



**Mwangi v Red Lands Roses Limited (Cause 1318 of 2018)  
[2024] KEELRC 212 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 212 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1318 OF 2018  
SC RUTTO, J  
FEBRUARY 9, 2024**

**BETWEEN**

**STEPHEN KIGOTHO MWANGI ..... CLAIMANT**

**AND**

**RED LANDS ROSES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Through a Statement of Claim filed on 20<sup>th</sup> August 2018, the Claimant avers that he was employed by the Respondent on 30<sup>th</sup> July 2013 as a Senior Accountant Manager. He states that he was a hardworking and dedicated employee and that his performance was at par with the demands of his position. That as a result of his outstanding performance, he was promoted to the position of Manager within the Finance Department.
2. Evidently, the employment relationship soured following the Claimant's performance appraisal which was carried out on 25<sup>th</sup> January 2018. In the Claimant's view, the said appraisal was unfair as it was conducted by the Human Resource Manager and the Executive Director and not the Director of Finance Administrator or the Chief Accountant who usually appraised him and to who he used to report.
3. As it came to be, the Claimant was terminated following the said performance appraisal. According to the Claimant, he was not given an opportunity to be heard before his employment was terminated. In this regard, he has termed his termination unfair, unlawful and a violation of his rights under Article 41(1) of *the Constitution*. Consequently, the Claimant prays for a Certificate of Service, compensatory damages in the sum of Kshs 1,676,760/= together with costs of the suit and interests.
4. The Respondent countered the Claim through its Memorandum of Defence dated 23<sup>rd</sup> October 2018, in which it avers that the Claimant was terminated from employment on grounds of consistent poor performance, wilful neglect of duty encompassing carelessness and/or improper performance of



duties. The Respondent contends that the Claimant's termination was warranted in the circumstances and was done in accordance with all applicable laws. The Respondent has further termed the Claimant's claim unfounded, misleading and ill-advised and as a result, has asked the Court to dismiss the Claim with costs.

5. During the trial, which was conducted on 3<sup>rd</sup> October 2023, both parties called oral evidence.

### **Claimant's Case**

6. The Claimant who testified in support of his case adopted his witness statement as well as the list and bundle of documents filed alongside the Memorandum of Claim to constitute his evidence in chief.
7. It was the Claimant's evidence that on or about 25<sup>th</sup> January 2018, the Respondent carried out an appraisal in which he scored 48.6% which according to the Respondent was poor performance. In the Claimant's view, the said appraisal was unfair for the reasons that:
  - a. He was appraised by persons who were not conversant with his duties;
  - b. He was appraised on duties which were not part of his job description;
  - c. He was appraised at a period outside the time allocated for appraisals in the Respondent's Basic Employment Conditions; and
  - d. He was denied the opportunity to have the Director of Finance and/or Chief Accountant present for the appraisal as they are the ones who ordinarily appraised him and were conversant with his duties.
8. The Claimant further stated that on 27<sup>th</sup> January 2018, he received a Notice to Show Cause why he should not be terminated from employment to which he responded via a letter dated 27<sup>th</sup> January 2018 to all the comments made on the evaluation form. He went further to request for the opportunity to discuss his appraisal in the presence of the Director of Finance and Administration or the Chief Accountant as they would understand and clarify on his duties as per his job description and others he performed outside his scope of work.
9. That without further communication from the Respondent, he was given a termination dated 29<sup>th</sup> January 2018 terminating his employment purportedly for poor performance. The Claimant contended that the Respondent did not give him any opportunity to be heard before terminating his employment.
10. The Claimant maintained that his termination was therefore unlawful and amounted to unfair dismissal as the Respondent did not give him an opportunity to be heard before the termination and that he was not terminated in accordance with fair labour practices.

### **Respondent's Case**

11. The Respondent called oral evidence through its Director of Finance and Administration, Mr. George Kimani, who testified as RW1. Similarly, he adopted his witness statement and the bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
12. RW1 stated that in keeping with the Respondent's policies, the Claimant, like the rest of the Respondent's employees, was required to undergo an annual performance appraisal as per the Respondent's Performance Management Policy and Guidelines and as per the procedure set out in the Respondent's Appraisal Procedure Manual. The performance appraisal was an ongoing process throughout the year.



13. That the Respondent's Appraisal Procedure Manual provided the Respondent with various options to take depending on an employee's appraisal results. These included awarding employees who consistently demonstrated outstanding performance and terminating the employment of employees whose performance was unsatisfactory.
14. RW1 further stated that the Claimant underwent the first performance appraisal in the year 2014, in which he was appraised as having a very good performance and was recommended for promotion to the position of Assistant Manager.
15. In subsequent years, the Claimant's performance deteriorated, ultimately leading to termination of his employment on 29<sup>th</sup> January 2018.
16. It was RW1's evidence that the Claimant's performance appraisal for the year 2016 found his performance to be unsatisfactory in a number of areas, which independently and cumulatively demonstrated willful neglect of duty on the Claimant's part. However, in an act of good faith and as a responsible employer, the Respondent committed to support the Claimant to improve his performance to meet the set targets before the next appraisal.
17. Instead of improving, the Claimant's performance only got worse in 2017 to such an extent that the Respondent issued him with two warning letters, due to his carelessness and/or improper performance of his duties. That the Respondent issued the warning letters in good faith as it sought to give the Claimant an opportunity to correct and improve his performance.
18. That the Claimant's willful neglect of duty, carelessness and improper performance of work, included:
  - i. Failure to provide monthly supplier reconciliation reports by the 15<sup>th</sup> day of each month.
  - ii. Inconsistencies in supplier and other restatements and failing to complete these reconciliations by the 10<sup>th</sup> day of each month.
  - iii. Inconsistency in VAT reconciliations and failure to complete VAT reconciliations by the 13<sup>th</sup> day of each month.
  - iv. Late posting of Maasai Flowers invoices by over six months.
  - v. Making duty payment for imports from Bickle to Kenya Revenue Authority Stanbic Bank Account instead of Commissioner of Customs Services Bank Account.
19. RW1 averred that despite being issued with warning letters and being given over two years to improve his performance, the Claimant's performance steadily continued on a downward trajectory culminating in a performance rating of 48.6% in the January 2018 performance appraisal. It is at this juncture that the Respondent invoked clause 15 (iv) of the Claimant's Contract of Employment which entitled the Respondent to summarily dismiss the Claimant from employment for willful neglect of duty including careless and/or improper performance of work.
20. In RW1's view, the Claimant's performance appraisal of January 2018 was fair, procedural and lawful in that:
  - i. The Chief Accountant, who usually appraised him and was conversant with his duties, was one of the signatories to his Appraisal Report thus demonstrating that the Chief Accountant was aware of and fully endorsed the contents of the appraisal report.
  - ii. As per the Respondent's Appraisal Procedure Manual, performance appraisal was an ongoing process which was carried out throughout the year and was not restricted to a particular period.



- iii. The Claimant was appraised on the same duties that formed the basis of his previous appraisals including the 2014 appraisals which led to his promotion.
21. RW1 further stated that the Respondent issued the Claimant with a Notice to Show Cause, which he responded to in detail. The Respondent was dissatisfied with the Claimant's Response to the Notice to Show Cause and proceeded to lawfully summarily dismiss him from employment and pay all terminal dues that were due to him.
22. In further demonstration of the Respondent's good faith, it paid the Claimant one month's gross salary in lieu of notice, which he was not entitled to as this was a summary dismissal.
23. RW1 maintained that the Claimant is not entitled to damages for unfair termination as pleaded.

### **Submissions**

24. It was submitted on behalf of the Claimant that he was unlawfully and unprocedurally terminated. That he was not accorded an opportunity for fair hearing and neither were any of the concerns addressed in his response to the termination letter addressed.
25. It was further posited that the Respondent did not adduce evidence to show that a disciplinary hearing was conducted to enable the Claimant a chance to defend himself as required under the [Employment Act](#). In support of the Claimant's submissions, the cases of Catherine Wawira Ndwiga v Board of Trustees Starehe Girls Centre (2020) eKLR and Ade v Auto Industries (2023) KEELRC 1490 (KLR) were cited.
26. It was further submitted that the Claimant was not given prior communication on the appraisal meeting as per the Respondent's Performance Management Policy and Guidelines.
27. That further, the Claimant was of good performance and was even promoted to the position of Manager due to his outstanding performance. Citing the case of Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 225 (ICK), it was submitted on behalf of the Claimant that the Respondent did not adduce evidence to show how his alleged poor performance was addressed.
28. On the Respondent's part, it was submitted that the termination of the Claimant on grounds of poor performance was valid and justified. The Respondent went on to argue that it had set standards for performance evaluation to measure employee performance against their assigned duties and set KPIs. That the Claimant was well aware of the said performance and appraisal policies that formed part of his terms of employment with the Respondent.
29. The Respondent further submitted that the policy did not provide for written notice prior to the appraisal. It was the Respondent's contention that the notice was verbal and that the Claimant was well aware as it formed part of its practice that appraisals for each completed financial year were conducted in January.
30. It was further submitted by the Respondent that in the subsequent years after 2014 especially in 2016 and 2017, the Claimant was consistently appraised as a poor performer, a fact he did not controvert. On this score, the Court was invited to consider the determinations in Barclays Bank of Kenya Ltd v Evans Ondusa Onzere (2015) eKLR and East Africa Portland Cement Company Ltd v Ismael Otieno Ondingo.
31. In further submission, the Respondent refuted the allegations by the Claimant that the duties listed in the 25<sup>th</sup> January 2018 appraisal form and the Notice to Show Cause did not form part of his



responsibilities. It was the Respondent's further submission that the Claimant was given constant feedback and guidance during the annual appraisal meetings and monthly review meetings. That despite several steps taken to assist the Claimant correct his poor performance, he neglected to remedy his performance. In support of this position, reliance was placed on the case of Jackson Kiprotich Kirui v Philips Pharmaceuticals Limited (2020) eKLR.

32. The Respondent further maintained that there was substantive justification to terminate the Claimant's employment as required under Section 45 of the [Employment Act](#).
33. In further submission, the Respondent argued that due process was followed in compliance with Section 41 of the [Employment Act](#) prior to termination of the Claimant's employment. That the concerns pertaining to the Claimant's poor performance were highlighted in the notice to show cause letter to enable him to respond adequately in writing. The Respondent further stated that the Claimant was allowed to provide his explanation in writing which he did. Placing reliance on the case of Kenya Revenue Authority v Menginya Salim Murgani (2010) eKLR, the Respondent posited that Section 41 does not mandate an oral hearing and that the same can be conducted through an exchange of letters as it was in the present case.

### **Analysis and determination**

34. Flowing from the pleadings on record, the documentary and oral evidence presented as well as the rival submissions, the following issues stand out for determination: -
  - i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
  - ii. Whether the Claimant was taken through a fair process prior to termination; and
  - iii. Is the Claimant entitled to the reliefs sought?

### **Justifiable reason for termination?**

35. Section 43(1) of the [Employment Act](#) (Act) requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Connected to this provision, is Section 45 (2) (a) and (b) of the Act which provides that a termination of employment is unfair if the employer fails to prove:-
  - a. that the reason for the 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; ...
36. What this basically means is that, beyond proving the existence of reasons to justify termination of an employee from employment, an employer is required to prove that the said reasons were fair and valid and related to the employee's conduct, capacity, compatibility, or its operational requirements.
37. Turning to the instant case, it is apparent from the record that the Claimant was terminated on grounds of poor performance. His letter of termination reads in part:

“Re: Termination from Employment



Reference is made to the performance appraisal conducted on 25<sup>th</sup> January 2018 and the discussion held during your evaluation. Stephen, the results of your evaluation are not encouraging.

We have pointed out some of your responsibilities which fall short of management expectations. Your performance according to your job description was below standards with a score of 48.6% which rates you as a poor performer. It is the view of management that your performance has continued to deteriorate. Despite training, you have shown no improvement and have not yet attained the desired results.

The management has looked at your response to the show cause why letter and was not satisfied with the explanation.

Please refer to your contract of employment signed between you and the company and the terms set out therein. Clause 7 provides the requirements to be met by either party intending to terminate services.

Regretfully, this letter serves to inform you that your contract has been terminated with effect from 31<sup>st</sup> January 2018 due to poor performance.”

38. It is evident from the record that the Claimant’s termination from employment came shortly after his performance appraisal which was conducted on 25<sup>th</sup> January 2018. According to the Claimant, the said performance appraisal was unfair as it was conducted by persons who were not conversant with his duties and that further, he was appraised on duties that were not part of his job description.
39. The Respondent opines otherwise and argues that the Chief Accountant who used to appraise the Claimant, was one of the signatories to the Claimant’s appraisal report thus demonstrating that he was aware of and fully endorsed the contents of the appraisal report. The Respondent has further maintained that the Claimant was appraised on the same duties that formed the basis of his previous appraisal including the 2014 appraisal which led to his promotion and that further, the Claimant’s response to the Notice to Show Cause, did not dispute the basis of the appraisal.
40. Revisiting the Claimant’s performance review of 25<sup>th</sup> January 2018, it is apparent that he has evaluated on the following areas: supplier reconciliation, bank reconciliation, supplier and breeders’ payments, VAT filing, Supplier and other restatements including DEG, Director’s Accounts Reconciliation, Filing of PO (General Filing), VAT Claims Refunds and Reconciliations, WHT payments and Certificates, GL Reconciliations of LPO Clearing A/C and Audit Support, Participation to stock take.
41. It is notable that in his response to the Notice to Show Cause, the Claimant did not raise an objection with regards to any of the areas under which he was evaluated on. Quite the contrary, he responded to each of the areas highlighted in the appraisal and defended his performance.
42. Further, upon scrutiny of the areas identified for appraisal during the period under review, it is evident that the same fall within the Claimant’s previous monthly Key Performance Indicators (KPIs) which included Supplier’s Reconciliations, Creditor’s Restatement, VAT refunds and VAT Reconciliation, General Ledger Reconciliations, Director’s accounts and Consultancies Costs Reconciliation, and filing.
43. Therefore, it cannot be said that the Claimant was evaluated on targets outside his job description.
44. That said, it is evident from the record that the Claimant was appraised by the Managing Director and the Human Resource Manager. During cross-examination, RW1 admitted that the Claimant’s appraiser was the Chief Accountant but was not the one who appraised the Claimant in the evaluation



leading to the disciplinary process against him. In its defense, the Respondent stated that the said Chief Accountant signed the Claimant's appraisal report hence endorsed its contents.

45. What the Respondent failed to explain to the Court was why the said Chief Accountant failed to conduct the Claimant's appraisal in the first place and only came in to endorse the appraisal report. Indeed, the appraisal exercise as undertaken by the Respondent's Executive Director and Human Resource Manager was contrary to the Basic Principles stipulated under clause (b) of the Respondent's Performance Management Policy and Guidelines which provides that the responsibility of appraising staff rests with the Managers/Supervisors who are directly responsible for their supervision.
46. In this case, the Chief Accountant being the person responsible for the Claimant's supervision, was the person who was well versed with his work hence was better placed to appraise him and determine whether or not, he had met his targets.
47. Granted, the Chief Accountant endorsed the Claimant's performance appraisal report. Be that as it may, the said appraisal flowed from an irregular process and the Chief Accountant's mere endorsement of the report was not sufficient to validate the same.
48. Having been appraised by persons who were not directly responsible for his supervision, the Claimant's appraisal cannot be said to have been objective and in consonance with the Respondent's Performance Management Policy and Guidelines.
49. All things considered, I am led to conclude that the appraisal of the Claimant as undertaken and having lacked objectivity cannot be said to have formed a valid and fair reason for the Claimant's termination within the meaning of Section 45(2) (a) and (b) of the Act. To this end, the Claimant's termination was not substantively justified.

#### **Fair process?**

50. Pursuant to Section 45 (2) (c) of the Act, an employer is required to prove that it terminated an employee's employment in accordance with a fair process. The specific requirements of a fair process are encapsulated under Section 41(1) of the Act thus: -

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- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

51. From the record, the Claimant was issued with a Notice to Show Cause dated 27<sup>th</sup> January 2018, asking him to respond to the allegations of poor performance. The Claimant responded to the Notice to Show Cause through his letter dated 27<sup>th</sup> January 2018.
52. Seemingly, the Claimant's employment was terminated upon him tendering his written response to the Notice to Show Cause. As it is, the Claimant was not given an opportunity to defend himself in an oral hearing. The Respondent has argued that an oral hearing is not mandatory under Section 41 of the Act. With tremendous respect, I hold otherwise.
53. My reading and interpretation of Section 41 of the Act reveals that during the hearing contemplated thereunder, an employee is entitled to have another employee or a shop floor union representative of his choice present. It thus follows that this can only be achieved through an oral hearing.



54. Besides, the Claimant was being faced with the imminent loss of his career and source of livelihood. Therefore, it was only fair that he be given an opportunity to defend himself as envisaged under Section 41 of the Act.

55. The Court of Appeal in the case of Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR, revisited the dicta in Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR and reckoned thus:

“Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the Kenya Revenue Authority case where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under Section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with... The respondent faced serious indictments which could torpedo his entire career and destroy his future. In our view, this was a matter in which oral hearing was necessary, but none was held.” Underlined for emphasis

56. I wholly subscribe to the position taken by the Court of Appeal in the Postal Corporation of Kenya case and applying the determination to the case herein, it is my finding that this was a matter where an oral hearing was necessary.

57. It is also notable that in his response to the Notice to Show Cause, the Claimant asked for an opportunity to discuss his appraisal in the presence of the Director of Finance and Administrator or the Chief Accountant to whom he used to report to. This request was not acceded to as the Claimant was terminated shortly thereafter, without further reference.

58. All in all, in my view, the Claimant was not accorded a fair hearing in the circumstances as the Respondent did not fulfill the spirit of Section 41 of the Act in terminating his employment. Ultimately, the Claimant’s termination was not procedurally fair hence was unlawful.

### **Reliefs?**

59. As the Court has found that the Claimant’s termination was substantively unjustified and procedurally unfair, he is awarded compensatory damages equivalent to six (6) months of his gross salary. This award has considered the length of the employment relationship as well as the manner in which the Claimant was terminated from employment.

### **Orders**

60. Against this background, I enter Judgment in favour of the Claimant against the Respondent and he is awarded: -

- a. Compensatory damages in the sum of Kshs 834,000.00 being equivalent to six (6) months of his gross salary.
- b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.
- c. The Claimant shall also have the costs of the suit.



61. Since the employment relationship has been admitted, the Claimant is entitled to a Certificate of Service pursuant to Section 51(1) of the Employment Act.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Kirui

For the Respondent Mr. Wesonga instructed by Ms. Opiyo

Court Assistant Abdimalik Hussein

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.**

**STELLA RUTTO**

**JUDGE**

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