



**Kinyanjui v HF Insurance Agency Limited (Cause 263 of 2020)  
[2024] KEELRC 2112 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2112 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 263 OF 2020**

**SC RUTTO, J  
JULY 26, 2024**

**BETWEEN**

**FRANCIS MBUGUAH KINYANJUI ..... CLAIMANT**

**AND**

**HF INSURANCE AGENCY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the Respondent as Head of Business Development with effect from 5<sup>th</sup> January 2016. He avers that his terms of employment were permanent and pensionable. According to the Claimant, he carried out his duties diligently as assigned to him by his immediate supervisor, Jane Surungai who was the AGM-Principal Office.
2. From the record, the employment relationship began to crumble when the Claimant was asked to show cause why disciplinary action should not be taken against him on grounds of poor performance. The Claimant was subsequently terminated from employment on 20<sup>th</sup> March 2020. The Claimant has termed his termination illegal and unlawful. Consequently, he prays for the following reliefs against the Respondent:
  - a. An order of reinstatement to employment with the Respondent without any loss of rank, salary and/or benefits.
  - b. A declaration that the act of the Respondent in terminating the employment of the Claimant is illegal and unlawful and therefore null and void.
  - c. Damages for illegal and unlawful termination of employment.
  - d. Exemplary damages.
  - e. Costs of the suit.



- f. Interest at court rates on the above.
  - g. Any other relief that this Honourable Court may deem fit to grant.
3. Opposing the Statement of Claim, the Respondent has denied the Claimant's assertions that he carried out his duties diligently. The Respondent contends that the Claimant failed, neglected and/or refused to meet his performance targets particularly the growth of the Bancassurance brand through new business and renewals. According to the Respondent, the Claimant's termination was as a result of poor performance and was not illegal and unlawful as the Claimant was aware of his job description, his deliverables and performance targets. It is the Respondent's contention that the Claimant is not entitled to any damages and on this account, has asked the Court to dismiss the claim in its entirety with costs.
  4. During the trial which took place on 17<sup>th</sup> October 2023 and 19<sup>th</sup> December 2023, both sides called oral evidence in support of their respective cases.

### **Claimant's Case**

5. The Claimant testified in support of his case and for starters, he sought to adopt his witness statement and his list and bundle of documents to constitute his evidence in chief.
6. The Claimant stated that he responded to the show cause letter on 21<sup>st</sup> February 2020 and on 9<sup>th</sup> March 2020, he attended a sham disciplinary hearing set up by the Respondent with the sole aim of going through motions of an alleged "fair hearing" before termination.
7. He was subsequently given a letter terminating his services on 20<sup>th</sup> March 2020 on alleged poor performance.
8. According to the Claimant, it is in the public domain that the Respondent and its Parent Company HF Group Limited have been performing poorly in the last few years and were struggling financially and therefore sought ways to reduce their recurrent expenditure such as salaries of staff members.
9. The Claimant further contended that his termination was illegal and unlawful as he was not guilty of any such offence and in any event, he had not signed any performance based contract with the Respondent that would warrant termination of employment for alleged poor performance.

### **Respondent's Case**

10. The Respondent called oral evidence through Ms. Eunice Waweru who testified as RW1. She started by identifying herself as a General Manager-Human Resource with the Respondent entity. Similarly, she adopted her witness statement as well as the list and bundle of documents together with the supplementary list and bundle of documents filed on behalf of the Respondent, to constitute her evidence in chief.
11. It was RW1's evidence that on 17<sup>th</sup> July 2019, the Claimant was subjected to a Mid-year Performance Review in which he scored dismally with an Overall Performance Score of 9.9 points which fell Below Target.
12. RW1 contended that the Claimant was at all times aware of his deliverables particularly to obtain a gross premium in new business and renewals targeted at Kshs 163,139,880/= annually. The Claimant failed to achieve the agreed target and posted a score of 6.3 points with an actual achievement of Kshs 50,072,867/= against the Kshs 81,569,940/= expected during the Mid-Year Performance Review.



13. RW1 further stated that the Claimant was placed on a four month Performance Improvement Plan, to enhance his performance level failure to which he would face disciplinary action.
14. Despite being placed on a Performance Improvement Plan, the Claimant continued to demonstrate a severe inability to meet his performance targets and posted an equally dismal overall performance rating of 7.01 points as at 31<sup>st</sup> December 2019.
15. The Claimant's financial goal objective in the 2<sup>nd</sup> Half of the Year 2019 required him to obtain a gross commission in new business and Renewals in the sum of Kshs 77,322,000/= to which the Claimant posted an actual achievement of Kshs 55,538,704/= thus achieving a Below Target rating of 3.5 points.
16. Subsequently, the Respondent issued the Claimant with a show cause letter requiring him to show cause why disciplinary action should not be taken against him for consistent poor performance.
17. The Claimant was thereafter invited to a disciplinary hearing held on 9<sup>th</sup> March 2020 and accorded an opportunity to be heard regarding his consistent poor performance.
18. RW1 averred that the Claimant appeared for the disciplinary hearing and acknowledged that he never communicated to his supervisors that the revised budget of Kshs 661,431,708/= was unattainable and that as Head of Business Development, he was responsible for developing strategies aimed at achieving the budget targets for his team.
19. RW1 further averred that following the disciplinary hearing and based on the facts of the case and evidence provided, the Respondent's disciplinary panel recommended termination of the Claimant's employment. He was issued with a termination letter dated 20<sup>th</sup> March 2020 indicating that the reason for termination was due to Poor Performance for the year 2019 which fell Below Target.
20. The Claimant subsequently appealed the Respondent's decision to terminate his employment and an Appeal Hearing was held on 22<sup>nd</sup> April 2020. The Appeal panel found that no new evidence was tendered to alter the Respondent's decision hence upheld the termination.
21. With respect to the Claimant's assertions that the Respondent and its parent Company HF Group Limited have been performing poorly and were struggling financially and therefore sought ways to reduce their recurrent expenditure such as salaries of staff members, RW1 was categorical that there is no nexus between the aforesaid allegations and the Claimant's Claims.

## Submissions

22. It is worth pointing out that the Claimant did not file written submissions. When the matter came up for mention on 15<sup>th</sup> May 2024 for taking further directions on filing of written submissions, the Claimant's Counsel on record at the time, informed the Court that he did not have instructions from the Claimant to allow him proceed further with the matter hence he intended to file an Application to cease acting.
23. On its part, the Respondent filed written submissions which the Court has considered. The Respondent submitted that it had satisfied the criteria set out in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010 (2010) LLR 255 (ICK) (September 2013) in terminating the Claimant's employment.
24. It was the Respondent's further submissions that the Claimant's poor performance was thoroughly addressed and the Respondent saw it fit, with a valid reason to terminate his employment.



25. It was further submitted by the Respondent that the Claimant has neither alleged nor pleaded that fair procedure was not followed during his termination as his sole claim was that he was terminated unfairly on grounds of poor performance.
26. The Respondent maintained that the Claimant was afforded fair procedure during his termination as it met all the requisite criteria as provided for in the law.

### **Analysis and Determination**

27. Upon considering the pleadings the evidentiary material before me and the Respondent's submissions, I have singled out the following issues for determination: -
  - i. Whether the Respondent has proved that it had a justifiable cause to terminate the Claimant's employment on account of unsatisfactory performance.
  - ii. Whether the Claimant's termination was in accordance with fair procedure.
  - iii. Is the Claimant entitled to the reliefs sought?

### **Justifiable cause?**

28. Pursuant to Sections 43 and 45 (2) (a) and (b) of the [Employment Act](#) (Act) an employer is required to prove that it had a justified reason to warrant termination of an employee's services. Fundamentally, this entails proof of the reasons which occasioned the termination of an employee's contract of employment. It is also worth mentioning that such reasons ought to be fair, valid and related to the employee's conduct, capacity; or compatibility or based on the employer's operational requirements.
29. Turning to the instant case, the record bears that the Claimant was terminated from employment on account of poor performance. This is discernible from the Claimant's letter of termination which reads in part: -

“Termination Of Employment Contract

....

Your performance for the period 2019 was rated poor performance rating of 7.01. Your performance for the year 2019 was below the agreed target despite being under performance improvement program.

Your poor performance is contrary to the performance improvement letter, Regulations and Rules for management and secretariat staff, your employment contract and the [Employment Act](#) 2007.

We regret to advise that your employment has been terminated. Your last working date will be March 20, 2020...”

30. In support of its case, the Respondent exhibited the Claimant's Performance Agreement which states that his target (job to be done) was to obtain a gross premium insurance of Kshs 163,139,880/= by December 2019. It is evident from the record that the Claimant's half-year performance was evaluated sometimes in July 2019 and his actual achievement against the agreed target was Kshs 50,072,867/=. This translated to 61% against a weight of 70%. The rating assigned was B.T (Below Target).



31. Following the Claimant's evaluation, Jane Surungai, his then supervisor, addressed him as follows through a letter dated 23<sup>rd</sup> August 2019:

“This letter serves to confirm our discussion held on August 23, 2019, whereby your review indicated that you have not met your 2019 half-year performance targets. Your PMF rating for 2019 half-year was Below Target.

In view of the above, please note that you have been placed on a 4 month's Performance Improvement Plan programme effective September 1, 2019. You are expected to meet the set Performance Improvement Plan (PIP) targets at the end of the PIP. While it is our hope and expectation that you will respond positively to the Performance Improvement Plan and improve your performance level, it is important for you to understand that failure to meet performance standards on a sustained basis will result in disciplinary action.”

32. In essence, the Claimant was placed on a Performance Improvement Plan (PIP) with effect from 1<sup>st</sup> September 2019 and at that point, his target was to obtain a gross commission of Kshs 77,322,000/= by December 2019.

33. At the end of the PIP period, the Claimant's performance was once again evaluated and the record bears that his actual achievement against the agreed target was Kshs 55,538,704/= translating to 50%. The rating was indicated as Below Target.

34. It is subsequent to the foregoing performance evaluation that the Claimant was subjected to a disciplinary process.

35. What can be deduced from the Claimant's performance targets is that the same was majorly figure-based. That is to say, both the Claimant's agreed targets and actual achievement are depicted in figures. It can thus be said that the evaluation of his performance was quite scientific and hence objective. I say so because the Claimant's scores and overall performance evaluation can only be discounted by figures against similar targets.

36. Judging from the Claimant's performance evaluation with respect to the half year of 2019 and after his PIP, it is evident that his performance was below the agreed targets.

37. Further, it is notable that in response to the show cause letter, the Claimant indicated that the targets assigned to him were unrealistic. This notwithstanding, there is no evidence that he raised this issue with his supervisor prior to the performance evaluation being undertaken. As a matter of fact, he admitted as much during cross-examination.

38. The total sum of my consideration is that the evidence on record leads me to conclude that the Respondent has proved to the requisite standard that it was justified in commencing disciplinary action against the Claimant on account of poor performance.

### **Fair procedure?**

39. Pursuant to the *Employment Act*, an employer is required to prove that it subjected an employee to a fair process prior to terminating his or her employment. That is the general requirement under Section 45(2) (c). The specific requirements of a fair process are to be found under Section 41 of the Act. Specifically, an employer is required to notify the employee of the reasons for which it is considering termination of his or her employment contract. The employer is further obliged to give the employee an opportunity to make representations in his or her defense and in so doing, he or she is entitled to be accompanied by a fellow employee or shop floor union representative of his or her own choice.



40. From the record, the Claimant was issued with a notice asking him to show cause why disciplinary action should not be taken against him for consistent poor performance.
41. The Claimant responded to the notice to show cause and subsequently, he appeared before a disciplinary panel for the hearing of his case. The Claimant has termed the disciplinary hearing a sham set up by the Respondent with the sole aim of going through the motions of an alleged “fair hearing” before termination.
42. Despite the Claimant’s assertions, he did not provide better particulars to allow this Court to apply its mind appropriately.
43. From the record, the Claimant attended the hearing of his disciplinary case on 9<sup>th</sup> March 2020 and ventilated his case as his responses are captured in the attendant minutes.
44. In light of the foregoing, I cannot help but observe that the Claimant was accorded a fair hearing prior to the termination of his employment contract as he was notified of the allegation levelled against him beforehand and given an opportunity to be heard on his explanation with respect to the said allegation.
45. In the circumstances, I am satisfied that the Respondent complied with the spirit of Section 41 of the Act hence the disciplinary process leading up to the Claimant’s dismissal from employment was procedurally fair.
46. In sum, I find that the Claimant’s termination from employment was neither unfair nor unlawful.

**Reliefs?**

47. In the final analysis, I find that the Claimant is not entitled to the prayers sought hence I dismiss the Claim in its entirety with an order that each party bears their own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

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**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Ms. Wangui instructed by Mr. Mungai

For the Respondent Ms. Mbiro instructed by Mr. Kibara

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.



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**STELLA RUTTO**

**JUDGE**

