence of another employee of their own choice.”

75. Applying the foregoing propositions and provisions of law to the facts of the instant case, it is clear that the Respondent did not accord the Claimant an opportunity to confront the alleged poor performance for the Respondent to make a decision on the way forward including the option of giving the Claimant the opportunity to improve her performance.

76. From the evidence on record, it is the finding of the court the Respondent has failed to prove on a balance of probabilities that termination of the Claimant’s employment was procedurally fair.

77. RWI confirmed on cross-examination that he had no evidence of a meeting or session between the Claimant and the supervisor or any other person and the Respondent did not issue a notice to show cause.

Reliefs

78. Having found that the Respondent has failed to show that termination of the Claimant’s employment was fair, the Claimant is entitled to various reliefs under the provisions of the *Employment Act, 2007* as follows;

Declaration

79. Having found that termination of the Claimant’s employment by the Respondent was unfair, a declaration to that effect is merited.

General damages for unfair termination

80. The Claimant adduced no evidence of entitlement to damages for unfair termination.

81. More significantly, the *Employment Act, 2007* makes no provision for damages for unfair termination of employment.

Earnings till the age of retirement

82. The Claimant led no evidence of entitlement to the earnings she would have made till the age of retirement.

83. More significantly, the prayer involves anticipatory earnings which have no legal anchorage as held by the Court of Appeal in *D. K. Njagi Marete V Teachers Service Commission (2019) eKLR*.

The prayer is declined.

Compensation

84. Having found that the termination of employment was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act, 2007*.

85. In determining the quantum of compensation, the court has considered the following:

i. The Claimant was an employee of the Respondent for a very short time of about 7 months.



- ii. The Claimant neither appealed the decision of the Respondent nor express her wish to continue in its employment.
 - iii. The Claimant contributed to the termination of employment.
86. In the circumstances, the court is satisfied that the equivalent of 3 months' salary is fair.
87. In the upshot, judgment in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of employment was unfair.
 - b. Equivalent of 3 months' salary
 - c. Costs of this suit
 - d. Interest at court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF JANUARY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

