



Kirigia v First Drinks (K) Limited (Employment and Labour Relations Cause 774 of 2017) [2024] KEELRC 1658 (KLR) (24 June 2024) (Judgment)

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 774 OF 2017**

**K OCHARO, J
JUNE 24, 2024**

BETWEEN

LOLAINE KIRIGIA CLAIMANT

AND

FIRST DRINKS (K) LIMITED RESPONDENT

JUDGMENT

Introduction

1. Contending that at all material times, she was an employee of the Respondent whose employment was terminated unlawfully and unfairly, the Claimant sued the Respondent herein seeking various reliefs; a declaration that the termination was unlawful, unprocedural and unjustified; damages for unlawful termination equivalent of 12 months’ salary at Kshs.210,000/- per month totalling Kshs. 2,520,000/-; one month’s salary in lieu of notice; unlawfully deducted Kshs.3,000/- from the February pay slip; general damages for emotional distress, interest and costs.
2. In response to the Memorandum of Claim, the Respondent filed a Memorandum of Reply dated 26th May 2017, denying the Claimant’s cause of action and the reliefs sought.
3. The matter proceeded for hearing of the Claimant’s case on 21st September 2022 with the Claimant testifying as CW1, and hearing of the Respondent’s case on 31st October 2023, with Charity Njoka testifying on their behalf as RW1. Following the Court’s directions issued on the same day, the Parties filed their respective submissions. The Claimant filed hers dated 22nd February 2024; while the Respondent filed theirs dated 21st March 2024.

Claimant’s case

4. It is the Claimant’s case that she was employed by the Respondent as a Marketer on 1st February 2015 earning a monthly salary of Kshs. 210,000/-. Despite performing her duties diligently, as evidenced



- by various bonuses and pay increments, on 7th February 2017, the Respondent terminated her employment through a letter dated 3rd February 2017. The termination was allegedly due to poor performance.
5. Before issuing the termination letter to the Claimant, the Respondent's Human Resource Manager had urged her to resign, instead of being terminated, as the Respondent's Board had so decided and instructed her to effect the termination. The Manager further informed her that her replacement had been identified.
 6. She states further that on 8th February 2017, she received an email requiring her to hand over to a new employee.
 7. The Claimant states that in her letter dated 9th February 2017, she challenged the termination of her employment. In a bid to sanitize the termination process, the Respondent reversed its decision to terminate, vide their letter dated 22nd February 2017. They conditionally reinstated her, placing her on performance probation for 3 months.
 8. Upon receipt of the letter dated 22nd February 2017, The Claimant objected to the probation through her letter dated 27th February 2017, insisting that the conditional reinstatement was not justifiable and fair in the circumstances. Further, at the material time, the Respondent didn't have a policy for performance probation.
 9. On 1st March 2017, the Claimant was summoned to a meeting by the Manager. In the meeting, she was subjected to ridicule before being given an ambiguous termination letter which was contradictory in content and a testament of malice and bad faith. By the letter, she was barred from accessing the company premises forthwith. Subsequently, the passwords to her computer were changed.
 10. Further, the Respondent unlawfully deducted KShs. 3000 from her salary as a penalty for the late handing over of its vehicle, and 9 reports going all dating back to 2016, to the Respondent's officials. The handing over had been frustrated by the fact that she had been barred from accessing the Respondent's premises, and disabled from accessing her computer.
 11. The Claimant contends that she was not subjected to any disciplinary hearing or granted an opportunity to be heard on the charges of poor performance before the termination of her employment. The termination was procedurally unfair and substantively unjustified. It was malicious and unlawful.
 12. Cross-examined by Counsel for the Respondent, the Claimant stated, that when she joined the Respondent, she had little experience. Her relationship with the employer in the 1st and 2nd years of employment was good.
 13. Referred to the Respondent's documents, pages 14-16, she admitted that the same was a performance review document for the period May 2015- January 2016. According to the review, she had scored 51%, a rating of below expectation. However, there was no performance review done as purported through the document.
 14. According to the document, [under the KPIS column], out of the 400 places targeted for branding, only 10 were. The Claimant stated that that was a result of budget constraints. The row for accomplishment indicated a score of 10%.
 15. The end-year review, rated her overall performance at 36%. On partnerships, the review document showed an accomplishment of 72%.



16. The Complaints against her during her tenure largely stemmed from the fact that there was a blurred line between her job description and the work of the sales Department.
17. The Claimant further testified that when she joined the Respondent, her first position was that of a sales team Leader. This was different from a Marketer position. After a year of service, she was moved to Marketing. Her starting salary was Kshs.100,000/-, which in 2016 was reviewed upwards to KShs. 210,000/-.
18. Referred to the Respondent's document on page 24 of its bundle of documents, the Claimant stated that it speaks to an end-year review which gave her an overall rating of 36% which was below the expected target of 70%.
19. After computing her terminal dues, the Respondent paid her a sum of KShs. 141,136.00. This amount was paid through her advocate.

Respondent's case

20. The Respondent presented one witness, Mrs. Charity Njoka to testify on its behalf. The witness adopted her witness statement dated 31st August 2017 as her evidence in chief and produced as the Respondent's documentary evidence all those documents it filed under the list of documents dated 26th May 2017.
21. The witness stated that the Claimant first came into the employment of the Respondent in the position of Trade Development Coordinator in February 2015. Following a three-month probationary contract, she was confirmed into employment on 17th June 2015.
22. The witness asserted that the Respondent invested heavily in the Claimant's training by paying for her Diploma course in Marketing at Makini College and catering for her examination fees with the Chartered Institute of Marketing, at a total cost of about Kshs. 150,000/-.
23. The Claimant worked well up to 2016, when to the dismay of the Respondent her attitude towards work and the quality of work degenerated drastically. To motivate the Claimant, the Respondent increased her salary as can be discerned from the letter dated 3rd May 2016. This effort didn't realize a fruit.
24. The Claimant performed below expectation, receiving scores of 51% and 36% in the two half-year performance reviews for 2016. The Claimant's poor performance and other issues surrounding her department were discussed in June and December 2016 during the performance reviews. The Claimant requested time to improve, and the Respondent made certain recommendations to enable her to improve her performance inter alia that she get a mentor but ignored. Her performance continued to deteriorate drastically.
25. The witness stated further that through email correspondence on 22nd November 2016 and 21st December 2016 from the Respondent's General Manager; 10th January 2017 from the Respondent's Operations Manager; and 14th January 2017 and 26th January 2016 from the Financial Controller, the Claimant was repeatedly informed that the Respondent was concerned about the issue of delayed reporting and incorrect formatting of the submitted report, which were impossible to utilize, causing the Respondent financial and reputational losses as scheduled promotions had to be cancelled.
26. She further stated that the Claimant had a habit of blaming others instead of owning up to her mistakes.



27. After being afforded countless opportunities to improve which she never seized, the matter was escalated to the Human Resource Manager. On 3rd February 2017, the Human Resource Manager wrote to the Claimant explaining that the Respondent was dissatisfied with her performance, expressing the Respondent's intention to terminate her employment, inviting the Claimant to seek clarifications and/or make appeals against the intention to terminate, and informing the Claimant of the right to have an employee of her choice present.
28. It was her evidence that through its email of 8th February 2017, the Respondent advised the Claimant time to hand over Promotions and activation details to a new employee, who was to be in charge of Promotions and events. The new employee would report to the Claimant. It was not the Respondent's intention to replace the Claimant.
29. The Claimant turned down the option to be heard. However, she chose to make her representations in writing. Her representations were considered culminating in the conditional reinstatement communicated to her vide the letter dated 22nd February 2017. Further, the Claimant rejected the conditional reinstatement as she was not keen to be held accountable for her poor performance.
30. The witness asserted that in the circumstances the termination was warranted. Subsequent to the termination of her employment, the Claimant's terminal dues amounting to Kshs. 144,136.00/- were paid to her via cheque.
31. In her evidence under cross-examination, the witness admitted that at one point the Claimant was promoted. The promotion was a result of the training that she had undergone. She was given the new role as it aligned with her Diploma in marketing.
32. The immediate supervisor of the Claimant was the Regional Sales Manager, Peter Nderitu. In the performance appraisal, he pointed out areas the Claimant needed to improve in, this notwithstanding that he gave her a rating of 78%.
33. She further testified that the Claimant's line Manager who was directly reporting to her [the witness] was not dismissed from employment but he resigned.
34. It was the duty of the Human Resource Manager to conduct Performance appraisals. Shown the Performance appraisal document, the witness admitted that in the summary section thereof, obtained a comment, "meets expectation."
35. The termination letter made the performance appraisal of May 2016 one of the grounds for the termination of the Claimant's employment.
36. She stated further that the Claimant was supposed to get a professional mentor. The Human Resource Department of the Respondent was supposed to source the mentor for her. James Mwambu [the mentor] was available for her but she did follow up with him. There are correspondences a testament to this.
37. Cross-examined on the correspondences by the Human Resource Department, the witness admitted the fact that the mentor was not in copy. She explained the situation by stating that the Human Resource Manager excluded the professional mentor from the email because the mentor and the Claimant were not seeing eye to eye. The Respondent didn't replace the mentor for her.
38. The witness further admitted in her evidence under cross-examination that the Claimant's signature isn't on the appraisal documents. She alleged that the Claimant declined to sign as she did agree with the Manager.



39. She testified that the Respondent's Human Resource Manager advised that where an employee declined to sign the appraisal, the appraisal documents could be filed and subsequently followed by a discussion with the concerned employee. As to whether this was done in this matter, she was not able to tell.
40. The witness testified further that she could not tell whether or not the Human Resource Manager ever undertook a disciplinary hearing against the Claimant before her termination.
41. Following the assignment of the new role to the Claimant, she directed under her email dated 2nd May 2016, that a job description for the assignment be given to the Claimant aligned to the role. She testified that she was not sure whether the same was ever given to the Claimant.
42. In her evidence in re-examination, the witness testified that in her email dated 23rd December 2015, to the Director, she acknowledged that she had made blunders here and there in the course of her employment.
43. It was the duty of Peter Nderitu and the Human Resource Manager to appraise the Claimant. When Peter separated from the Respondent, she stepped into his shoes.
44. The witness asserted that the right to accompaniment was extended to the Claimant way after the decision to have her employment terminated had been taken.
45. Queried by this Court, the witness alleged that the Claimant was put on a Performance Improvement Plan in December 2016. Further, none of the Managers indicated on the performance appraisal documents that the Claimant declined to sign the same.

Claimant's Submissions

46. The Claimant's Counsel submits that the demonstrated laid sufficient evidence before this Court from whence it can be discerned that the performance review was done in bad faith and was contradictory. The summary of the Claimant's mid-year review dated 13 May 2016, indicates that she scored an overall rating of 51% which was below expectation. It did not disclose what the expectations were. Reasonably, a score of above 51% is a pass. The summary section of the review documents indicates the Claimant "meets expectation". This contradicts the portrayed overall performance rating.
47. The respondent is seen praising the Claimant in several emails. In fact, in one of them, the Respondent describes her as a good employee with a passion for the company and its vision, a further, contradiction to the assertion of poor performance.
48. Out of the end Year Review conducted at the end of 2016, a score of 36% was given for her performance. RW1 testified at the hearing that in the review, the Claimant's line Manager did score her performance at 78%. It is curious that the person who was supervising the Claimant gave her a score of 78 and other persons who did not demonstrate what kind of relationship they had with her, scored her lowly.
49. There is no dispute that she protested the overall score by declining to sign the appraisal documents. The Respondent failed to demonstrate to the Court the steps it took to settle the impasse.
50. It is submitted that during the hearing, it became clear that no performance improvement plan was ever put in place by the Respondent to assist the Claimant in improving her alleged poor performance. The Respondent expected the Claimant to get a career coach, but it did not provide her with any, however, it later faulted her in her appraisal for not having one.
51. There was no disciplinary hearing against the Claimant. As a result, it cannot be asserted that the Respondent has demonstrated poor performance on the part of the Claimant. It is trite that where



an employer alleges that an employee was terminated because of poor performance, it falls on that employer to demonstrate that when poor performance was noted an internal process was engaged to help the employee address the poor performance. To buttress this reliance has been placed on the case of *Naumy Jemutai Kirui v Unilever Tea Kenya Limited* [2020] eKLR.

52. It was further submitted that the termination of the Claimant's employment was without procedural fairness. She was not given an opportunity to be heard. Her right of accompaniment under section 41 of the *Employment Act* was not extended to her. The termination was unfair therefore by dint of the provisions of Section 45(2) of the *Employment Act* 2007.
53. On the reliefs sought, Counsel submitted that having proved that the termination of her employment was unfair, the Claimant is entitled to the reliefs.

The Respondent's Submissions

54. Counsel for the Respondent identified two issues for determination, thus; whether the Claimant was unlawfully terminated; and whether the Claimant is entitled to the reliefs sought. Submitting on the first proposed issue, he submitted that under Section 45 of the *Employment Act*, fair termination has two components, procedural and substantive fairness.
55. Section 43 of the Act speaks to substantive fairness. In a dispute regarding termination of an employee's employment, the employer bears the burden to prove the reasons thereof. However, the burden sets in for discharging only after the employee has discharged his or her burden of proof under, Section 47 (5), to demonstrate that the termination occurred and that it was unfair. The Respondent relies on the case of *Pius Machafu Isindu vs Lavington Security Services Limited* [2017] eKLR to buttress this submission.
56. On the appropriate approach to be engaged by the Court in determining whether the employer had valid and fair reasons for termination, the Respondent submits that courts are often careful not to substitute their views for those of the employer, but rather to consider whether a reasonable employer would have effected termination in those circumstances. In support of this point reliance was placed on *Magdalene M. Ngea vs National Cereals and Produce Board* [2017] eKLR, and affirmed in *Kenya Revenue Authority vs Reuvel Waithaka Gitahi & 2 Others* [2019] eKLR.
57. It is submitted that the Respondent terminated the Claimant's employment for reasons of poor performance. In the year 2016, she was appraised twice. In the half-year review, she scored an overall rating of 51% which was below expectation. Besides the score, the performance review report for this period showed that the Claimant failed to meet the majority of the performance objectives. The end-of-the-year review gave her an overall rating of 36% a score way below the expected 70%. The report indicated that the performance of the Claimant was wanting and recommended termination.
58. It is further submitted that the Respondent specifically pleaded and proved numerous instances of poor performance on the Claimant's part. Further, she admitted in her email of 28th February 2017 that she was not performing as expected.
59. In reliance on the case of *Gladys Chelimo Bii v Kenya Power and Lighting Company Limited* [2021] eKLR, the Respondent submits that where poor performance is alleged, all that the employer must demonstrate is that the employee was aware of the applicable standards of performance, efforts were in place to support such an employee and time was given to allow such an employee to make improvements with constant reviews.
60. The Claimant herein was well aware of the applicable standards of performance as her Offer of Employment dated 21st January 2015 outlined her job description. Additionally, the performance objectives for the review period were developed at the beginning of the period as can be seen in the



Claimant's half-year review report dated 13th June 2016 and the end-of-the-year review report of December 2016.

61. The Respondent submits that it considered the Claimant's representations and overturned its decision to terminate her employment on condition that the Claimant be placed on a three-month performance probation. The performance of the Claimant was to be constantly reviewed during the period. This would give her sufficient time to improve her performance. Unfortunately, the Claimant rejected the offer. For all the above reasons, the Claimant's termination from employment was substantively fair.
62. On the issue of procedural fairness, the Respondent relies on the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR, submitting that procedural fairness embodies components which the employer must establish if the process leading to an employee's termination were to be considered fair.
63. Vide the Letter dated 3rd February 2017, the Respondent expressed its intention to terminate the employment of the Claimant. The letter informed the Claimant that the termination was on account poor performance; that she had 3 days to file an appeal; and that she had a right to have another employee of the company present during the hearing. The Respondent therefore discharged its responsibility as far as procedural fairness is concerned.
64. On the reliefs sought, the Respondent submits that the Claimant is not entitled to damages for unfair termination as the termination was both substantively and procedurally fair. In any event, the Claimant is not entitled to the maximum 12 months' compensation as she has not demonstrated any exceptional circumstance to attract this maximum compensation contemplated by the law.
65. Finally, the Respondent submits that the Claimant is not entitled to one month's salary in lieu of notice as the same was already paid; and she is not entitled to the Kshs. 3,000/- deducted from her salary as it related to a car benefit.

Analysis and Determination

66. I have reviewed the parties' pleadings, oral and documentary evidence, and written submissions, and return that the issues for determination are as follows: -
 - a. Whether the Respondent unfairly terminated the Claimant's employment;
 - b. Whether the Claimant is entitled to the reliefs sought.

a. Whether the Respondent unfairly terminated the Claimant's employment

67. Section 47 (5) of the *Employment Act* 2007 imposes a dual burden of proof. That to be borne by the employee on the one hand, and by the employer on the other in a dispute regarding the termination of the employee's employment. The Section provides that:-

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

68. The provision is couched in a manner suggesting a sequential discharge of the respective burdens it imposes on the employee and the employer. The employee must first discharge his or her burden demonstrating prima facie that an unfair termination or wrongful dismissal occurred, then



a requirement shall fall on the employer to prove to the requisite standard the reason[s] for the termination or dismissal and that the reason[s] was valid and fair and that consequently the termination or dismissal was substantively justified. Further, the statutory cannons of procedural fairness were adhered to.

69. I have carefully considered the evidence by the Claimant on the lack of procedural fairness in the process leading up to her termination, the Respondent's witness's evidence under cross-examination, when she stated that she could not tell whether or not the Claimant was subjected to a disciplinary hearing, and that on the alleged poor performance, the Respondent's witness's evidence under cross-examination inter alia that she could not tell whether or not a job description was prepared for the Claimant for the new role, in my view giving credence to the Claimant's position that there wasn't and that the perceived poor performance was as a result of the blurred line between her role and that of the Sales Department, and come to the conclusion that she discharged her legal burden under Section 47[5] of the Act.
70. Before terminating an employee's employment on the ground of poor performance, the employer is enjoined by the law, Section 41 of the Act to; notify the employee that it contemplates to and the reasons arousing the intention; provide the employee with an opportunity to make a representation on the ground, without forgetting that this right is conjoined with her or his right to be accompanied with a colleague of choice, or a trade union representative if that employee is a member of a trade union, and to consider those representations while making a final decision. See Kenfreight (E. A) Limited vs Benson K. Nguti, [2016] eKLR.
71. Throughout this matter, the Claimant firmly maintained that Procedural fairness was totally absent in the termination of her employment. In her evidence under cross-examination, the Respondent's witness expressly stated that she could not tell whether or not the Claimant was taken through any disciplinary hearing. Considering that the duty to prove procedural fairness fell on the Respondent, I have no hesitation in stating that this evidence by the witness was in ignorance of this duty, and couldn't aid the Respondent in discharging the burden of proving procedural fairness as required under Section 45[2] of the Act.
72. There isn't a dispute that through its letter dated 3rd February 2017, the Respondent terminated the Claimant's employment on the grounds of poor performance on her part. The imperative to put forth the contents of the letter in extenso, thus;

“Further to the meeting of 2nd Feb 2017, as discussed, we are not satisfied with your performance as a Brand Manager at First Drinks (K) Ltd (FDKL).

As a company we have empowered you with adequate resources and constantly aimed to develop your talent; by attending an international training trip, catering for CIM professional diploma course in marketing and continuous recommendations on how to improve your performance. We therefore have been forced to terminate your contract with FKDL.

As stated in the meeting the reasons for terminating your employment with is:

Several Verbal communications on improved reporting and job performance. Job appraisal done on May 2016 you scored 51% where we recommended improved reporting and job mentorship (Getting a professional mentor) which was not done. Job appraisal done in



December 2016 you Scored 36% where it was agreed to give 1 months' notice, as this is below expectations

You will therefore serve 1 month notice as stipulated in your contract, your final date of operations as 28th February. You currently have 1.5 leave days which you may use if you wish. Please turn in company property so that we can account for all company-owned items by your final date. Kindly do a checklist of all items turned in.

Subject to Section 42 (1) of the *Employment Act*, if you do not understand the reason for your termination or need further clarity you are entitled to have another employee of the company of your choice to be present during the explanation from the management on the termination.[emphasis mine]

In case you would like to appeal this decision, you have 3 days to do so from the date of receipt of this letter. If we do not receive any communication regarding any appeal we will consider it as acceptance to the termination.

Any accrued payments will be included in your final pay slip which you will receive after the Accountant has made the necessary deductions and the amount transferred to your account. You will also receive a Certificate of Service from FDKL.

Thank you for your past efforts and all the best for your future endeavors.

Best Wishes”

73. I am of a clear view that there is no evidence to suggest that prior to the termination there was compliance on the part of the Respondent with the statutory procedural dictates mentioned hereinabove. A keen look at the contents of the letter depicts the Respondent as an employee who didn't decipher the extent scope of the provisions of Section 41 of the *Employment Act*, or one who was fully oblivious of the same. The Respondent in its letter attempted to accord the Claimant that which it could have before taking the decision to terminate her employment.
74. Sight hasn't been lost on the fact that her lengthy letter dated 9th February 2017, which I take to be pursuant to the right of appeal expressed in the termination letter, the Claimant protested the termination setting out various vital grounds.
75. On the 22nd of February 2017, the Respondent wrote to the Claimant captioned, 'Decision to overturn termination of the contract', which read in part:
- “Upon reviewing your letter dated 9th February, 2017 and having considered the issues raised and concerns of the case, the Board of Directors have overturned the decision to terminate your contract.
- You are hereby required to resume work immediately upon end of your approved sick off days which will be on the 24th February,2017.
- You will be put on a three [3] months performance probation. A performance probation letter with clearly outlined targets will be issued to you upon resuming work.
-”
76. In reaction to the forestated letter which was a communication of the Board's decision on her, appeal, and conditional return to work direction, the Claimant through her letter dated 27th February 2017, expressed, her dissatisfaction with the decision, and that she couldn't return to duty in the manner suggested.



77. On 1st March 2017, the Respondent wrote a letter to the Claimant which read in part;

“As a result of your response declining to return to work on performance probation basis after the Board of Directors decided to overturn the termination of your contract, the management has accepted your decision.

Kindly set up an appointment with the human resources department to return all company property in your possession as follows.....

After this process is finalized, your final dues will be calculated and paid. Effective immediately, you are no longer permitted in any employee-only areas of our company.”

78. In my view, the termination of the Claimant through the letter dated 3rd February 2017, and the Respondent’s “acceptance of the decline by the Claimant to resume duty on condition” are interwoven. To determine the fairness or otherwise, and the justice and equity in the termination of her employment, the two acts by the Respondent cannot be looked at in isolation.

79. What is expected of an employer asserting that the termination of an employee’s employment was poor performance was aptly restated in the Court of Appeal decision in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR as follows:

“The reason advanced by the Bank for terminating the respondent’s employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September 2013)* the court observed as follows;

- a. Where poor performance is shown to be the 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.
- b. 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.
- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

80. I have carefully considered the Respondent’s pleadings and its witness’s evidence, it doesn’t come out that the Respondent had a policy or practice for detecting poor performance and a system of assessing noted poor performance. It isn’t surprising, therefore, that the witness in her evidence in



cross-examination was categorical that the immediate supervisor of the employee [read the Claimant] was the one charged with the performance appraisal of his or her supervisee, but contradicted herself in her testimony under re-examination when she asserted that the performance appraisal could be done by the immediate Supervisor and the Human Resource Manager. Queried by the Court for purposes of clarification of the point, the witness stated that the appraisals were done by the Human resources manager.

81. The Court notes that the Performance Report signed by the Human Resource Manager on 13th June 2016, out of the Half-Year Review, gave the Claimant an overall score of 51%, classified as “Average (Below Expectations). No evidence was presented to show, and I cannot decipher, what the expected score was.
82. It has not escaped the sight of this Court that the report, [see the item “mid-year performance review summary”] required a comment by the General Manager on the overall rating and employee’s performance. The appraiser’s comment was ‘meets expectation’. This in my view is a clear contradiction of the classification of the Claimant’s performance, as below expectations.
83. In the section, ‘Recommendations’ it was stated, “The employee’s level of work mostly exceeds expectation.....” Looking at the Mid-year Management/Administrative Performance and Review form, one will have no reason to disagree with this statement. For all the 10 performance factors, the rating of the Claimant’s performance was marked, as “meets or exceeds expectation”. Not surprising, therefore, that her immediate supervisor, in his assessment had given her a score of 78%. It is imperative to note that the supervisor, Mr. Nderitu didn’t sign the form, but inexplicably, the general manager. There was no explanation as to how the rating of 51% was arrived at, and how and why the score by the immediate supervisor turned out to be 51%.
84. Keenly looking at the form, it is clear that some of the performance objectives were inexplicably not weighted. That is objective numbers 4 and 7, both of which had a positive comment ‘progressing’. Was the Claimant’s performance deliberately underweighted? Without any explanation for the omission, I conclude, yes.
85. It would be remiss of this Court, failing to point out that one of the grounds, the basis for the termination of the Claimant’s employment was an alleged poor performance during the period that ended mid-year 2016, and conclude that with the foregoing premises, no reasonable employer could term the performance poor and terminate an employee’s employment on the account.
86. The Respondent contended that in the end-year performance review, the Claimant’s overall rating was 36% which was classified as “Barely meets expectations – below 70%”. Under the recommendation section, the Respondent recommended discontinuing the Claimant’s contract. I have carefully scrutinized the report in regard to the appraisal, the document is neither signed by the supervisor, nor the Claimant. The performance factors were not rated at all. The fields for “development progress” and “end-year performance review summary” were not filled by the appraiser. In my view, the End Year Management/Administrative Performance Planning & Review Form is largely unfilled. Considering these premises, I could only agree that no appraisal was done as the Claimant contended.
87. It is not possible to tell when the appraisal was done and by whom, from the appraisal form. What it has is only scribblings purported to be weightings.
88. The purported end year performance report recommended that the Claimant be issued with one month’s termination notice. Undeniably, the Respondent didn’t bother to place the Claimant under a Performance Improvement Plan before deciding to terminate her employment. This was in breach of what the law expected of it as the employer as elaborated in the National Bank case [supra].



89. The Respondent contended that it placed measures in place to aid the Claimant improve in her performance, by inter alia recommending that she get a mentor. Further, she failed to pursue the recommendation. It turned out from the evidence of the its witness under cross-examination that the Human Resource Department was supposed to avail the mentor, but none was availed to the Claimant. According to the Human resources manager, the only mentor who was engaged at the material time with the Respondent could not see eye to eye with her. Yet the Respondent blamed her for this.
90. The Respondent's witness testified under cross-examination that indeed the performance appraisal report was contested by the Claimant, and that in such a situation, the report could be filed pending a conversation over the disceptation with the employee affected, [I think this could be the proper approach that any reasonable employer could take]. In the instant case, the Claimant was issued with a termination letter before the contested matter[s] could be discussed. In my view, to terminate an employee's employment on a contested alleged poor performance without first resolving the controversy, cannot be said to be an act in accord with justice and equity as required under Section 45[7] of the [Employment Act](#).
91. Considering all the foregoing premises, I come to an inescapable conclusion that the Respondent didn't prove that the alleged reason for termination of the Claimant's employment-poor performance, was fair and valid. As a result, the termination was substantively unfair.
92. I have immensely agonized over the Respondent's decision to purportedly place the Claimant under a "performance probation" for three [3] months. The Respondent did not demonstrate that this decision flowed either from the employment contract of the Claimant or the Respondent's Human Resources policy and manual. Further, it is not alleged or shown that the decision found a basis in a written law. The way I know it, an employee who has been confirmed into employment and continued to serve the employer for some period cannot under any situation be re-subjected to probation.
93. In my view, clandestinely, the Respondent by its decision wanted to maintain the verdict of poor performance on the Claimant, yet, she had successfully challenged the same and the Respondent's Board overturned it. The decision cannot be seen in any other way other than that which fits in the description, of unfair labour practice, and one that affronts the requirement for equity and justice. Consequently, it was within the Claimant's right to decline to resume duty conditionally as the Respondent wanted, and demand that the controversy be first addressed.
94. Without prejudice to all that I have said hereinabove, I am not convinced that in her letter of protest to the conditional reinstatement, the Claimant made any offer, that was available for acceptance by the Respondent as it "smartly" purported to. Nothing could seriously turn on the Respondent's letter dated 1st March 2017. An unfair termination had occurred. It couldn't sanitize the same by depicting the Claimant as the person who caused the separation.

Whether the Claimant is entitled to the reliefs sought.

95. Having held that the Claimant's employment was unfairly terminated, I now turn to consider the reliefs that can be availed to the Claimant.
96. On the one month's salary in lieu of notice sought by the Claimant, the Respondent argued that it was paid to the Claimant as salary for February 2017 when she was serving her notice period. I am unable to fathom the reasoning here. The Claimant worked in that month. It could be different if it was the Claimant who had given the termination notice.
97. On the deduction of Kshs. 3,000/- from the Claimant's salary, the Respondent explains that this was mandatory. The Claimant had enjoyed a car benefit. She was supposed to pay the Respondent for



the enjoyment. The Respondent did not present any documentation indicating that the action was anchored on a stipulation in Claimant's contract of employment and or its policy. The assertion was not proved. It, therefore, remained a bald assertion. The money was deducted without justification, I hold. For this reason, I grant this prayer.

98. On damages for emotional distress, I hold that no evidence was tendered to establish the distress and the entitlement to the relief for general damages sought. I decline to grant this prayer.
99. I now turn to the prayer for compensation for unfair termination. Under Section 49 (1) (c) of the *Employment Act* 2007, this Court is empowered to award compensation up to a maximum of 12 months' gross salary of the employee who has successfully assailed his or her employer's decision to terminate his or her employment or wrongfully dismiss him or her from employment. However, it should be borne in mind that the power is discretionary, and exercisable depending on circumstances peculiar to each case.
100. The Claimant prays for 12 months' gross salary as compensation. The Respondent vehemently opposes.
101. Taking into account, the manner through which the Claimant was terminated from employment; the casual disregard for the law by the Respondent; the fact that the Respondent acted without equity and justice; her length of service, being almost 2 years; the fact that in my view, the Respondent acted without good faith; and that the Claimant was not proven to have contributed to the termination, and find that she is entitled to the compensatory award contemplated under the provision foretasted, to the extent of 6 months gross salary, KShs. 1,260,000/-.
102. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the Claimant's employment was terminated unfairly and unlawfully.
 - b. The Claimant be paid the following;
 - i. Deducted amount from the Claimant's salary Kshs. 3,000/-.
 - ii. Compensation for unfair termination, tabulated at Kshs. 1, 260, 0000/- (Kshs. 210,000/- x 6 months).
 - iii. Salary in lieu of notice, KShs. 210,000/-.
 - c. Interest on (b) above at Court rates from the date of judgment until payment in full.
 - d. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 24th DAY OF JUNE, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Mr. Okoth for the Claimant.

No appearance for the Respondent

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.

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OCHARO, KEBIRA

JUDGE

