



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutua v CFAO Motors Kenya Limited (Employment and Labour Relations
Petition E065 of 2023) [2024] KEELRC 221 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 221 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E065 OF 2023**

**AN MWAURE, J
FEBRUARY 9, 2024**

BETWEEN

EVELYNE MUNINI MUTUA PETITIONER

AND

CFAO MOTORS KENYA LIMITED RESPONDENT

JUDGMENT

1. The Petitioner filed the Petition herein dated 4th April 2023.

Petitioner's Case

2. The Petitioner avers that she was initially employed by the Respondent as an entry level cashier in the Westland's Toyota Finance Department vide a contract of employment dated 27th September 2011 and was confirmed on permanent and pensionable terms upon completion of her probation period on 5th June 2012.
3. The Petitioner avers that she was promoted to an assistant accountant in 2015 and thereafter vide a letter of offer dated 3rd February 2020, she was appointed as a compliance officer.
4. The Petitioner avers that throughout her employment, she was an exemplary employee who excelled in the performance of her duties.
5. The Petitioner avers that due to her good performance, she qualified for bonuses every year based on the company's Performance Management System (PMS). She was also complemented with increments on her basic salary on several occasions.
6. The Petitioner avers that three months in the Risk and Compliance department, she received a letter dated 2nd July 2020 indicating she would be placed on a 3 months Performance Improvement Plan effective 3rd July 2020.



7. The Petitioner avers that the plan intimated that in the event the targets set in the Performance Improvement Plan were not met, the Respondent was at liberty to terminate her contract on the basis of non-performance.
8. The Petitioner avers that she undertook the plan under supervision of the Risk and Compliance Manager by putting in overtime and undergoing training on various courses to improve her output.
9. The Petitioner avers that it was logical upon the Respondent to closely monitor the plan progression against the laid down objectives to ascertain whether the Petitioner was making improvement as well as give criteria based performance evaluations to enable her know her level of achievement. To the contrary, the Respondent engaged in routine checking of boxes without meaningful evaluation of her performance.
10. The Petitioner avers that the fortnight check ins were dotted with general statements and did not highlight any areas where she was underperforming. Further, the evaluation tool proves there was no designated area she failed in.
11. The Petitioner avers that the Respondent did not formally close the PIP at the end of the prescribe 3-month period and did not carry out an objective appraisal to demonstrate a pattern of poor performance by her.
12. The Petitioner avers that on 18th December 2020, she received a letter from the Respondent terminating her employment on grounds that she was placed on a Performance Improvement Plan but no improvement was noted.
13. The Petitioner avers that she appealed against her termination by lodging an appeal vide a letter dated 23rd December 2020 addressed to the Managing Director. The Petitioner urged the Respondent to reconsider their decision by pointing out her action points aimed at improving her performance and enunciated various grounds under which her performance was impeded on the Respondent's fault.
14. The Petitioner avers that on 29th January 2021, the Respondent wrote to her communicating its decision to uphold her termination and that the decision was reached following review of her performance indicators without significant improvement despite monthly review meetings to discuss support from her manager.
15. The Petitioner avers that her termination was both substantively and procedurally unwarranted as her termination was not substantively based on poor performance but was precipitated by her condition of pregnancy at the time of termination.
16. The Petitioner avers that the Performance Improvement Plan was not an action plan aimed at curing any deficiencies at work and build her performance but merely a tactic to arrive at a predetermined decision to terminate her employment in view of the said 'disability'.
17. The Petitioner avers that even if the reason for termination was proper, the Respondent failed to comply with the procedural requirements laid down as company policy and under section 41 of the [*Employment Act*](#) thus the termination was unfair.
18. The Petitioner avers the Respondent failed to hear any representations made by herself before making the decision to terminate her despite her request for the same.

Respondent's Case

19. In opposition to the Petition, the Respondent filed replying affidavits dated 9th June 2023 and 27th June 2023.



20. The Respondent avers that the Petitioner was employed vide a contract dated 27th September 2011 as a cashier, she held several positions until February 2020 when she was appointed as a Compliance Officer and was to be on probation until 30th June 2020.
21. The Respondent avers that the Petitioner acknowledged that the Employee Handbook, Code of Conduct formed part of her employment and on 07/03/2019, the Petitioner confirmed her knowledge of and agreement to adhere to the policies and guidelines of the Performance Management System.
22. The Respondent avers that the Petitioner performed her obligations over her years of employment in the several roles that she held, however, on her last role as a Compliance Officer the issue of her performance arose leading to her termination.
23. The Respondent avers that towards the end of the Petitioner's probation period in June 2020, it was evident that she was not performing her job as expected, therefore, confirmation was not given and she was put on a three-month Performance Improvement Plan commencing July 2020 to September 2020.
24. The Respondent avers that in October 2020, the outcome of the PIP for the Petitioner was released. The Petitioner's supervisor, Margaret Guandaru gave a probation period dated 8/10/2020 which showed that the Petitioner was falling short in delivering what was expected of her in her position. The report indicated that out of the six months, performance was only noted in the last month.
25. The Respondent avers that the report indicated the Petitioner's supervisor had on several occasions had conversation with her about her performance and even suggested one week leave but upon her return, the performance issues resurfaced.
26. The Respondent avers that the Petitioner failed to improve her performance under the Performance Improvement Plan despite being given 5 months to improve. Therefore, after a hearing to discuss her performance, the Petitioner's employment was terminated vide a letter dated 18th December 2020 which clearly stated the reasons for her termination as failing to improve her performance under the Performance Improvement Plan.
27. The Respondent avers that the Petitioner appealed as per the Employee Handbook and she was granted a chance for hearing of her appeal on 6th January 2022. The Petitioner's previous supervisors were asked for their opinion on her performance in her previous roles to assist the Respondent make a sound decision.
28. The Respondent avers that after the appeal, it considered the issue discussed and maintained its position to terminate the Petitioner's employment.
29. The Respondent avers that it followed laid down procedure as per the contractual documents when terminating the Petitioner's employment on the basis of her performance. Clause 13.2 of the Employment contract provided that the Respondent shall have the right to terminate the agreement on 30 days' notice on grounds of performance or otherwise. However, rather than give one month's notice, the Petitioner was paid one month's salary in lieu of notice.
30. The Respondent avers that the Petitioner was treated humanely and all her human rights, labour rights and constitutional rights were fully abided by the Respondent. The Petitioner was accorded her statutory and contractual terminal dues comprising of salary until 18th December 2020 and one month pay in lieu of notice, leave pay and pension refund in accordance with the pension scheme's rules and certificate of service. She was compassionately retained on the Respondent's medical cover for one-year post termination.



31. The Respondent avers that the Petitioner was not meeting the expectations of her performance in her role as a Compliance Officer thus affecting her work output, her colleagues, the department and the company at large.
32. The Respondent avers that the Petitioner's dismissal was valid, fair and just as it was in accordance with her employment contract, the operational requirements of the Respondent and the law.
33. The Respondent avers that it was made aware of the Petitioner's pregnancy by her during the PIP hearing of 18th December 2020 when she informed the meeting that she was six months' pregnancy and it had no knowledge of the pregnancy prior to the meeting. Further, it graciously and compassionately retained her medical cover for one-year post termination. Hence the Petitioner cannot allege her pregnancy was the case of the termination.

Petitioner's Submissions

34. The Petitioner submitted that it is trite law that he who alleges must prove as codified in section 107 of the Evidence Act. Therefore, the Respondent has failed to prove the allegations of poor performance.
35. The Petitioner submitted that it is not disputable that she was the Respondent's employee for 9 years in various roles and that she had been an exemplary employee as evidenced by the bonuses and salary increments received from the organisation.
36. It was submitted for the Petitioner that the Petitioner was moved to different departments and she remained a permanent employee. However, vide a letter dated 14th February 2020, the Respondent purported to place her on a 3-month probation into her new role and that her employment would be dependent upon successful completion of her probation.
37. The Petitioner submitted that the employer cannot alter the terms of an employment contract without consulting the employee. In this case, the Respondent alleged that the Petitioner's employment would be pegged on the outcome of the probationary period would mean her employment was being reverted from permanent to a probationary term.
38. The Petitioner submitted that an employee cannot revert from permanent to probationary terms but can only be reverted back to their previous department or work engagement.
39. The Petitioner submitted that the Respondent cannot say that the Petitioner failed to achieve what was expected of her as the daily performance records and monthly appraisals which would have proved poor performance were lacking in value directions such as levels of compliance and indications of non-compliance. She relied in *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2020; [2010] LLR 255 (ICK) (September, 2013)*.
40. The Petitioner submitted that in the absence of the appraisals and minute sheets for any of the alleged discussions held between the Petitioner and the supervisor hence the claim of poor performance as a reason for termination fails.
41. The Petitioner submitted that the probation report was merely tailored to suit a predetermined end as it had no date and bore no authorship but just super imposed name, signature and date conveniently placed to justify the Respondent's ill intended actions.
42. The Petitioner submitted that the probation lasted 6 months contrary to the three months provided for in the staff handbook. Further, her supervisor did not adhere to the procedural check ins and the same has been tailored to suit a predetermined end.



43. The Petitioner submitted that the allegation that she had prior engagements with her supervisor are merely hearsay and cannot be relied on to contradict documentary evidence.
44. The Petitioner submitted that the Respondent still allowed her to proceed working beyond the PIP period and there are no KPI results for the month of October, November and December. The Petitioner allowed her to continue with her role for the rest of the year without any indication of her poor performance. The Petitioner has established and demonstrated there was no substantive justification for termination of her employment contract.
45. The Petitioner submitted that there were no subsequent meetings between her and the Risk and Compliance Department to determine the alleged poor performance. She was never invited to any disciplinary hearing and the hearing held on 18th December 2020 was merely for the purpose of communicating her termination and not to accord her the right to fair hearing. She relied on *Jane Samba Mukala v Ol Tukai Lodge Limited* (supra).
46. The Petitioner submitted that the PRP report was never received by the Petitioner despite communicating with her via emails. In the absence of proof of service of the report, its authenticity is in doubt as stated in *George Muteti v Express DDB Kenya* [2015] eKLR.
47. The Petitioner submitted that by failing to afford the Petitioner an opportunity to be heard, the Respondent denied her an opportunity to ventilate her grievances in a manner consistent with Article 41 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*.
48. The Petitioner submitted that the Respondent failed to comply with the procedural requirements set out in section 41 of the *Employment Act* nor its contractual obligations as provided for in the staff handbook to give 30 day notice of an intention to terminate the employment on the grounds of poor performance.
49. The Petitioner submitted that the Risk and Compliance department had new employees as all the other employees had left and the department did not have proper structures. The Petitioner got pregnant just after her transfer to the department. The department required a lot of movement around the country and she could not travel based on her condition; this did not augur well with her supervisor who already had an attitude with her absenting herself occasionally to go for antenatal. The supervisor felt her absenteeism was hamstringing her performance and as at some point stopped assigning her work.
50. It was submitted for the Petitioner that by December she was 6 months into her pregnancy and she was about to go on maternity leave and even after maternity leave she would not be able to travel. The Petitioner submits that the only reason the Respondent put her on the PIP plan was due to her pregnancy at the time.

Respondent's Submissions

51. The Respondent submitted that in its internal procedures, when an employee is transferred to a different department, he or she is issued with an offer letter on probationary term and in each instance the Petitioner acknowledged the terms by appending her signature in agreement with the content therein, therefore, the averment that this was introduced in this instance is denied by the Respondent.
52. The Respondent submitted that the purpose of probation is to allow the employer to assess the employee's professional skills and test his or her capabilities before entering into a definitive contract. The Petitioner was not performing her duties and at the end of the period her supervisor recommended that she be put on the Performance Improvement Plan (PIP) in line with the Employee Handbook.



53. The Respondent submitted that the Petitioner applied for the position as per the letter of offer, she accepted the terms in line with the new role and communicated in writing as envisaged under Section 10(5) of the [Employment Act](#) and as such the Respondent did not breach this section as alleged by the Petitioner.
54. The Respondent submitted that after the Petitioner's performance issues arose, the Respondent was not under any obligation to confirm her position. As laid out in the Employee Handbook, the Respondent put in place measures to ensure the Petitioner's challenges were addressed under the PIP. Further, due process was followed including weekly and monthly check ins and a formal report issued at the end of the probation period hence dispelling any allegations that the termination is unfair.
55. The Respondent submitted that PIP report signed on 8th October 2020 which were prepared and filled by the Petitioner and the supervisor and which was confirmed and signed by both parties demonstrating she was in agreement with the entries in the reports.
56. The Respondent submitted that the Petitioner's employment was on probationary terms as such a disciplinary hearing was necessitated as per Section 42 of the [Employment Act](#).
57. The Respondent submitted that the Petitioner was afforded a forum to be heard during the PIP meeting held on 18th December 2020 which was centred around gaps in her performance which had not improved for the period she was under PIP.
58. The Respondent submitted that it added time as prescribed for PIP in order to give the Petitioner a chance to improve but she failed to do so and during the meeting on 18th December 2020, the supervisor explained the PIP results to the Petitioner. The Respondent asserts it was fair and involved the Petitioner before making the decision to terminate her contract.
59. The Respondent submitted that there was no discrimination as alleged and the reason for her termination was solely based on her poor performance and that this allegation of termination because of pregnancy is an afterthought as the Petitioner's pregnancy never came up during the PIP.
60. The Respondent submitted that the Petitioner was paid her final dues and issued the Certificate of Service which was collected by her.

Analysis & Determination.

61. The issues for determination are:
 - i. Whether the probation period is applicable to the Petitioner's employment.
 - ii. Whether the termination was lawful and fair.
 - iii. Whether the Petitioner is entitled to the reliefs sought

Whether the probation period is applicable to the Petitioner's employment.

62. The Respondent submitted that in its internal procedures, when an employee is transferred to a different department he or she is issued with an offer letter on probationary term. It is therefore its argument that the Petitioner was serving a probationary term, which begs the question what happens to the 9 years served before she signed this new contract upon transfer.



63. This court guided by the decision made in *Carole Nyambura Thiga v Oxfam* [2013] eKLR in which the court held:

“This according to the Respondent’s evidence is the Policy of Oxfam. An old employee working under a new contract must undergo probation and is treated as a new employee under this Policy. This is a strange Policy that under the Kenyan Labour Law regime amounts to an unfair labour practice. The Claimant had been working for the Respondent from 2008. She was discharging the same role in continuity. There was only a short break of 23 days between her two written contracts.

Probation is served by new employees to provide job adjustment opportunity for both the new employee and the employer, to determine whether to continue with the employment relationship.....

.....

The Claimant was not a new employee on 25th March 2011 when the Respondent offered to employ her for 3 months. There was nothing new she was being called upon to learn. She was not a stranger at Oxfam, and needed no induction. There was no need to ask her to serve probation. Such a perpetual probation clause has no place in the Kenyan Labour Law. Employees would be denied the right to claim remedies under the unfair termination law, even after years of service, if such a policy is allowed to take root. The Court completely rejects the evidence of the Respondent that the Claimant was on valid probation at termination, and therefore disentitled to claim for unfair termination.”

64. Similarly, in *Kenya Union of Domestic Hotels, Education, Institution and Hospital Workers v Baba Dogo Catholic Church School* [2018] eKLR the court held: -

“it is clear that probation period is meant for new employees. The Respondents have not disputed the fact that all the Grievants had been in their employment for more than a year in which case the probation period does not apply.....”

65. With due consideration that the Petitioner was not a new employee and it is not disputed that she had worked for the Respondent for over 9 years in different capacities, therefore, the probation period does not apply.

Whether the termination was lawful and fair

66. For termination of an employee’s employment to be lawful and fair, the employer must prove that at the same time it was both substantively and procedurally fair.

67. In respect to substantive justification, the court in *Joseph Mwaniki Nganga v United Millers Limited* [2022] eKLR observed:

“The question for this court then become whether these are valid and fair reasons for an employer to terminate an employee. Section 43(2) of the *Employment Act* defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee. In the case of *British Leyland UK Ltd v Swift* (1981) I.R.L.R 91 Lord Denning described the test of reasonableness in the following words: -



“The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

68. In the instance case, the Respondent submitted that the Petitioner was terminated on grounds of poor performance which was communicated in the termination.
69. To support its averment, the Respondent informed this court that upon completion of the said probation period, the Petitioner was placed under a further 3 months Performance Improvement Plan with the aim of facilitating her improvement, however, this was futile as her supervisor informed the management she continued with the streak of poor performance.
70. The petitioner in her pleadings and submissions averred she was placed on probation in the year 2020 having worked for the bank since 2011. In February 2020 she was offered a position of compliance officer and was placed on probation of three months.
71. As earlier observed in the case of Kenya Union of Domestic Hotels education Institution & Hospital workers v Baba Ndogo Catholic Church [2018] eKRL supra and Carole Nyambura Thiga v Oxfam [2013] eKLR an old employee cannot all of a sudden be placed on probation again. That is not provided anywhere in *the constitution* or in the employment laws of Kenya. That is the trite law.
72. The evidence on record further states after 3 months in the new position the petitioner was again placed on a 3 month performance improvement plan. The petitioner was said to have acknowledged and assented both to their employers staff handbook and also code of ethics.
73. She however says the performance evaluation was to be based on training awareness routine checks, compliance and Sop gap assessment and compliance reports. She says that is not what she was put through and instead of real time criteria based performance she was taken through a routine and formalistic boxes without any meaningful evaluation of performance.
74. She says she signed a probation report in October 2020 but only signed it because she was intimidated by her supervisor. She says they had a strained relationship with her supervisor and hence the reason she signed the reports even though she was not in agreement with the same and it was under duress.
75. The petitioner says even after the three months PPI she worked another three months and on 18th December 2020 she was issued with a termination letter.
76. The petitioner says she appealed the decision to terminate her on 23rd December 2020 but got a response on 29th January 2021 that the termination was upheld.
77. The court has followed the process leading to the termination of the petitioner keenly from when she was offered the position of a Risk Compliance Officer to the time of termination.
78. Poor performance according to section 41 of *employment act* 2007 is one of the grounds for termination. However, in any situation of summary dismissal the ground or termination must be explained to the employee and the employee must be given an opportunity to defend himself before his witness as provided in section 41 of the said *employment act*.



79. If the ground is poor performance as said in this case the employer must prove poor performance. The same was well put by the honourable court in the case of Jane Samba Mukala v Ol Tukai Lodge Limited Industrial cause No 823 of (2010) eKLR cited by the petitioner where court held:

Where poor performance is shown to be reasons for termination, the employer is placed at a high level of proof as outlined in section 8 of the *employment act*, 2007. 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 performances as against poor performance.

It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

In any event, even where there was a review of the PIP and the performance, section 41 of the employment act at such being a managerial issue the employee must be issued with notice that he had been found a poor performer and there is intention of termination of employment. On such notification, the employee must be given a hearing and the procedures envisaged under section 41 followed.

80. In the case of Walter Onuro Ogal v Teachers Service Commission Cause No 955 of 2011 the court held:

“for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for the termination but also procedural fairness.”

81. To buttress this issue of procedure to be followed in terminating an employee on ground of poor performance court is persuaded by the case of Antony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] EKLR where it held:

“the ingredients of procedural fairness as I understand it within the Kenya situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed by the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges and he has a right to proper opportunity to prepare and to be heard and to represent a defence or state his case in writing or through a representative or a shop floor union representative of his choice if possible.”

82. In this case and flowing from the evidence on record and submissions the petitioner was not given an opportunity to defend herself as pertaining to the allegation of poor performance. The court therefore holds the termination of her employment was unprocedural and unfair and indeed there is no evidence that she was invited or attended a disciplinary hearing. The court enters judgment in favour of the petitioner.

83. As to the prayers in her petition the court grants her prayers A, B and C of the same. In prayer C she is awarded 6 months equivalent of her salary as compensation for unfair termination which translate to kshs 960,000 as per her salary in her last contract of 2020.

84. Prayers D, and E are not proved and so are not granted.



The petitioner is awarded interest at court rates from date of judgment till full payment on the award.

86. Costs follow the event and so petitioner is entitled to the costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

