



REPUBLIC OF KENYA



**Mbugua v CMC Motors Limited & another (Cause 2307 of 2017)
[2024] KEELRC 717 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 717 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2307 OF 2017
NJ ABUODHA, J
MARCH 14, 2024**

BETWEEN

GEORGE NGATIRI MBUGUA CLAIMANT

AND

CMC MOTORS LIMITED 1ST RESPONDENT

CMC HOLDINGS LIMITED 2ND RESPONDENT

JUDGMENT

1. The Claimant filed his statement of claim dated 20th November, 2017 and pleaded inter alia as follows:-
 - a. The Claimant was employed by the Respondent as a sales representative on 2nd January, 1995 where he rose up the ranks and sometimes in 1998 he was appointed as the Sales Manager/ Brand Manager Volkswagen and was put in charge of promoting the Volkswagen Brand in the Kenyan Market.
 - b. The Claimant averred that he successfully promoted the brand to a success until 2014 that is after 16 years when he was transferred to Nanyuki as a branch Manager for Volkswagen.
 - c. The Claimant further averred that on 30th June, 2016 when still based in Nanyuki he received a letter redeploying him as a brand Manager for Mazda. That he was brought in to manage brand due to the success he had with Volkswagen.
 - d. The Claimant averred that following his new appointment he wrote a letter dated 2nd July 2016 to the Group Human Resource Manager giving his views on the task that he had been appointed to that a period of 2 years was required before there would be any visible uptake of the product in the market.
 - e. The Claimant further averred that he was not given any branded vehicle during his tenure as a Mazda Brand Manager as per the agreement. That thereafter he received a letter dated 11th



July,2016 from the Human Resource Manager who informed him that they had received his letter and that his request for leave had been approved.

- f. The Claimant averred that on 26th January,2017 he gave a report to the Respondents giving suggestions on how the Mazda Brand could be invigorated. That there was no feedback from the Respondents and there was no input or budget provided by the Respondents towards this.
- g. The Claimant averred that during the entire time the Claimant was the Mazda Brand manager there was no budget provided to the Mazda brand for marketing and sensitizing the public about the brand. There was no budget provided to train the employees.
- h. The Claimant averred that on 13th June,2017 he received a letter of termination from the Respondent's Human Resource Manager. The letter stated that he had been terminated on poor performance.
- i. The Claimant averred that there were no established targets created or discussed with the General Manager, passenger Vehicles at the beginning of the year as per the Human Resource Manual.
- j. The Claimant averred that prior to his termination he received a performance improvement plan by email on 26th April,2017 at 5.08pm from the Group Human Resource Manager advising him to sign PIP.
- k. The Claimant averred that he told the Group Human Resource Manager that the PIP was unachievable for the reasons that he had given in his letter of 2/7/2016 and 26/1/2016.
- l. That at the meeting it was agreed the PIP would begin on 1/5/2017 however when he received the PIP it was indicated that the same would start on 12/4/2017. That the Group Human Resource Manager indicated that he should sign the PIP where he signed with comments and the Group Human Resource Manager rejected the PIP with comments and advised him to deliver a signed copy without comments which he did.
- m. That on 5/5/2017 the Respondent changed the reporting lines and he was advised he would report to Business Operations Head-Suzuki and Mazda which was changed from reporting to the General Manager Passenger cars.
- n. That on 11/5/2017 he received a memo from acting group sales Director indicating that he had not met targets as per the PIP. That on 25/5/2017 he received a caution letter from the Group HRM on account of update of sales record. He replied to the letter and expressed his grievances in the manner in which his issue of performance was being handled.
- o. The Claimant averred that no response was given on his grievance despite his letter having been received by the Group HRM on 7/6/2017. That on 12/6/2017 he received a warning letter informing him that he would remain on PIP for a further period of 30 days where it was indicated that the Claimant had been provided with 60 days PIP. That this letter was received by the Claimant on 13/6/2017 morning hours.
- p. The Claimant averred that he received another letter on 13/6/2017 terminating his services with immediate effect. He wrote a letter dated 20/6/2017 appealing the Respondent decision to terminate his services and asked to be reinstated.
- q. The Claimant averred that he asked about his commissions that were pending since 2010 and the pension that was payable as per pension scheme that was operated by the company



where he was remitting Kshs 11,500 per month. His contributions as at May,2017 were Kshs 5,037,401.17.

- r. That the Respondent paid commissions of 6% on every motor vehicle sold. That he wrote to the Managing director on 7/8/2013 requesting for commissions of 217 Volkswagen sold to judiciary. Each Motor vehicle was sold at Kshs 5,010,000 which translated to commission of Kshs 300,600 per vehicle hence the total commission was Kshs 65,230,200.
 - s. The Claimant averred that he received a letter on 31/7/ 2017 from the Group HRM informing him that they had received his appeal and the decision of terminating his services was upheld.
 - t. That the Respondent through the Group HRM released a memo on 17/7/2017 indicating that the company was performing poorly and it would be declaring employees redundant.
 - u. The Claimant averred that he had outstanding financial responsibilities at the time of his termination by the Respondent which he was paying by the monthly salary deductions. That the Respondent withdrew all the benefits he was enjoying like the school fees payments and medical cover and at the time of termination he was earning a salary of Kshs 230,000.
2. The Claimant in the upshot prayed judgment against the respondent for:
- a. This Honourable Court do order the Respondent to pay the Claimant Kshs 65,230,200 as outstanding commissions from 2010.
 - b. This Honourable Court do order the Respondent to pay the Claimant Kshs 2,760,000 as 12 months compensation for unfair termination.
 - c. This Honourable Court do order the Respondent to pay the Claimant Kshs 5,228,667 as severance pay at 31 days for the 22 years worked.
 - d. This Honourable Court do order the Respondent to remit the pension from the Pension Scheme.
 - e. Costs of the suit and interests on the above from the date of filing of the suit.
3. The Respondents filed their statement of Response dated 7th December, 2018 and they averred inter alia as follows;
- i. The Respondents denied the contents of the claim and averred that the Claimant was employed as a sales representative vide a letter dated 29th November,1994 by the 2nd Respondent where he would be employed by the CMC Kenya Division.
 - ii. That the employment letter had terms and conditions of work together with duties and obligations provided for in the employment letter. That the Claimant however in breach of his duties and obligations on 30th March,1995 he carelessly and improperly performed his work damaging the 2nd Respondent brand new Car New Samurai Chassis No 413220. That the Claimant agreed to bear the cost of repairs.
 - iii. That the Claimant completed his probation period and his appointment confirmed by a letter dated 3rd July,1995 effective 30th June,1995. That his salary was reviewed and adjusted over the years following annual appraisals. The Claimant was also promoted severally by the Respondents.



- iv. The Respondents averred that the Claimant was involved in three accidents involving the 1st Respondent's motor vehicles and he had a notorious record of misusing the company transport and motor vehicles.
- v. That the Respondents in the year 2005 gave the Claimant the job description of a sales Manager with a job purpose and responsibilities. The Claimant was issued with inter office memos on commissions payable on 1st October, 2008 and 14th December, 2011 and Government Business policy on 27th July, 2011.
- vi. That following the re-organization of the Respondent's operations by a letter dated 19th October, 2011 the Claimant's job title was changed from sales Manager CMC Kenya Band 7 to brand Manager VW (Band B) with its terms of service and duties and obligations.
- vii. That during the four months ended 31st May, 2012 the Claimant's VSM Division achieved 69% of the sales target which was below the expected standards and he was reminded of the same vide a memo dated 15th June, 2012.
- viii. That by a memorandum dated 23rd January, 2013 the Respondents re-designated the Claimant's position to sales manager instead of Brand Manager with a new commission plan. That the Claimant while a Brand manager he was allocated a company vehicle and car allowance of Kshs 57,500/= and which should have ceased immediately but the Claimant continued to receive the allowance dishonestly from November, 2011 to June 2013 amounting to Kshs 1,050,000/=
- ix. The Respondents averred that by letters dated 5th August, 2014 and 1st October, 2014 the Claimant was appointed as acting Branch manager Nanyuki branch with effect from 6th August, 2014 with its job purpose and responsibilities. The Claimant was confirmed to this position after his probation period by a letter of 28th April, 2015.
- x. The Respondents further averred that following a job grading exercise they revised the Claimant's job grade to grade H and by a letter dated 30th June, 2016 the 1st Respondent redeployed the Claimant to Brand Manager, Mazda based in Nairobi. They issued the Claimant with role profile containing the job purpose, dimensions and accountabilities and the Claimant signed the same on 21st July, 2016.
- xi. The Respondents averred that on 25th April, 2017 the Claimant was noted to have performed poorly and was issued with PIP. That a performance development review of the Claimant's performance as at 5th May, 2017 revealed poor performance where the Claimant was supposed to make up for the April 2017 shortfall and meet the May 2017 target.
- xii. The Respondents averred that they cautioned the Claimant by letters dated 25th May, 2017 and 12th June, 2017. That the Claimant was informed that he would remain on PIP for 30 days with a second review on 30th June, 2017. That the Claimant was informed that failure to pass his 90 days PIP could result in serious action including termination. That the Claimant was required to achieve 100% of agreed brand performance target.
- xiii. The Respondents averred that by a letter dated 13th June, 2017 the 1st Respondent gave the Claimant a summary of his performance based on agreed objectives noted during his PIP.
- xiv. The 1st Respondent proceeded to terminate the Claimant's services with effect from 13th June, 2017 on the grounds of poor performance on the Mazda brand after a 60-day PIP.



- xv. The Respondents averred that the Claimant was expected to close all pending deals, handover any company property in his possession to his immediate supervisor and medical insurance cards for the Claimant and his family to the Human Resource Department whereupon his dues if any would be paid.
- xvi. That the Claimant vide a letter dated 20th June,2017 appealed against termination of his services and the Respondents after a review the decision to terminate the Claimant's services was upheld.
- xvii. The Respondent averred that subsequent to filing this suit the Claimant undertook the clearance process, handed over the Company property in his possession and in May 2018 his dues were processed and paid out to the tune of Kshs 664,212.12 including leave days and notice pay.
- xviii. The Respondents denied owing the Claimant any commissions since 2010 and acknowledged that the Claimant was a member and contributor to a pension scheme No.4 administered by AON Kenya Insurance Brokers Ltd. That the Claimant was entitled to payment from AON Kenya Insurance Ltd of his staff pension benefits subject to the rules and regulations governing the pension scheme.
- xix. The Respondents denied paying any commission at the rate of 6% of total price, denied that the Claimant introduced, negotiated and finalized the sale of 217 Volkswagen motor vehicles to Judiciary.
- xx. The Respondents further averred that as at 11th September,2012 when the said vehicles were sold to Judiciary, Pewin Motors Ltd was the authorized agent for the Respondents' who negotiated for the sale and commission paid to Pewin Motors Ltd.
- xxi. The Respondents denied the termination of the Claimant being unfair or premature and denied the claim for severance pay since the Claimant was not terminated on account of redundancy. The Respondents prayed that the claim be dismissed with costs.

Evidence

- 4. At the oral hearing, the claimant adopted his statement as his evidence in chief and the documents filed with the claim as his exhibits. The Claimant further testified that he was redeployed from Branch Manager Nanyuki to Brand Manager Mazda Nairobi due to his performance in Volkswagen brand where he worked for around 19 years. That the Mazda brand was new which was an emerging Japanese brand.
- 5. It was his testimony that he responded to the deployment letter and highlighted what needed to be done for the brand. That he also warned of no quick market uptake for the Mazda brand. He advised that the performance of the Mazda brand was too low and he needed an effective team and expected full support in marketing covering the entire country.
- 6. It was further his testimony that in the PIP dated 26/4/2017 delivered on 27/4/2017 he requested to have his comments but his proposal was refused and was asked to sign without any comments which he did as directed. He further stated that he responded to the warning letters and never got any response instead he got another warning letter. He was also informed that he was placed on 90 day PIP with effect 25/4/2017. It was his testimony that he was given another 30 day PIP but he got terminated instead.
- 7. It was his testimony that on the issue of commissions he wrote to his supervisor on 7th July, 2013 on the business introduced by himself on Volkswagen vehicles sold to Judiciary and got no response. He



- testified that as per the memo of 17th October 2008 sales to government were regarded as House deals and sales people did not get commission. He testified that by internal memo of 27.7.2011 government policy changed to agency commission from house deals and the commission went to someone else.
8. CW1 testified that upon re-designation the commission rates reduced to 0.25% of sales and the vehicles were sold in 2012.
 9. On cross examination CW1 confirmed that he joined the Pension Scheme No 4. He confirmed that the termination notice was one month and that he accepted the letter of termination which did not mention commissions. CW1 confirmed that he was not in charge of government sales and that as per government policy Pewin Motors Ltd was appointed to get government business. That he was claiming Kshs 65 Million for sales he did to government and his letter to managing Director was asking for the same.
 10. CW1 confirmed that the list of vehicles did not have figures, the invoices were not attached which had figures. That he gave a claim sheet but did not retain a copy of the same. CW1 further confirmed that Judiciary got 42 vehicles and Pewin was paid commission.
 11. On the vehicles sold to the Prime Minister's Office and Ministry of Finance, CW1 confirmed that they did not have any figures, they had delivery notes but no invoices. The Passats to Judiciary did not have invoice numbers which was an error. According to him each vehicle left with an invoice and delivery note. He confirmed that the invoices were not his as commission was claimed through a claim sheet.
 12. CW1 further stated that the Kshs 65 million was based on 230 vehicles at Kshs 5m each and he gave his employer the invoices. He confirmed that there was no clear documents on commission but in such a transaction one would walk to his supervisor and discuss the benefit he would get which was the basis of his discussion but he never got a response. He confirmed that the memo did not talk about the Kshs 65 million commission.
 13. CW1 confirmed that he was redeployed to the Mazda brand due to his performance in Volkswagen brand with his remuneration raising from Kshs 200,000/= to Kshs 230,000/=. He stated that he was never given any targets and that there was no budget for Mazda and that he received a caution yet there were no targets.
 14. CW1 confirmed that the termination letter outlined his dues and on the issue of pension he confirmed that the same had been settled hence there was no claim over it. He further stated that he did not have any liabilities with the Respondents and that his Sacco loan was offset from his terminal dues.
 15. In re-examination CW1 clarified that sales to government were house deals and he was not a government sales manager and that Pewin was an agent of CMC and the commissions were as early as 1999. He further clarified that the list of vehicles had various dates in 2010 and that no one questioned the list when he submitted it and the document was copied back to him in confidence. He appealed his termination and mentioned the issue of commission in his appeal.
 16. CW1 clarified that the caution letter informed him on the need to improve sales and he addressed the issue in his response. He proposed change in attitude for the brand, the number expected to be sold being high and he needed market support. He clarified that he was identified for the Mazda brand for being most experienced and the best among his colleagues. That he never got a response on his concerns about the PIP.
 17. The second Claimant's witness Ms. Mary Kamau testified on 25th July, 2023 and adopted her statement filed in court as her evidence in chief. In cross examination she confirmed that she worked as Personal Assistant to the CEO of the Respondent and had worked since 1991. She confirmed that CW1 claim



- for commissions was Kshs 65 Million. It was her evidence that a memo was issued on payment of commission on government vehicles it was dated 14th December,2011 and did not state the amount of commission payable on government sales.
18. CW2 confirmed that the correspondences about the commission were never in writing and was aware that the Respondent engaged agents to source for government business and Pewin was one of them and was appointed in 2010 and paid commission whenever they brought government business.
 19. CW2 stated that she never came across any document or contract on payment to CW1 of commissions on government sales. In re-examination CW2 clarified that she would not know if commissions were paid to sales staff since the same were made under confidential cover.
 20. The Respondent's case on the other hand was heard on 25th July,2023 and the first witness was Ms. Sarah Kitheka (RW1). She adopted her witness statement and documents filed by the Respondents as her evidence in chief. RW1 stated that there was no document providing for payment of commission on government sales at Kshs 300,600/=. That the termination of the Claimant was on account of non-performance after he had been cautioned.
 21. RW1 stated that targets were set and the Claimant was informed that he would be put on PIP with clear targets and he would be given support to improve performance. The Claimant was put on PIP on 25/4/2017 and signed it on 27/4/2017. A review was done on 11/5/2017 and his performance was still unsatisfactory hence the PIP was extended. RW1 further testified that the Claimant was issued with a caution letter dated 25/5/2017 which was on unsatisfactory performance. That he was also issued with a warning letter and thereafter terminated on 13/6/2017. The termination letter spelt out terminal dues. RW1 confirmed that the Claimant was a member of pension scheme.
 22. On cross examination RW1 stated that the Claimant was confirmed into employment despite the issue of accidents at his third month of probation period. That he had other incidents where he was either warned or disciplined. She further stated that the Claimant was generally a good employee who started working as sales representative in 1994 with a number of promotions in between.
 23. RW1 testified that the vehicles sold to government were Volkswagen and Pewin was paid commission on 13/5/2013 amounting to Kshs 12,081,000/=. RW1 confirmed that Mazda was a new brand in the market. That the Claimant accepted the Redeployment but expressed his reservations on the market up take for the Mazda brand. That the PIP signed on 26/1/2017 had comments from the Claimant. She admitted that there was no evidence that the Claimant did not meet targets in April,2017.
 24. RW1 confirmed that policy on performance provided that there ought to be an agreement between the employee and his supervisor before the PIP and confirmed that there were no records showing any communication between the Claimant and his manager before the PIP started. RW1 confirmed that there was extension of PIP on 12/6/2017 but the Claimant was terminated on 13/6/2017 one day after extension of PIP. That the Claimant had sold 13 units when he was put on PIP and further that on 17/7/2017 the Respondent issued redundancy notice.
 25. RW1 confirmed that 2012 and 2017 were election years and that the claimant neither negotiated nor finalized sale of Volkswagen to government. She confirmed that she was in Human Resource hence could not know what transpired in sales and she joined CMC in September,2021 but the organization records were available for one to appraise self with. RW1 Further confirmed that there was no consultation on the change of commission and that the Respondents reorganized staff with a reward system.
 26. In re-examination RW1 clarified that house deals did not qualify for sales commission and that the Claimant was not in charge of government sales. That the Claimant was a sales Manager for



Volkswagen but Pewin was the appointed agent for CMC for business for government. That the memo did not provide for payment of commission to individuals.

27. RW1 clarified that the memo by the Claimant to the Managing Director claiming commission did not have any attachment and that the list contained other government, ministries and department not exclusively judiciary and further that there were no figures on commission claimed by the Claimant on the document

Claimants' Submissions

28. The Claimant's Counsel Mr. Wachira, filed written submissions dated 15th November, 2023. The Claimant submitted that issue pension (prayer d) of the Claim was settled by parties through a consent dated 25th April 2018.
29. On the issue of whether the Claimant is entitled to payment of Commissions the Claimant submitted that he was entitled to the commissions by virtue of an agreement termed as a house deal which was a benefit payable after a successful sale. It was the Claimant's contention that he made a request for payment of commissions for the sale of 217 Volkswagen Passats by a memo dated 7/8/2013 and that the Respondent failed to pay him commissions between 7/8/2013 to 13/6/2017 and further that the Respondents were quick to vary his terms and conditions without paying him his commissions for four years.
30. It was the Claimant's submission that practices adopted by his employer created legitimate expectation and while advancing this argument relied on the case of *Isabel Wayua Musau v Copy Cat Limited* [2013] eKLR. The Claimant further submitted that there were various memos issued concerning payment of commissions where the Respondent reviewed his terms removing him from a position of benefiting from any commission. The Claimant complained that the Respondent continually reviewed the payment of his terms of commission payable without consulting him and relied on among others the case of *Wekesa v Multimedia University of Kenya* (Cause 1682 of 2016) [2022] KEELRC 1507 (KLR) on employee involvement before terms are varied and submitted that the employer ought to give the employee favorable terms once created.
31. It was the Claimant's submission that where a term of employment was in dispute, the evidential burden was upon the employer while relying on the holding in *Charles Wanjala Watima v Nyali Golf & Country Club Limited* [2013]. The Claimant thus submitted that the Respondent during the hearing failed to produce any information challenging the Claimant's requisition for payment of commission. He relied on section 74 of the *Employment Act* on the duty to keep and produce employee records and the case of *Saima Yusuf Kassim v African Safaris Destinations Limited* (2021) eKLR on duty of the employer to supply information on the commissions to resolve the issue.
32. The Claimant submitted that the practice was discriminatory as the Respondent failed to give the Claimant the commissions due to him despite having been engaged in driving the growth of the brand and securing government contracts to supply VW Passats and giving commissions to a 3rd party who was not engaged in driving the core business. That this contravened the provisions of the Respondent's Human Resource Policy and Procedures Manual, 2014 which came into force in December, 2014. This meant that request for payment of commissions was recognized before its enforcement thus the Claimant was entitled to commissions as claimed.
33. On the issue of whether the claimant's service was unfairly terminated the Claimant submitted that it amounted to unfair termination because prior to his termination, he was put under a Performance Improvement plan (PIP) on 26/4/2017 with effect from 22/4/2017. That on expressing his comments on the PIP he was advised to submit a copy without his comments. That he also advised the Group



- Human Resource that PIP was unachievable and stated reasons thereof. Further, he received the PIP on 26/4/2017 when the same was to start on 12/4/2017 and despite a meeting and the parties agreement that the PIP would start from 1/5/2017 the Respondents retained the earlier date.
34. The Claimant submitted that he was first demoted by the Respondent before termination and relied on the case of *Gitau Harrison Joshua v Teachers Service Commission & another* (2015) eKLR. The Claimant further submitted that his termination was not in line with the Company Human Resources Policy and Procedures Manual 2014 concerning the establishment of annual performance review which required the setting down in writing, of work expectations with employee and if the employee fails to meet he be put on PIP with times set for review and meetings with his supervisor. This according to the claimant did not happen in his case.
 35. It was further the Claimant's submissions that despite his suggestions on support for the Mazda brand no support or budget was given to him. In this regard he relied on the case of *Namai v National Bank of Kenya Limited* on what amounted to poor performance. The Respondents ought to have taken in to account the claimant's reservations on why the PIP was unachievable and adopted his recommendations. According to the claimant as was held in *Namai's* case above if an employer fails to take an employee's recommendations to improve performance the employee cannot be faulted for poor performance.
 36. It was the Claimant's submission that if the expectations set down in the PIP were not met then the employer could escalate the issue to a disciplinary issue or termination. Counsel therefore submitted the Claimant was not given an opportunity to be heard or recourse as set out in the respondent's manual chapter 16 and section 41 of the Employment Act.
 37. On the issue of whether the Claimant was entitled to severance pay the Claimant, the submitted that had the Respondent followed procedure as laid down in the Human Resource Manual, he would not have been terminated on account of poor performance instead he would have been declared redundant and as such severance pay would have applied to him. It was further submitted that the Respondent issued a redundancy notice indicating they would be declaring its employees redundant due to a drop in motor vehicle sales. The Claimant relied on the case of *Jenvey v Australian Broadcasting Corp*, 2002 WL 819992 (2002) QB where the employee ought to have been declared redundant instead of termination.

Respondent's Submissions

38. Counsel for the respondent Mr. Ombati on the other hand submitted that that there was no agreement between the Claimant and the Respondent for payment of a commission of 6% of the total price of the motor vehicles sold and that the Claimant did not negotiate and finalize the sale of 217 Volkswagen motor vehicles to the Judiciary.
39. The Respondent relied on Section 9 (Part VII Employment Relationship) of the *Employment Act* No 11 of 2007 and Section 10(2) of the Act and submitted that the terms of the contract of employment between the Claimant and the Respondent were in writing as evidenced by the letters and inter-office memos produced among the Respondents' list/copies of documents.
40. It was the Respondents' submission that the Claimant's claim for Commission of Kshs 65,230,200/= was in the nature of special damages to which the Respondents relied on the case of *Swalleh C. Kariuki & another v Violet Owiso Okuyu* [2021] eKLR where it was held that special damages must not only be specifically claimed (pleaded) but also strictly proved. The Respondents submitted that the Claimant failed to prove his claim for commission



41. On the issue of whether the Claimant's employment was terminated wrongfully, unlawfully and unfairly the Respondent relied on the provisions of Section 45(1) and (2) of the Employment Act on unfair termination and submitted that the Respondent having noted that the claimant was performing poorly, issued him with a performance improvement plan for sixty (60) days starting 12th April 2017. Since the Claimant did not meet the expected targets, he was issued with a warning letter dated 12th June 2017 and the Respondent informed him that he would remain on PIP for 30 days with the second review on 30th June,2017. The respondent further submitted that the Claimant was advised that failing to pass his 90 days performance improvement plan could result in serious action including termination of employment.
42. Counsel therefore submitted that the Claimant's employment was terminated with effect from 13th June 2017 on grounds of poor performance of the Mazda brand over which he was in charge.
43. On the issue of whether the Claimant was entitled to payment of severance pay of Kshs 5,228,667/= the Respondent submitted that the Claimant was not entitled to severance pay since the Claimant's employment was terminated on account of dismal performance and failure to meet targets. The Respondent further relied on the provisions of Section 40(1) and 40(1)(g) of the Employment Act and submitted that severance pay was only payable when an employee's contract of service had been terminated on account of redundancy. This was not the case with the claimant hence he was not entitled to severance pay.

Analysis & Determination

44. I have reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the claim. I have also considered authorities relied on by Counsels and three main issues arise, namely:
 - a. Whether the Claimant's termination of employment was unfair and unlawful
 - b. Whether the Claimant is entitled to the unpaid commissions sought.
 - c. Whether the Claimant is entitled to Severance pay.

Whether the Claimant's termination of employment was unfair and unlawful

45. The Respondents alleged that they terminated the Claimant's service on grounds of poor performance in that the Claimant performed dismally on the Mazda brand. On the other hand the Claimant's case is that the ground of poor performance was a sham because the Respondent did not comply with their own Human Resource Policy Manual and the Employment Act.
46. Under Section 44 (4) (g) of the *Employment Act*, 2007 poor performance is a valid ground for termination of employment. It however requires to be proved under section 43 read together with section 47(5) of the Act.
47. The Claimant maintained that he had worked for the Respondents for over 22 years and was picked among his colleagues to be a brand Manager for Mazda due to his exceeding performance in Volkswagen for over 19 years.
48. The Respondents deployed the Claimant to the Mazda brand in July,2016 with effect from 1st August,2016. The issue of poor performance came up on April,2017 when the Respondent placed the Claimant on PIP from 12/4/2017 although this was communicated to the Claimant on 26/4/2017.The Claimant was however cautioned on 25/5/2017. A review of the Claimant's performance was done on 12th June, 2017 which was 60 days after the PIP. The PIP was extended for



a further 30 days to 30th June, 2017. The Respondent however proceeded to terminate the Claimant's service on 13th June, 2017, one day after the warning and extension of PIP.

49. The Respondents did not provide any performance appraisals to show that the Claimant was rated poorly over the time. The Manual required the Respondents to appraise their employees yearly which was not the case in this matter.
50. In the case of *Peter Kamau Mwaura and another v National Bank of Kenya* (2020) eKLR the court quoted the case of *Jane Samba Mukala v Oltukai Lodge Limited* [2010] KLR 225 where it was observed that–

“Where poor performance is shown to be reason 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 performance as against poor performance.”

51. Section 43 requires the employer to prove the reason for termination to be valid and fair and if the employer fails to do so the termination shall be deemed unfair under Section 45 of the Act. This is in tandem with case law as was held for instance in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the court stated: -

“Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity”.

52. In this case the Claimant gave his reservations before taking over the new role of the Mazda brand and it came out clearly that the Respondents directed the Claimant to sign without his comments. The Respondents did not rebut the Claimant's evidence that there was no support and budget for the new Mazda brand.
53. The Respondent's witness acknowledged during hearing that the company was already facing economic hardships in 2016 by the time they gave the Claimant this new role. It was also clear that 2017 was an election year. The Court therefore does not agree with the Respondents that the Claimant performed poorly yet he had worked for them for over 22 years performing very well. Furthermore, the Respondents' witness acknowledged that the Claimant was a good employee.
54. In addition, to show that the Claimant was not to be faulted for the poor performance, the Respondents issued a redundancy notice dated 17th July, 2017 shortly after he left since the company was not doing well. To this extent the Court finds and holds that the termination of Claimant's employment was not substantially justified in that there was no valid and fair reason for the termination.
55. Regarding procedural fairness courts have repeatedly emphasized on both substantial and procedural fairness. For instance in the case of *Janet Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR it was held that for termination to pass the fairness test, it must be shown that there was not only substantive test for termination but also procedural test. Further Section 41 of the Employment Act is the cornerstone of the procedure to be followed before termination of employment or dismissal occurs. That is to say the employee requires to be explained to in a language such employee understands, the reason for which his dismissal or termination is being considered and be accorded a chance to make representations before the action is taken.



56. The Respondent maintained that they dismissed the Claimant on poor performance after placing him on 60 PIP. Whereas I note that the Claimant was placed on PIP on 12/4/2017, the notice was received by the Claimant on 26/4/2017. The same therefore could not be running when the claimant was unaware of it. Further, despite the agreement by the parties thereafter fact that the PIP begins to run from 1st May, 2017, the respondent still retained 12th April, 2017 as its commencement date. In addition, the Claimant was warned on 12/6/2017 and given another 30 days PIP only to be terminated the next day on 13/6/2017 when it was clear that the next review date after the extension could have been 30th June, 2017. The Claimant was therefore terminated while still on PIP without any notice.
57. The Respondents did not give the Claimant any show cause letter, allow him make any representations to defend himself at a disciplinary hearing. This was against their own manual and the Employment Act. It was not enough for the Respondents to pay the Claimant in lieu of notice when the whole process was flawed and considering the fact that the Claimant had worked for the Respondents for quite a long time and singled out to be the Brand Manager- Mazda out of his previous sterling performance on Volkswagen. In this regard, I am of the view that the Claimant's termination was procedurally flawed hence unfair under section 45 of the Employment Act.

Whether the Claimant is entitled to the unpaid commissions sought.

58. The Claimant maintained that he was entitled to the commissions on the 217 Volkswagen vehicles sold to the Judiciary. That he was entitled to 6% of the sale price which was around 5 million hence he was entitled to Kshs 300,600 per vehicle. He based his assertion on the fact that he was the brand manager for Volkswagen when the sale occurred. The Claimant produced a memo dated August 2013 to the managing Director requesting for the said commission which he stated he never got a response to.
59. Further during hearing the Claimant acknowledged that Pewin Motors Ltd was the appointed agent for government sales in 2011. He further acknowledged that commissions were not payable for government business to the sales people since they were termed as house deals. The Claimant acknowledged that he was not working for government sales and that Pewin was paid commission for the said sales. There was also the memo of 27/7/2011 on government policy on agency commission rather than the house deals. The Claimant confirmed that commission was not to be paid to individuals.
60. The Claimant during hearing acknowledged that the list attached to his memo to the CEO was not produced in court and further that the same did not have any figures detailing the claimed commission. Further, he never produced any agreement between himself and the respondent showing he was entitled to the commission claimed. The duty to prove this entitlement lied on the Claimant under section 108 of the *Evidence Act* provides that he who alleges must prove. Besides, commission being like a special claim, the claimant was required to specifically plead and strictly prove his entitlement to the same. From the above observations, the Court is not persuaded that the claimant has proved to the necessary standard in civil claims that he was entitled to the commission claimed. This prayer is therefore found unmerited.

Whether the Claimant is entitled to Severance pay.

61. The Court has noted that a redundancy notice was issued in July, 2017 while the Claimant was terminated in June 2017. This was after the claimant's service had been terminated. He is therefore not entitled to severance pay.
62. The Court having found and held that the claimant was unfairly terminated as above and considering the number of years he had worked for the respondent including his sterling performance in the



Volkswagen Brand leading to his identification as the one who could promote the new brand Mazda in the Kenyan market and taking into account the hurried manner in which he was pushed out of employment without his views being heard, this becomes a proper case to award the maximum twelve months' salary as compensation for unfair termination. The Claimant was however paid together with his terminal dues, one month's salary in lieu of notice.

63. In conclusion the Court disposes of the claim as follows:

- a. Unpaid Commission.....rejected
- b. Severance pay.....rejected
- c. 12 months' salary as compensation @ Kshs 230,000..Kshs 2,760,000/=
- d. This award shall be subject to statutory deductions but attract interest at Court rates from date of judgment until payment in full
- e. Costs of the suit.

64. It is so ordered

DATED AT NAIROBI THIS 14TH DAY OF MARCH, 2024

DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH, 2024

ABUODHA NELSON JORUM

JUDGE

