



**Aika v Surgilinks Limited (Cause E582 of 2022)  
[2024] KEELRC 1583 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1583 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E582 OF 2022**

**SC RUTTO, J  
JUNE 21, 2024**

**BETWEEN**

**BILDAD AKUNGA AIKA ..... CLAIMANT**

**AND**

**SURGILINKS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. It is not in dispute that the parties herein were in an employment relationship up to 12<sup>th</sup> July 2021 when the Claimant’s employment was terminated. What is in dispute is the manner in which the employment relationship ended and the reasons thereof. According to the Claimant, he served the Respondent with loyalty, diligence and with full dedication. He further avers that the Respondent terminated his employment unprocedurally, unlawfully and unfairly. It is on account of the foregoing that the Claimant has sought against the Respondent the sum of Kshs 1,431,118/= being notice pay, unpaid house allowance and compensatory damages for unfair termination.
2. The Respondent did not take the Claim lying down. In its Memorandum of Response, the Respondent denies that the termination of the Claimant’s employment was unfair. The Respondent further avers that the reason for the Claimant’s termination was failure to meet his targets, giving false information and insubordination. As such, the Respondent prays that the suit be dismissed with costs.
3. During the hearing which proceeded on 15<sup>th</sup> November 2023 and 19<sup>th</sup> February 2024, both parties called oral evidence.

**Claimant’s Case**

4. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on his behalf as exhibits before Court.



5. It was the Claimant's evidence that he received his letter of termination on 12<sup>th</sup> July 2022 which cited poor performance and gross misconduct as reasons for termination.
6. According to him, it came as a shock as he was neither issued with a Notice to Show Cause nor was he heard or represented. It was his position that the decision to terminate him was unexpected.
7. The Claimant further averred that he performed well during his employment with the Respondent but felt unfairly treated upon being assigned a new manager whom he noted was biased in that he made false accusations without hearing his side. That further, he maliciously set him up for termination by transferring him to a new location with unreasonable enhancement of targets despite the COVID-19 pandemic.
8. The Claimant further averred that the said new manager applied a different standard of treatment to employees specifically targeting and discriminating against him. That none of his workmates met their target during the pandemic. He added that previously, he had been surpassing his targets.
9. It was the Claimant's further evidence that he was not given an opportunity to respond to any ground necessitating termination.
10. That his advocates issued a demand letter to the Respondent which elicited no response.

### **Respondent's Case**

11. The Respondent called oral evidence through Mr. Joseph Son Asati and Ms. Celestine Wambilianga who testified as RW1 and RW2 respectively.
12. Mr. Asati who was the first to go, identified himself as the Head of Marketing and Strategy at the Respondent company. He adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the Respondent as exhibits before Court.
13. RW1 stated that as part of his duties, he visited the Claimant at his work station in Eldoret in February 2021. That he worked closely with the Claimant and his colleague for one week before proceeding to other stations.
14. At the end of the week, they had a meeting with the Claimant and his colleague and they discussed areas they should improve on. They also agreed on the actions they should take on a regular basis, such as giving daily reports of their activities. They further agreed to come up with a plan on how to improve.
15. He did a follow-up email after his visit to the Claimant's station, which email elicited no response from the Claimant. According to RW1, the Claimant only responded one (1) month later, on 1<sup>st</sup> March 2021, after several follow-ups. In the response, the Claimant thanked him for visiting them and came up with a plan on how to achieve his targets.
16. He kept tracking the Claimant's performance which was wanting and he constantly informed him of the same. He further gave the Claimant the required support to help him meet his targets, such as giving sponsorship to doctors and engaging in Doctor-Pharmacists activities within the region. Despite all this, no improvement was forthcoming from the Claimant's part.
17. RW1 further stated that on or about 10<sup>th</sup> April 2021, they organized an online meeting with the Claimant to discuss his performance. The Claimant willingly absconded the meeting and their frantic efforts to reach him on the same day were rendered futile as he was neither reachable on phone nor email.



18. The Claimant resurfaced on 13<sup>th</sup> April 2021 and responded to the email stating that he went to have a good time with his brother on 9<sup>th</sup> April 2021 and was drugged.
19. RW1 further averred that the Claimant's averments on email were a contradiction of what he stated on the phone conversation he had earlier on the same day with a representative of the Respondent. That on phone, the Claimant did not make any reference to visiting any hospital, but on email, he stated that he was taken to a hospital, whose details he did not disclose.
20. It was RW1's further evidence that despite being well aware that he was supposed to be at work on 10<sup>th</sup> April 2021, the Claimant still went on his drinking expeditions on the night of 9<sup>th</sup> April 2021 without taking into consideration the implication that the activity would have on his capacity to work the following day.
21. That the Claimant was asked to produce a medical report before resuming work but he disregarded the Respondent's orders and resumed his duties as usual without producing the medical report as requested.
22. That as a result of the Claimant's persistent poor performance and perennially absconding work, a meeting was held to discuss his performance. A decision was consequently reached to transfer him to Nairobi to enable him improve. The decision was well communicated to the Claimant, and he requested for more time to organize himself before moving.
23. RW1 further stated that the main reason given by the Claimant for not moving to Nairobi as soon as was required, was because he considered the move would destabilize his family. However, that was in contradiction to what he had earlier told the Respondent, that he lived alone and that his kids and spouse were in another region. Therefore, moving to Nairobi could in no way destabilize his family.
24. Regardless, the Claimant was granted two (2) months to be in Eldoret on condition that his sales would improve and he would submit weekly and monthly reports without fail. The Respondent further continued giving the Claimant support to enable him discharge his mandate. Still, the Claimant did not improve.
25. All this while the Claimant was being reminded by the Human Resource Department to provide the medical report to prove that he was drugged and that he received medication from a hospital. On 3<sup>rd</sup> May 2021, the Human Resources Department reminded the Claimant to produce the medical report, and surprisingly within two (2) hours, he produced the same.
26. RW1 further stated that upon the lapse of the two (2) months period, a meeting was held with the Claimant to discuss his performance. Upon closer look at the reports that he had prepared, they established that the same was not tallying which amounts to false reporting. They informed the Claimant of the inconsistency in his reports and he was very remorseful. He did not give any proper reason for falsifying the records.
27. According to the Respondent Company's Policy, false reporting is considered a grievous offence warranting summary dismissal which the Claimant was well aware of.
28. Due to the persistent poor performance, absconding duty and giving false reports, a decision was consequently reached to terminate the Claimant's employment, and the reasons were well communicated to him.
29. RW2 who identified herself as the Human Resource Assistant at the Respondent company, equally adopted her witness statement to constitute her evidence in chief. It is worth pointing out that her evidence was similar to that of RW1 in many aspects.



30. It was RW2's testimony that having no direct supervision, the Claimant was expected to conduct his duties diligently, carefully, and honestly, and give weekly and monthly reports to the Respondent.
31. She stated that the Claimant's performance was dismal and constantly dwindled despite being given sufficient support by the Respondent to enable him to discharge his duties effectively and meet his targets.
32. Several meetings were held with the Claimant to discuss how to improve and he was given all the support required but no change was forthcoming.
33. RW2 further averred that a meeting was held with the Claimant to discuss his performance and it is from the meeting that the Respondent also discovered that the Claimant had presented falsified reports as the weekly and monthly reports were not tallying. The Claimant did not give any cogent reasons for giving the falsified reports but only showed remorse.

### **Submissions**

34. The Claimant submitted that the Respondent had failed to show that his conduct fundamentally breached an obligation under the contract of employment in terms of Section 44(3) of the [Employment Act](#) to warrant summary dismissal. In support of his submissions, the Claimant placed reliance on the case of Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR.
35. It was the Claimant's further submission that the Respondent failed to follow its own disciplinary process. The Claimant further posited that the procedure preceding his summary dismissal was not fair as he was not accorded an opportunity to defend himself as per the disciplinary policy.
36. On its part, the Respondent submitted that the Claimant's termination was based on grounds of insistent poor performance, failure to meet his targets, submitting fake reports, absconding duty without obtaining leave, and insubordination. It was the Respondent's contention that as per Section 44 (3) of the [Employment Act](#), these are sufficient grounds for gross misconduct warranting summary dismissal. In the Respondent's view, the Claimant's dismissal was fair, rightful and lawful.
37. The Respondent further submitted that it took all the rightful procedural steps in arriving at the decision to summarily dismiss the Claimant.

### **Analysis and Determination**

38. Flowing from the pleadings, the evidence on record as well as the rival submissions, it is clear that the Court is being called to resolve the following questions: -
  - i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
  - ii. Whether the Claimant was accorded procedural fairness prior to termination of his employment; and
  - iii. Is the Claimant entitled to the reliefs sought?

### **Justifiable reason?**

39. The starting point in determining this question is Section 43(1) of the [Employment Act](#) (Act) which requires an employer to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. In addition, Section 45 (2) (a) and (b) of the Act 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; ...
40. In the case herein, it is apparent that the Claimant was terminated on grounds related to his performance. This is discernible from the Claimant’s letter of termination which I will reproduce herein for context purposes:

“Dear Bildad,

RE: POOR PERFORMANCE AND GROSS MISCONDUCT- SUMMARY  
DISMISSAL BILDAD AKUNGA AIKA

This letter confirms your dismissal from your position as a medical representative at Surgilinks Limited for your performance and gross misconduct effective immediately.

You are dismissed because despite repeated feedback and performance coaching from your supervisor; (the BDM and Head of Marketing & Strategy) your work performance has not improved. Your performance has been documented in the last meeting’s minutes, which were shared on email. Additionally, the performance improvement plan you were participating in put forth specific goals and targets that you agreed to meet by their due date. There has been no significant outcome either.

You again have gone ahead and reported falsely on your latest duties at your base station as is indicated in your last presentation. You have failed on your part to have a plan on how you intend to achieve the targets that you agreed on as set by your supervisor. As a consequence, your dismissal is the result of your refusal to meet the core requirements of your job.

Payment for your accrued entitlements including your lieu of notice and the days worked for this month will be included in your final pay cheque which you will receive from accounts office after your clearance by all the relevant departments.

You are therefore required to hand in all and any company property that is in your possession including all the marketing materials.

Yours sincerely

signed

DEEPAK KOTHARI

MANAGING DIRECTOR”

41. At the outset, it is notable that as of 17<sup>th</sup> May 2021, the parties were not on the same page with regards to the specific targets the Claimant was required to meet within a specified timeline. I say so because in the email of 17<sup>th</sup> May 2021, referenced “Poor Performance”, Kshitij Kothari addressed the Claimant as follows;

“Apologies for sending your targets late since I didn’t have my laptop.



We have been communicating and every time you have asked me for your targets I have told you not to worry about them as achieve (sic) Kshs 1 million in this month from your direct customers...”

42. What this therefore means is that before the said email, the Claimant was operating on unclear targets.
43. Further to the foregoing, the Respondent did not lead evidence to prove that the Claimant’s performance was evaluated prior to his termination from employment. Indeed, there was no report or such other document constituting the Claimant’s overall performance evaluation. What’s more, the Respondent did not prove that it had put in place measures to evaluate the Claimant’s performance against specified targets.
44. In light of the foregoing, I am led to question how the Respondent was in a position to determine that the Claimant had not improved on his performance without any measures being undertaken to assess his performance and evaluation of his overall performance against set targets.
45. In the case of *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR, the Court of Appeal held 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 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.”

...We have considered the said reasoning in light of what we have set out above as the correct procedure for terminating an employee’s contract as restated by the Court in the *Janet Nyandiko* case (supra) and the observation of the ELRC in the *Jane Samba Mukala* case (supra). We find no basis for faulting the Judge’s finding that an appraisal ought to have been conducted on the respondent’s work performance in 2014 to confirm whether the respondent had improved on his 2013 performance rating before



termination of his employment and that in the absence of such proof, termination of the respondent's employment with the Bank was unfair."

46. I subscribe to the position taken by the Court of Appeal in the aforementioned case and find that for the Respondent to arrive at a determination that the Claimant's performance had not improved, it needed to have put in place measures to assess his performance. This included but not limited to target setting and providing the manner of assessment of his performance against such targets. As I have stated, this was not evident in this case hence it follows that the decision by the Respondent that the Claimant had not improved on his performance was not arrived at based on an objective assessment.
47. It is also worth pointing out that during cross-examination, both RW1 and RW2 testified that the Respondent has in place a performance policy. However, the same was not exhibited before Court.
48. The total sum of my consideration is that the Respondent has failed to discharge its evidential burden under Sections 43 and 45(2) (a) and (b) of the Act by proving that it had a valid and fair reason to terminate the Claimant's employment based on his performance. Needless to say, the Claimant's termination was not substantively justified.

### **Procedural fairness?**

49. In terms of Section 45 (2) (c) of the Act, an employer is required to prove that it applied a fair procedure prior to terminating an employee from employment. The specific requirements of a fair procedure are encapsulated under Section 41 of the Act as follows: -
  - (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.
50. The Claimant herein has contended that he was not given a fair hearing as he was not given a chance to understand and respond to the accusations against him. This position has been refuted by the Respondent.
51. In support of its case, the Respondent exhibited a copy of the minutes of a disciplinary hearing held on 19<sup>th</sup> April 2021. Besides the said minutes, there was no other evidence confirming that the Claimant was accorded a fair hearing within the meaning of Section 41 of the Act, prior to his termination from employment.
52. In this regard, several questions linger. For instance, was the Claimant put on notice that the Respondent was contemplating terminating his employment on account of poor performance? If so, how was this done? Was the Claimant notified of the allegations he was to face at the disciplinary hearing? How was the Claimant notified of the hearing? What was the time frame given to the Claimant to appear for the hearing? Was it sufficient and reasonable? Was the Claimant informed of his right to be accompanied to the hearing by a fellow employee or a union representative?
53. The answers to these questions cannot be found on the record hence casting doubt on the Respondent's version that the Claimant was terminated procedurally.
54. Indeed, during cross-examination, the Claimant testified that the last meeting he had with the Respondent was a relocation meeting rather than a disciplinary hearing. That he only became aware of his termination after he was called by the Respondent's human resource officer and asked to collect a



parcel from the G4S office. Without evidence of a notification of a disciplinary hearing, it is doubtful whether the Claimant was aware that the meeting of 19<sup>th</sup> April 2021, was a disciplinary hearing.

55. Further, during her testimony in chief, RW2 stated that the Claimant was not accompanied to the hearing as he did not know anyone in Nairobi and none of his colleagues could travel from Eldoret. Again, this leads me to question whether the Claimant was well aware of the nature of the meeting he was going to attend on 19<sup>th</sup> April 2021 and his level of preparation.
56. In analysing the import of Section 41 of the Act, the Court of Appeal had this to say in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR:

“ Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

57. Applying the above decision to the instant case and in the absence of relevant evidence from the Respondent’s end, I cannot help but find that the Respondent has not proved that it acted in compliance with the spirit of Section 41 of the Act. To this end, the Respondent failed to discharge its burden under Section 45(2) (c) of the Act.
58. In total sum, I find that the Respondent’s termination from employment was not substantively justified and was procedurally unfair in light of the provisions of Sections 41, 43 and 45 of the Act.

### **Reliefs?**

59. As the Court has found that the Respondent has not proved that the Claimant’s termination from employment was substantively justified and that it applied a fair process in effecting the termination, he is awarded one (1) month’s salary in lieu of notice and compensatory damages equivalent to seven (7) months of his last salary. This award has considered the length of the employment relationship as well as the circumstances attendant to the Claimant’s termination from employment.
60. The Claimant has further sought to be paid house allowance in the sum of Kshs 758,800/=. In its defense, the Respondent avers that the Claimant’s salary was consolidated hence was inclusive of house allowance. The letter dated 2<sup>nd</sup> October 2014, confirming the Claimant’s employment on permanent terms indicates that his salary was “gross”. The Black’s law dictionary, 10<sup>th</sup> Edition defines gross income as the “Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings.”
61. A clear construction of the definition above, reveals that the term “gross” refers to all income payable. Presumably, these includes the remunerative allowances an employee is entitled to. To buttress this finding, I gather support from the case of *Samson Omechi Ongera vs Tusker Mattresses Limited* [2018] eKLR, where the Court found that “Gross monthly pay comprises of basic pay together with house allowance but does not include other work dependent on allowances such as bonus or car allowance and overtime.”



62. I will arrive at a similar finding in this case and determine that the Claimant's salary having been termed as "gross", was inclusive of house allowance. As such, the Claimant's prayer in that respect is denied.

### Orders

63. Against this background, Judgment is entered in favour of the Claimant in the following manner: -
- a. A declaration that the Claimant was unfairly and unlawfully terminated from employment.
  - b. The Claimant is awarded one (1) month's salary in lieu of notice being the sum of Kshs 52,486.00.
  - c. The Claimant is awarded compensatory damages in the sum of Kshs 367,402.00 being equivalent to seven (7) months of his gross salary.
  - d. The total award is Kshs 421,888.00.
  - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
  - f. The Claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE 2024.**

.....  
**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Ms. Kosgey instructed by Ms. Chepkurui

For the Respondent Mr. Tanui

Court Assistant Millicent Kibet

### 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**

