



REPUBLIC OF KENYA



**Seii v LVCT Health (Cause 1452 of 2017) [2024] KEELRC 2162 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2162 (KLR)

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

**CAUSE 1452 OF 2017**

**K OCHARO, J**

**JULY 30, 2024**

**BETWEEN**

**MERCY JEBET SEII ..... CLAIMANT**

**AND**

**LVCT HEALTH ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the Statement of claim dated 12.07.2017 and filed in court on 25.07.2017 through the firm of J. A Guserwa & Company Advocates. The Claimant prayed for judgment against the Respondent for:
  - a) A declaration that the Claimant suffered unfair and unlawful termination by the Respondent.
  - b) An order for reinstatement to her previous position without any loss of benefits.
  - c) Damages for mental stress, harassment and discrimination.
  - d) Payment of all terminal dues set up in paragraph 10 of the Statement of Claim.
  - e) Maximum 12 months' compensation for wrongful termination.
  - f) Cost of this suit with interest thereon.
2. In response to the Statement of Claim, the respondent filed its Memorandum of Defense dated and filed in Court on 04.04.2018 through the Federation of Kenya Employers (F.K. E). The Respondent prayed that this Court finds the termination fair both procedurally and substantively and, as a result, dismisses the claim in its entirety with costs.



### Claimant's case

3. At the hearing, the claimant testified and adopted her witness statement dated 12<sup>th</sup> July 2017 as her evidence in chief. She also produced documents filed under the list of documents dated 12<sup>th</sup> July 2017 and the supplementary list of documents dated 3<sup>rd</sup> October 2022, as her documentary evidence.
4. The Claimant's case was that she, was first employed by the Respondent as its Manager - Western Region on a two-year contract commencing 01.10.2015, and to lapse on 31.12.2016. Under her tenure, the Respondent was able to secure funding for a new project, STEPS, that was scheduled to commence in October 2016.
5. She stated that in August 2016, the Respondent's Executive Director, Dr. Wanjiru Mukoma notified her that she would be a Project Director for a Grant based in the Western Kenya region, an offer she gladly accepted. However, she received her formal contract for the position in January 2017. The contract was a two-year fixed-term one, to run from 1<sup>st</sup> January 2017 to 31<sup>st</sup> December 2018, at a monthly consolidated salary of Kshs. 514,466/=.
6. The Claimant testified that she was abruptly summoned to a meeting by the Respondent's Human Resources Manager on 24<sup>th</sup> April 2017 whereby she was informed of her demotion. The act to demote her was without prior notice or justification. Further, was subjected to extreme interrogation, humiliation and harassment at the said meeting.
7. Upon being informed of the decision to demote her, she requested the reasons for the decision, as according to her nothing adverse had been reported or raised on her performance. She then asked for time to reflect on the matter as it was weighty. The Executive Director gave her until the 28<sup>th</sup> of April, 2017 to respond.
8. On the 4<sup>th</sup> May 2017 the Executive Director called her and asked her to give her take on the offer for the Care and Treatment position and informed her that the position of the Project Director was no longer available for her.
9. The Claimant stated that she was served with a notice to show cause letter dated 19<sup>th</sup> May 2017 on 22<sup>nd</sup> May 2017 that required her to put a response on the same day. She obliged and put in her response as directed.
10. The Claimant testified that she was subsequently invited for a disciplinary hearing on 30<sup>th</sup> May 2017 during which meeting, she was not allowed to be accompanied by a witness or a representative. After the hearing, she was issued with a letter of termination dated 12<sup>th</sup> June 2017 that cited the reasons for her termination as follows:
  - a) Unsatisfactory performance in your current position while on probation. An alternative managerial position was offered to you which you have declined.
  - b) As per your communication to us dated May 8, 2017, you stated that the relationship between you and the management of LVCT health was no longer tenable and requested to be released as per your current employment contract.
  - c) You absconded from work between May 15 – 26<sup>th</sup>, 2017 without any lawful excuse contrary to your terms of employment. Further, it has been noted that even after our meeting on May 30, 2017, you have continued to be absent from work."
11. She contended that was not appraised on her performance at the material time and was not at any time informed that her performance was unsatisfactory.



12. It was asserted that there was no valid reason for the termination of her employment and that the Respondent's decision to terminate her employment was afflicted by malice, bad faith, and based on unfounded allegations against her. She, therefore, urged this Honourable Court to find the claim against the Respondent with merit and to allow it and grant the reliefs sought in the Statement of Claim.
13. Cross-examined by Counsel for the Respondent, the Claimant testified that initially, she was employed from October 2015, as a Regional Manager in charge of Western Region. She was in charge of an amalgamation of various projects. At this point, the STEPS project was not in place. It did become, in August 2016.
14. The magnitude of the STEPS project was larger than the projects she was managing previously. Its value was approximately USD 5,000,000. It had an enhanced Human Capital. Her role changed as can be discerned from the letter of appointment dated 1<sup>st</sup> January 2017.
15. Under the contract, she was not in a substantive position. She was in an acting capacity. Her confirmation into employment was subject to a satisfactory performance. Her legitimate expectation was that at the lapse of the six months' probation period, she could be confirmed into employment.
16. For the STEPS project, the Respondent had not put in place any performance evaluation system. There was no set way to track one's performance. Unlike the previous position where she was appraised twice. However, the donor [CDC] had a tracking system, DATIM. Through this official system targets could be set. Her performance could be tracked through the system.
17. For monitoring her performance there was a team in the Western Region to supervise the project. She and the team had regular communication. According to the donor's practice, they could have meetings quarterly, and if there was an issue[s] of concern, it then could be raised at that fora.
18. Her immediate supervisor was the Programme Director, Dr. Lilian Otiso. She was the overall Project Director, sitting in Nairobi, overseeing all the projects in the Respondent Organization.
19. The Claimant reiterated that the Respondent did not at any time inform her that her performance was unsatisfactory. In her view, at all material times, the Respondent's Directors were happy with her performance.
20. In her email dated 8<sup>th</sup> May 2017, she, referred to the meeting of 24<sup>th</sup> April 2017, a meeting which she was summoned into without being informed of the agenda for the same, and indicated that she had never been notified that she was of poor performance and that her record didn't bear anything to suggest that she was.
21. She asserted that contrary to Counsel's suggestion, she didn't have several meetings with one Annarita of the project she [the Claimant] was overseeing. Though she engaged her in the STEPS project, she could not remember the exact matters on which the engagement revolved due to the passage of time.
22. The Claimant stated that she has not cleared with the Respondent because of how the separation occurred. She still has in her custody, their laptop. At one point, she wrote to the Respondent expressing her desire to hand over the same, but the Respondent never responded.
23. In her evidence in re-examination, the Claimant asserted that though she requested a report from the DATIM system, the respondent refused and or neglected to avail.



## Respondent's case

24. The Respondent presented Lilian Nyakerario Otiso [RW1], its Executive Director to testify on its behalf. RWI adopted her witness statement dated 23<sup>rd</sup> August 2022 as her evidence in chief. She tendered as the Respondent's documentary evidence, the documents filed herein contemporaneously with the Memorandum of Defence, and under the supplementary list of documents dated 23<sup>rd</sup> March 2023.
25. The witness stated that at all material times relevant to the instant claim and specifically in 2017, she was the Respondent's Program Director and the Claimant had been the Respondent's Regional Manager for Western Region. She was her direct supervisor.
26. In 2016, the Respondent applied for CDC awards and, was successful. CDC awarded it a new project, STEPS that started in October 2016. The project was to be implemented in Kisumu, Kisii, Homabay, and Migori Counties. The donor, CDC required that the Respondent appoints a Project Director. Since the Claimant was already the Regional Manager in Western, she was given an opportunity to be the Project Director in an acting capacity before sourcing for one externally.
27. The new project was a much larger project than what the Respondent had ever had in Western Kenya before. It was a full project. It moved the budget from below USD 5,00,000 to approximately 5 million a year. Further, the Respondent had to deliver extremely high targets for HIV testing and counselling, HIV prevention, care and treatment and other interventions.
28. The witness stated that with the new project, came new recruitment and transitions as advised by the donor, CDC. The Respondent absorbed staff from other entities, thus, increasing the Respondent's employee population in the region.
29. The witness asserted that part of the Project Director's job description was to engage with the donor continuously and report on performance after getting concurrence from the Head office. Before submission of the reports, the Project Director had to make sure that the Respondent's expenditure matched the achievement deliverables i.e. 25% of the targets. CDC expected the Respondent to be at 25% expenditure.
30. By December 2016, the donor expected the Respondent to have achieved 25% of the targets. There were a lot of challenges in starting up the STEPS project and the team was unable to meet the targets in the first quarter. However, the reports the Claimant transmitted to the Respondent painted a different picture.
31. Relying on the reports, the Respondent, assumed that targets were being met only to be surprised by the donor's review in March which revealed a very poor performance on its part. The performance review was for the period up to December 2016. The performance was supposed to be at 25% then. However, it came out that some of the key indicators like HIV testing and counselling which was the Respondent's priority were only at 7%.
32. The witness asserted that CDC had a meeting in Kisumu with the Respondent's team with the Claimant as the lead. Subsequently, the Respondent got a report from the donor that the Western Kenya team led by the Claimant had not prepared for the presentation and were not able to answer questions. As the lead of the team, it was the responsibility of the Claimant to respond to most of the questions, however, she failed to explain why the project was failing.
33. Director The witness testified that after the Kisumu meeting, the Executive Director, the Operations Director and her, were summoned to the CDC head office to meet the CDC leadership, to explain why



- the Respondent was performing so poorly. They also had subsequent meetings with the Claimant to understand and identify actions to be taken.
34. The witness asserted that as the Claimant's immediate supervisor, she took time, to interview and interact with the team. It emerged that the challenge on the ground was that the Claimant was just not able to coordinate the team to achieve the new targets. It also became clear that she didn't know how to implement the program, yet she was unwilling to allow the team to try different means of achieving the targets. Some of the staff were senior-level program implementers, who had come from other programs and knew how to implement programs, but the Claimant would not allow them to.
  35. The witness asserted that whenever the officers planned an outreach or an activity, the Claimant would hinder their efforts to conduct the same. They were also not allowed to interact with the team at the national level, to establish or to seek guidance.
  36. It was contended that contrary to what was expected of the Claimant, she did not allow the team to engage with the CDC team. This frustrated the officers who ended up not doing their job well, hence the failure to achieve targets.
  37. She testified that on 24<sup>th</sup> April 2017, the Respondent had a meeting with the Claimant to understand her perspective, the challenges that were driving the dismal performance, and how things would be done differently. The Claimant was very defensive, giving the same excuses that she had been giving. It came out that she did not have any solid plan that could help the Respondent improve her performance. This notwithstanding, the Claimant still felt that she could manage to do the job.
  38. However, the Respondent was of a contrary view. As a result, they decided that the Claimant would not be confirmed as the project Manager, but rather she could be re-assigned to a different role in a similar capacity to what she was doing. This wasn't a demotion but a reassignment. The Respondent also considered moving her to a different region if remaining in Kisumu was a problem for her.
  39. The witness alleged that as the direct supervisor of the Claimant, she offered to provide mentorship and support her growth so that she could grow technically in those areas where she had weaknesses. Unfortunately, after the meeting, the Claimant became hostile and non-receptive of the feedback and plan that the Respondent had.
  40. On 8<sup>th</sup> May 2017, the Claimant indicated that she was not interested in the new position that she was being offered. She on the same day sought for a sick off, which the Respondent granted. After the sick off, she didn't return to work. Subsequently, she was issued with a show-cause letter.
  41. On 30<sup>th</sup> May 2017, she was invited to a meeting to show cause. In the meeting, she reiterated that she was not going to take up the new role. She did not give any satisfactory explanation as to why she had not been reporting to work. Further, she confirmed that she had indeed declined to perform some specific duties when she was called upon to.
  42. As a result, she was issued a termination letter dated 12 June 2017. She was urged to attend the Respondent's offices for her terminal dues in the letter, but she never turned up.
  43. As the Respondent could not reach her, the Respondent sent her the dismissal letter via email and text. She never acknowledged receipt of the same.
  44. The respondent maintains that the claimant was duly informed of her right to be accompanied by a fellow employee at the disciplinary hearing. The claimant chose to be accompanied by a witness who was not a member of staff contrary to the policy that allowed witnesses to be employees.



45. Cross-examined by Counsel the witness testified that between 2015-2017, she did not note poor performance on the part of the Claimant.
46. She testified further that the Claimant was given the position of Project Director on account of various reasons; the Respondent gives priority to internal candidates first; and in the previous roles, she had proved her capability to run projects adequately.
47. The Respondent engaged her for the position of Project Manager in January 2017. Confirmation into the position was subject to satisfactory performance during her six-month probationary period. As of April 2017, the probation period had not lapsed.
48. The Respondent had carried out a performance evaluation on the Claimant for the period up to 24<sup>th</sup> April 2017. However, the Respondent has no document to support the fact.
49. The witness asserted that she had given the Claimant targets to meet in writing. The targets were informed by what the donor had expressed as its desired achievables. The witness admitted, however, that she had not presented any document to show that she had set targets for the Claimant.
50. She testified that from the 24<sup>th</sup> of April 2017, the Claimant did not report back to work. The Respondent had time sheets. Unfortunately, it did not place the same forth to prove the Claimant's absence from duty.
51. The Claimant was invited to the meeting on 24<sup>th</sup> April 2017 through an email, in the email the agenda for the meeting was set out. The Respondent didn't however present to this Court, the email as evidence.
52. The witness testified further that after the meeting, she prepared the minutes. The minutes presented as evidence before this Court are unsigned.
53. It was in the meeting that the decision to reassign her was made. She was not demoted as alleged. Since the decision was made in the meeting where she was in attendance, she was therefore consulted. The Claimant was grossly underperforming, hence the decision.
54. The witness stated further that it was the donor who reported that the Claimant was underperforming. The Respondent did not file any document from which this can be discerned.
55. In her evidence in re-examination, the witness stated that according to her, the Claimant's letter dated 8<sup>th</sup> May 2017, suggested that she was no longer interested to continue working with the Respondent.
56. The performance evaluation was done by the donor who was the activity manager.
57. By April 2017, the Claimant had not completed her probationary period. However, had the Respondent continued to maintain her, the dismal performance could have continued leading to the collapse of the project and withdrawal of the donor.

### **Submission by the Parties**

58. The Claimant submits that her termination was unfair as she was not accorded a fair hearing in line with the mandatory requirements set out in Section 41 of the Employment Act, 2007. She further contended that she was ambushed to a meeting only to be informed of allegations of poor performance without any supportive material to support the allegations to allow her to make a defence.
59. The Claimant further submits having made out a case for unfair termination as required under section 47(5) of the Employment Act, 2007 and is thus entitled to compensation as pleaded in her Statement



of Claim. She therefore urged this Honourable Court to allow the claim as prayed. For emphasis, the claimant relied on the Court finding in the cases of Onesimus Kinyua Magoiya Vs Prudential Assurances Kenya (2022) eKLR and Dominic Otieno Ooko Vs Northern Rangelands Company Limited (2022) eKLR.

60. In conclusion the Claimant urged this Honorable Court to find her case with merit and grant the reliefs sought in her statement of claim.

### **Respondent's submissions**

61. The Respondent on the other hand submitted that the termination of the Claimant's employment was substantively justified and procedurally fair. It denied any allegation of malice as alluded to by the claimant maintaining that the law.
62. The Respondent further submitted that the Claimant is not entitled to compensation for the reason that her termination was substantively and procedurally fair.
63. On the claim for payment of medical bills, the Respondent submitted that the Claimant is not entitled to compensation under the head as she had medical cover with the Respondent and was not required to pay any monies for treatment. Further, the Respondent maintained that this being a special damage, it needed to have been proved and that in absence of proof the same cannot be awarded.
64. It was further submitted that an order for reinstatement would be impracticable as the Claimant had already indicated that she was no longer willing to work with the Respondent.
65. The Respondent further submitted that the Claimant has failed to demonstrate any damages arising from mental stress, or harassment, or discrimination as contended and further that damages sought are not remedies contemplated under the Employment Law.
66. In conclusion the Respondent urged this Honourable Court to find the claim as filed without merit and to dismiss it in its entirety with costs to the Respondent.

### **Analysis and Determination**

67. I have carefully considered the parties' pleadings, evidence and submissions, and distil the following issues for determination;
- a. Was the termination of the Claimant's employment fair?
  - b. Is the Claimant entitled to the reliefs sought?

### **Was the termination of the Claimant's employment fair?**

68. Section 45[1], and [2] prohibit and define unfair termination, respectively. They provide;
- (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer 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 employee's conduct, capacity, or compatibility; or
      - ii. based on the operational requirements of the employer; and



c. that the employment was terminated in accordance with fair procedure.”

69. Considering the provisions foretasted, it isn't difficult to conclude that a fair termination of employment embodies two statutory components, procedural fairness and substantive fairness. Where both or any of the aspects are absent in the termination, it shall be deemed unfair.
70. Before terminating an employee's employment on the grounds of poor performance or any of those other grounds set out in Section 45 [2][b][i], the employer is enjoined by the law, Section 41 of the Act; to notify the employee that it contemplates to and reasons arousing the intention; provide the employee with an opportunity to make a representation on the ground[s], 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 Kenfright [E. A] Limited vs Benson K. Nguti, [2016] eKLR.
71. Throughout this matter, the Claimant firmly maintained that procedural fairness was absent in the termination of her employment. At the same time, the Respondent asserted that it duly complied with the procedural cannons enshrined under provisions of Section 41 of the Act. Undeniably, the Claimant was issued with a notice to show cause dated 19<sup>th</sup> May 2017. In the letter, accusations against the Claimant were elaborately set out, and the Respondent's contemplation was expressed. Through her letter dated 22<sup>nd</sup> May 2017, she responded to the Respondent's letter.
72. It is imperative to state that in the letter dated 19<sup>th</sup> May 2017, the Respondent did indicate that the Claimant was required to report back to work by Monday, May 22<sup>nd</sup> 2017 to show cause why her services could not be terminated. This date was not suitable for the Claimant.
73. By an email dated 26<sup>th</sup> May 2016 the Respondent informed her that the meeting had been rescheduled for 30<sup>th</sup> May 2017. There is no dispute that she attended the meeting, on the stated date. It is important to note that the Claimant in her email of the same date noted, that the Respondent had shown that it wouldn't allow an external witness.
74. In the disciplinary meeting, the Claimant expressed her desire to call an external witness. Her said desire was thwarted when the Executive Director ruled that what was at hand was an internal process and as such an external witness could not be allowed. The Claimant took issue with this in her submissions, stating that it deprived her of a fair hearing. The Respondent submitted that the rejection of her bid to have an external witness was merited. The law only allows a fellow employee to accompany an affected employee to a disciplinary hearing. Further, its policy didn't allow it.
75. In my view, there is a difference between the accompanying person [a colleague or trade union representative as the case may be] contemplated under Section 41 of the Employment Act and a person that an employee may wish to call as a witness to give evidence in support of her or his defence against the employer's accusations against him or her.
76. In this Court's view, the accompanying person contemplated under Section 41 is in character a representative. I say this because I construe the right accorded to an employee under the section as one that allows the employee facing a disciplinary hearing to be represented or assisted at the hearing either by a fellow employee or by a shop steward. The representative will be afforded the opportunity to make representations on behalf of the employee and to cross-examine evidence and documents presented by the employer. Having said this, I come to the inevitable conclusion that the Respondent's position taken during the disciplinary hearing, and by its Counsel in his submissions, is with great respect, misplaced and unconvincing, to the extent that it fails to differentiate between the representative



contemplated in Section 41 and a witness that the employee may wish to call to support her or his defence.

77. Does the law prohibit the calling of external witnesses? I fear not. The entire purpose of a hearing is to allow an employee who is allegedly guilty of misconduct, a chance to defend himself/herself against the accusations. So that the purpose is not obliterated, the accused employee must be accorded the opportunity to lead evidence and call witness[es] in defence of the charges. In the legal labour relations regime, where the applicability of the tenets of natural justice has been onboarded into employment contracts, and employment and labour rights are constitutionally spirited, there cannot be room for employers to segregate witnesses that an employee would want to call in support of her defence in a disciplinary hearing.
78. The employee should be given full liberty to choose and avail a witness [es] whom she feels will best fortify her defence. Any segregation of witnesses shall lead to the unfortunate consequence, of erosion of the employee's constitutional right to a fair hearing under Article 50 of the Constitution.
79. In sum, the failure to allow the Claimant to call the witness she intended to, on the very narrow and legally unsupported ground mentioned hereinabove, rendered the process leading to the termination of the Claimant's employment procedurally unfair, as it negatively impacted on the hearing component contemplated under Section 41 of the Act.
80. Section 43 of the Employment Act, 2007 places a legal burden on the employer in a dispute regarding termination of employment to prove the reason[s] for the termination. Where a reason[s] is not proved, the termination shall be deemed unfair by dint of the provisions of Section 45 of the Act. This suggests that in Kenya the law does not allow termination of employment without cause.
81. The Respondent maintained that the Claimant's employment was terminated with cause. The reasons for the termination were first set out in the show cause letter, and eventually in the termination letter dated 12<sup>th</sup> June 2017. I am satisfied that the Respondent did discharge the legal burden under Section 43 of the Act.
82. However, it is not enough for the employer to prove the reason[s] for the termination as required by the provision above stated, the employer has to go that extra mile to satisfy the requirement under Section 45[2], that the reason[s] was valid, and fair - related to the grounds set out in Sub-section 2[b][i] and [ii]. Through this lens, I shall interrogate whether the termination was substantively justified.
83. There is no dispute that under a letter of appointment dated December 19, 2016, the Respondent offered the Claimant employment on the terms and conditions set out therein. Offer which she accepted. Her appointment was for a fixed term, two years running from January 01, 2017, to December 31, 2018, in the position of Ag. Project Director-STEPS.
84. It is imperative to state that her confirmation into employment was subject to her satisfactory performance in her probationary period of six [6] months. Unfortunately, her employment was terminated after only five and half months into the employment and therefore approximately half a month before the lapse of the probation period. The Claimant sees the timing of the termination and the decision to terminate her employment as malicious, propelled by ill faith and unjustified. At this point, it becomes necessary for this Court to point out that the expansive rights and protections that come onboard through the new statutory legal regime [employment and labour relations] are equally available to employees under probationary contracts.
85. The first reason set out by the Respondent for the termination of the Claimant's employment was what it alleged to be an unsatisfactory performance in her position while on probation.



86. 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 Vs 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 v Ol Tukai Lodge Limited-Industrial Court Case 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 the 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 grounds of poor performance, an employee must be called and an explanation on the poor performance shared where they could 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.

87. I have carefully considered the Respondent's pleadings and its witness' evidence, and it does not come out that the Respondent had a policy or practice for detecting poor performance and a system of assessing noted poor performance, particularly under the STEPS project, which was a new project and with peculiar requirements, as testified by the witness. It is not surprising, therefore, that the witness in her evidence heavily dwelt on the Respondent's performance in the project, weighted against the expectations/targets of the donor, and not the individual performance of the Claimant as an individual.

88. I haven't lost sight of the fact that one cannot talk about the performance of an employee and the evaluation thereof, without pointing out specific targets that were agreed on and set out, for achievement by the employee. I have thoroughly scanned the material placed before this Court by the Respondent, and seen none from which it can be discerned that there were set targets that the Claimant was to meet within a specific period. The Respondent's witness attempted to suggest that she set targets for the Claimant, but pressed under cross-examination, she admitted that she had no document to speak to the assertion.

89. The Respondent's witness asserted that to aid the Claimant address her weaknesses that had been identified, the Respondent decided to give her another position. I am unable to fathom the rationale here, couldn't she be helped to improve while still working in her contractual position? In my view, a



performance improvement plan is only relevant within the context of the role in which the employee was serving when poor performance was noted. Did the Respondent have a right to change unilaterally the contractual role under a fixed-term employment mid-way through the contract? Certainly not.

90. The Respondent's witness, stated in her evidence under cross-examination and I hold, in contradiction to her earlier insistence that the Respondent had an evaluation system, that the donor had a system for tracking the Claimant's performance. No witness from the donor was called to testify in this matter. No document from them was placed before this Court, speaking to targets and the Claimant's performance.
91. The Claimant's position that she at all material times, satisfactorily executed duties assigned to her, was not rebutted, therefore.
92. In the premises I hold that the termination of the Claimant's employment on the ground of poor performance was not justified.
93. The Respondent picked a statement from one of the emails by the Claimant, in the course of the back-and-forth correspondences that were between it and the Claimant over the matter, the intended change of her role, change which she held was a demotion, and made it ground for termination of her employment. In my view, the statement could not be fairly considered in isolation from the many events that preceded the email. I get the Claimant as insisting on the contractual position that she had. It would be unfair and unreasonable for an employer to perceive the insistence as an infraction to attract a disciplinary sanction. In any event, the ground cannot be a fair reason under Section 45, as it cannot fit in any of those broad fair grounds identified in Sub-section 2[b] [i] and [ii].
94. The Respondent stated that the last reason that informed the termination of the Claimant's employment was that she absconded duty between May 15<sup>th</sup> - 26<sup>th</sup> 2017, without any lawful excuse. There is no doubt that the Claimant was on sick leave which was to lapse on the 14<sup>th</sup> of May, 2017. I can see, numerous correspondences between the Respondent and the Claimant, on dates that fall within this period. In none of them, did the Respondent accuse the Claimant of absence from duty without authority. If indeed she was, it could be expected of a reasonable employer to mention the same in the correspondence and require the Claimant to report back to work.
95. Further, this Court notes that on the 24<sup>th</sup> of April 2017, the Respondent made a decision that the Claimant was to no longer hold her contractual position, Further, up to the dates mentioned above, through to the date of termination of her employment, the issue as to whether the Claimant could take up the position which to her was a demotion and given without justification, had not been settled. In the face of this impasse, it was the Respondent's duty as the supplier of work under an employment contract, to write to her, allocating her work or clarifying what was expected of her, as a resolution to the deadlock was being sought. It didn't. In the circumstance, it cannot be said that the Respondent acted with equity and justice as required under Section 45[7] of the Act, to allege that the Claimant absconded duty.
96. Lastly, I must point out that the Respondent's witness admitted in her evidence under cross-examination, that the Respondent had a clock-in sheet from which an employee's work attendance can be derived. Without justification and in ignorance of the fact that the accusation of desertion of duty, was seriously contested by the Claimant, the Respondent did not produce the sheet. I draw an adverse inference that had the same been tendered in evidence, it couldn't have been to the aid of the Respondent's case, but to its prejudice.
97. In conclusion, I hold that the grounds, the basis for the termination of the Claimant's employment were not valid and fair. Consequently, the termination lacked substantive fairness.



### **Is the Claimant entitled to the reliefs sought?**

98. The Claimant sought inter alia, an order of reinstatement. More than three years have elapsed since the termination of the Claimant's employment. As a result, by dint of the provisions of Section 12 of the Employment and Labour Relations Court Act, this is not a relief that this Court can award at this juncture.
99. The Claimant further sought damages for mental stress, harassment and discrimination. It is trite law that he who asserts must prove. Prove can only be through adducing sufficient evidence. The Claimant did not lead evidence to establish the alleged harassment, mental stress and discrimination. I reject her claim under this head.
100. She also claimed the Doctor's medical bills, KShs. 3,500, and Pay in respect of 2 days per diem, KShs. 15,000. In my view, these were special damages sought. They needed to be specifically proved. They were not. I decline to award the same.
101. The Claimant's employment was terminable under the contract of employment and Section 35 of the Employment Act, by one month's notice or payment of one month's salary in lieu. In the termination letter, the Respondent admitted the Claimant's entitlement to notice pay, just as it did for compensation for the outstanding 22 leave days. I grant these two reliefs on admission.
102. The Claim for salary for the 14 days worked in May 2017, is unchallenged.
103. Section 49[1][c], of the Employment Act, bestows upon this Court the power to grant an employee who has successfully assailed their employer's decision to terminate their employment, a compensatory relief to the maximum extent of twelve month's gross salary. However, it should be noted that the grant is made discretionarily depending on the circumstances of each case.
104. I have carefully considered how the Claimant's employment was terminated, the Respondent's failure to adhere to procedural and substantive fairness, the Respondent's action, which I see as without any legal or contractual basis for attempting to change the Claimant's role, the length of period that was remaining on her contract [almost one and half years] and hold that she is entitled to the compensatory award to the extent of five [5] months' gross salary.
105. In the upshot, Judgment is hereby entered for the Claimant in the following terms:
- a. A declaration that the termination of his employment was unfair.
  - b. Compensation for unfair termination of employment pursuant to the provisions of Section 49[1][c] of the Employment Act, five months' gross salary, KShs. 3,086,796.
  - c. Salary in lieu of notice, KShs. 514, 466.
  - d. Salary for the 14 days worked in May 2017, KShs. 240,084.10.
  - e. Compensation for the 22 outstanding leave days, KShs. 377,275.00.
  - f. Costs of this suit.
  - g. Interest on the amounts awarded above at court rates from the date of filing this suit, till full payment.

**READ, DELIVERED AND SIGNED THIS 30<sup>th</sup> DAY OF JULY, 2024.**

**OCHARO KEBIRA.**



## **JUDGE**

In the presence of:

Ms. Mwandare for Ms. Guserwa for the Claimant.

Ms. Opiayo 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 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 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.

**OCHARO KEBIRA**

**JUDGE**

