



**Milenja v Millward Brown East Africa Limited (Cause 371 of 2018)
[2023] KEELRC 752 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 752 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 371 OF 2018
J RIKA, J
MARCH 24, 2023**

BETWEEN

ELIZABETH MILENJA CLAIMANT

AND

MILLWARD BROWN EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on March 20, 2018.
2. She states that she was employed by the Respondent's Associate, in 2006. She worked as the Account Director / Head of Qualitative Research, earning a monthly salary of Kshs. 541,060, with other benefits and allowances. She worked for a total of 11 years for the Respondent and its Associates, in Kenya and Dubai.
3. The Respondent issued the Claimant a letter of termination dated July 10, 2017, alleging that the Claimant had failed to meet standards of performance, set by the Respondent.
4. There was no appraisal of her performance. There was no disciplinary hearing, with an opportunity availed to the Claimant, to contest the allegations. The Claimant states that termination was unfair, and in contravention of Articles 41 and 47 of *the Constitution of Kenya*, and the *Employment Act 2007*. There was no reasonable notice before termination; there was no warning or notice to show cause; there were no charges presented to the Claimant; and no valid reason was given to justify termination.
5. The Claimant prays for Judgment against the Respondent for: -
 - a. Declaration that the Respondent is in breach of the *Employment Act* and Articles 41 and 47 of *Constitution of Kenya*.
 - b. Damages for unfair and unlawful termination equivalent of 12 months' salary at Kshs. 6,492,720.



- c. Damages for loss of employment, career opportunities and progression.
 - d. Damages for loss of medical cover, annual bonuses and commissions.
 - e. Costs and interest.
6. The Respondent filed its Statement of Response dated May 31, 2018. It is conceded that the Claimant worked for TNS E.A. Limited from April 2008 to January 2016 as Associate Director of Qualitative Research; and for the Respondent, as Account Director, from February 2016 to July 2017. She had worked for other associates of the Respondent, dating back to June 2006.
 7. Her previous position with TNS was different from the position at the Respondent, and good performance at TNS as Account Director, did not guarantee good performance at the Respondent. The role at the Respondent was new, with different performance expectations.
 8. There were proper and valid grounds to justify termination, and procedural fairness was observed. Performance targets were communicated to the Claimant. She was, as a Manager expected to develop her team's objectives, through the Human Resource system.
 9. In early 2017, appraisal was done on the Claimant's performance by her Managers Sergey Sheykhov and Borene Jankovich. It was observed that although she had been given targets, and provided with resources and support to meet the targets, she was not performing as per targets.
 10. She was placed on Performance Improvement Plan [PIP] beginning April 2017. She met her Managers bi-weekly and fortnightly to assess performance and review her progress. She was not open to improvement and was antagonistic throughout. She did not fully utilize resources assigned to her. She was a failure at the end of PIP, and was advised as such.
 11. She appealed and was given an opportunity to state her case before an independent panel. She was heard on July 7, 2017. The appellate panel recommended termination through notice. Her contract was therefore terminated on July 13, 2017. She was paid all her terminal benefits.
 12. She filed a second appeal on termination, on July 19, 2017. The second appellate panel was satisfied that the Claimant's contract was fairly and lawfully terminated, and upheld the decision. The Respondent acted fairly and lawfully. There was no violation of Articles 41 and 47 of the [Constitution](#), or the [Employment Act, 2007](#).
 13. The Respondent states that the Claimant was a member of a Pension Fund; Employees were provided with Medical Cover; monthly airtime of Kshs. 13,000 was provided; bonus was not fixed at Kshs. 491,000 annually but was paid subject to satisfactory performance by individual Employees; and annual commissions were paid based on sales.
 14. The Respondent urges the Court to dismiss the Claim with costs.
 15. The Claimant gave evidence and rested her Claim on September 28, 2022. The Claimant's former Supervisor, Sergey Sheykhov gave evidence on November 22, 2022, when the hearing closed. The matter was last mentioned on February 21, 2023, when the Parties confirmed filing and exchange of their Submissions.
 16. The Claimant told the Court she is currently employed as a Market Researcher. She worked for the Respondent between 2006 and 2017. She filed a Witness Statement, which she adopted as her evidence-in-chief. She exhibited 9 Documents.



17. She was handed a letter of termination on July 10, 2017. She met the Human Resource Manager Gloria Akinyi and Supervisor Sergey, before she was handed the letter of termination. She was told that she had not met the required standards of performance. There was no Performance Improvement Plan, related to termination. She worked for the Respondent from 2016, and for Respondent's Associates from 2006. She was employed by CEO Githaiga. Many Employees left employment. She was new at the Respondent. There were multiple challenges. She did not have set targets. She was an Account Director in an associate company before. She took charge at the Respondent, waiting for the Respondent to re-organize its business. There were no set targets therefore, and 2016 ended without any targets.
18. In 2017, Sergey was now the new boss at the Respondent. The Claimant met him, and hoped there would be clear direction. The two had previously worked at the associate company. Sergey told the Claimant he would develop a set of targets. She was told her performance in 2016 was not good, and she would have to meet certain targets within 3 months, in 2017. The targets were not negotiated between her and Sergey. She was completely shocked. She did not know what her score was, when she was informed that she had failed. She never had performance issues. She met all her objectives. Many colleagues had left. The team was decimated. Some targets were not achievable. No document was signed between her and Sergey. He just issued an e-mail communicating targets. There was no appraisal. She asked Sergey what she ought to do, in absence of objectives. She was told to fix her own objectives. She picked 2 things she had done and rated herself, on keeping clients happy and on revenue collection.
19. Page 19 of the Respondent's main bundle has appraisal review. It is a 2015 document, from the time the Claimant was still working for TNS. Objective assessment and score were entirely the Claimant's. The Supervisor did not comment. She left TNS in January 2016. Sergey was not the Claimant's Supervisor at TNS. Her Supervisor then, did not complete the appraisal document. There was no comment by the Manager, and the Claimant did not know where the rating came from. She assumed that Sergey did the rating. She did not see the letter at page 1 of the Respondent's Supplementary Bundle. It says that the Claimant appealed after termination. She wrote to the Human Resource Manager and Human Resource Director, but was not aware of any hearing on appeal. She never went through Performance Improvement Plan.
20. Cross-examined, the Claimant told the Court that she worked with Respondent's sister companies. There were separate contracts between her and each company. The companies were market research businesses. There were various departments. The Claimant headed qualitative research department, and was engaged in business development, product development and client relationship. Job description was in her letter of employment. She was aware of what she was supposed to do. She met Sergey in March, 2017. There was no discussion about performance in 2016. Sergey did not supervise the Claimant in 2016. She just gave him her perspective of 2016. There were 5 targets discussed for 2017. The Claimant did not have a problem with the 5 items. She said that the targets were doable. Some General Managers were meeting their targets. She was to attend to the 5 targets in 3 months. There was a meeting held involving the Claimant, Sergey, Country Manager and Finance Manager on July 4, 2017. The Claimant gave a summarized version of what had taken place. She was not sure if the Respondent was satisfied with her explanation. She did not leave the meeting, knowing what the Respondent's view about her performance was. Agenda in the meeting preceding termination, was not clear.
21. The Claimant received the letter of termination. She appealed against the decision. A decision on appeal was communicated to her. She received her Certificate of Service. She received lump sum payment of 3 months' salary in lieu of notice. She was paid Kshs. 1,326,572. She was paid accrued annual leave. She did not recall deductions made in pension. She had medical cover and airtime. The



- Respondent was doing badly and no one was paid bonus. Bonus is not claimable because the company was doing badly.
22. Redirected, the Claimant stated that she understood the 5 target items. They were not negotiated. She understood them, but there was no agreement. There was no agenda at the meeting of July 4, 2017. Sergey would say one thing, while Gloria said her own thing. There was no review. The Claimant just shared her updates. She got another job, after she left employment.
 23. Sergey Sheykhov confirmed that he worked with the Claimant both at the Respondent and TNS. The 2 companies merged. Sergey adopted in his evidence, his Witness Statement filed on May 31, 2018. He exhibited documents filed by the Respondent, as exhibits 1-9. He was one of the Claimant's Supervisors. He participated in the process of termination of her contract. Bonus was discretionary, and dependent on the financial position of the Respondent and performance of individual Employee.
 24. He confirmed on cross-examination that there were 2 companies which merged. Transition was in 2016-2017. Page 19 of the Respondent's documents refers to performance review. This was the period up to December 2015. Review was from TNS. The Claimant made the entries. There were no comments by her Supervisor. It was not mandatory for the Manager to fill in his comments. A score of 2 was issued. There was a basis for the score of 2 issued to the Claimant. Sergey understood the process of appraisal. It was a matter of discussion at the Respondent. Sergey could not set targets for the Claimant while she worked in another Company. The targets were not specific in the forms for 2016. Sergey stated in his Witness Statement that appraisal was carried out in early 2017. He was mixed up, because the events he was speaking about, happened 5 years back. He was not the Claimant's Supervisor, in 2016. She was in another company. He did not have her appraisal for 2017.
 25. He had her appraisal for end of 2016. She was placed on PIP based on her appraisal in 2016 and first months of 2017. There was no appraisal for 2017.
 26. Sergey e-mailed her targets for 3 months. He had a conversation with the Claimant, before he set the targets. The targets were not unrealistic. She said she was surprised to earn a score of 2 on appraisal. It was not given in her absence. Sergey assumed that she accepted the targets.
 27. The Respondent continued to provide the Claimant with working resources and proper environment after April 2017. He did not set targets in 2016. There was no annual appraisal completed in July 2017. There was an assessment at the end of 3 months. She did not agree with the assessment and appealed twice. Sergey did not recall what was the score, leading to termination. The Claimant did not achieve any of the objectives. Sergey did not have a NTSC issued upon the Claimant. PIP was self-evident. There was no disciplinary hearing. Sergey was not aware if PIP was a disciplinary process.
 28. Redirected, he told the Court that appraisal involved filling of forms. Supervisors need not make comments. There were discussions before appraisal. The forms had overall performance parameters. Scoring was not arbitrary. Sergey supervised the Claimant in 2016. Targets were set end of March 2017. She did not consider targets set by Sergey outrageous. There was no annual appraisal in 2017.
 29. The issues are whether the Claimant's contract was terminated by the Respondent fairly and lawfully; and whether she merits the remedies claimed.

The Court Finds: -

30. The Claimant worked for the Respondent and its associates for a period of 11 years, in Kenya and Dubai.



31. She states that she was first employed by Research International from June 2006 to June 2008; TNS Middle East Africa Limited, in Dubai, from July 2008 to January 2013; the same company based in Nairobi from January 2013 to February 2016; and lastly for the Respondent, from February 2016 to 13th July 2017, based at Nairobi.
32. She last held the position of Associate Director Qualitative Research at TNS, and Account Director / Head of Qualitative Research at the Respondent.
33. Her contract was terminated on July 10, 2017. The letter of termination states that she was placed on Performance Improvement Plan between March 17, 2017 and June 17, 2017.
34. A PIP closure meeting, held on July 4, 2017, found that the Claimant had not met the required standards of performance. A further meeting was held on July 7, 2017. The meeting concluded like the first one, that the Claimant did not attain the required standards of performance. She was informed that it had been recommended that her contract is terminated effective July 13, 2017.
35. She appealed the decision on July 19, 2017. She stated that for 11 years, her performance was beyond reproach. She alleged gender and racial discrimination, grounds which she has not pursued in this Claim. The Court has not found any scintilla of evidence on gender or racial discrimination. She restated that there never was a PIP. There was an informal session held on July 4, 2017, but not a meeting with a known agenda. She had never been taken through a disciplinary process, and her performance for 11 years, was exemplar. She had no appraisal rating. The Appeal was not successful.
36. Performance. The Performance Review for the year 2015, where the Claimant's assessment was scored at 2, with the comment that she partially met expectations, does not seem relevant, to termination of employment, which happened on July 13, 2017.
37. The Claimant was at the time working for another company TNS, an associate of the Respondent. Review meeting held on September 9, 2015, is not relevant to termination of July 13, 2017.
38. She was employed afresh by the Respondent, Millward Brown, commencing February 22, 2016. Her contract did not allude to her service with TNS. It was a fresh contract, and the evidence on review carried out in 2015, at a different company, is in the view of the Court irrelevant.
39. She was appointed as Account Director-Firefly by the Respondent. She had worked for TNS as Associate Director of Qualitative Research.
40. She wrote an email dated March 20, 2017, to her Manager Sergey Sheykhov, complaining about a range of issues, in her new role at the Respondent.
41. She stated that she joined the Respondent during a season of numerous changes. She was not properly inducted into firefly business, and did not receive any proper handover, or updates on client lists and contacts. She was compelled to troll through clients' folders and e-mails to establish contacts.
42. She informed her Manager that her performance objectives were never finalized. There were no set objectives, until June/ July 2016 when CEO Soumya joined the Respondent, and cascaded his own objectives, suggesting the Respondent should adopt his objectives. The objectives were primarily KANTAR, and not relevant to the business.
43. In light of this lack of clear objectives, the Claimant decided that her key objective would be to meet financial objectives, GM levels and profits. In addition she would ensure client delight, as a means of generating regular business from happy clients. She stated that she had continually asked for resources,



- which was not availed. She asked to be trained on firefly. She asked for guidance from her Manager on additional innovation methods, beyond the use of WhatsApp.
44. She emphasized that she had never been on PIP throughout her period of service with the Respondent and its associates in Kenya and Dubai, and did not think she was a candidate for PIP.
 45. Sergey responded on March 31, 2017. On induction, Sergey told the Claimant that he understood joining another company, especially in turbulent times, was difficult. He however did not think, that the Claimant was in a unique or rare situation. This happened pretty often in the Respondent's business, and senior people like the Claimant, were expected to find their way quickly. Junior Employees may wait for instructions, but business leaders should take the initiative. Sergey did take initiative.
 46. Sergey further told the Claimant that she should not have complained about mastering of research tools, because she was connected to a global network of research professionals, and had access to research gurus. Formal trainings are important, but certainly not the only research tools. According to Sergey, the best training was on-the-job.
 47. Shortly after this conversation between the Claimant and Sergey, the Claimant was placed on PIP, commencing in April 2017, for 3 months, leading up to termination on July 13, 2017.
 48. There were no targets negotiated, agreed to, and signed, between the Claimant and Sergey, before the PIP.
 49. A Manager who places an Employee on PIP, should communicate with the Employee in a manner that resonates. Sergey does not seem to have communicated with the Claimant, as seen in the exchange of the above emails, in a manner that resonated.
 50. Sergey was not motivated by a sincere desire, to help the Claimant overcome perceived challenges. Primarily, the Claimant was in a new role. She asked for induction. She asked for training on firefly. She asked for resources. Sergey was dismissive, advising that she could get support from the internet. He gave himself as an example of a leader, who did not wait for support from the Respondent, to overcome performance challenges. He advised her to learn on-the-job, but gave her no time to learn on-the-job. Why advise an Employee to learn on-the-job, and place her on PIP the following day? She asked for his guidance, a request that was met with cynicism. In his evidence before the Court, he owned up that he was mixed-up, and could not give details of appraisals, because these took place over 5 years ago.
 51. Managers have an obligation to offer support to Employees who have performance challenges, before placing them on PIP, through training and performance coaching.
 52. Without rendering support to the Claimant, the Respondent ended up placing her on a punitive PIP, where the expected end result, was the termination of the Claimant's contract.
 53. Sergey did not even show to the Court that he had his PIP reviewed by Respondent's Human Resource Professionals. There was no Human Resource Manual exhibited before the Court by the Respondent, which guided the PIP.
 54. The Claimant complained that when she joined the Respondent, no details were given to her, on what exactly she was to do in her new role. The Respondent, as stated at paragraph 7 of this Judgment, agrees that her role was new. She was expected to define her role, restore and rebuild Qualitative Department. In 2016, there was restructuring at the Respondent, and no specific targets were set for the Claimant. Sergey told the Court he did not set any targets in 2016. The Performance Review document exhibited by the Respondent relates to the period April 29, 2015 to December 31, 2015. Sergey testified that he did not even have an appraisal for 2017.



55. Procedure: Performance Improvement Plan, is not a termination of employment process. The closure meeting at the end of PIP was not a hearing, contemplated under Section 41 of the [Employment Act](#).
56. Once PIP was over, and the Claimant deemed to have been unsuccessful, the result would not justify immediate termination, without the benefit of hearing her, under Section 41 of the [Employment Act](#).
57. She was being accused of poor performance, against the background of PIP. Section 41 of the [Employment Act](#), states inter alia, that, ‘‘ Before terminating the employment of an Employee on the grounds of misconduct, poor performance, or physical incapacity...’’ PIP and its outcome could only be used as evidence of poor performance, at the hearing of the Claimant, under Section 41 of the [Employment Act](#). At the end of the PIP process, the Employer can only contemplate terminating the particular Employee, for poor performance. There is an obligation to hear the Employee, before actual termination takes place.
58. The Claimant would be entitled to all procedural rights under Section 41 of the [Employment Act](#), including being explained to, in a language understood by the Claimant, the reason for which the Employer is considering termination, and entitled to the company of another Employee or shop floor Trade Union Representative during the hearing. These procedural rights were not satisfied by a PIP closure meeting.
59. The Respondent treated PIP as a hearing under Section 41 of the Employment, which it was not. Appeal made by the Claimant to Respondent’s Appellate Panel, did not originate from a hearing conducted pursuant to Section 41 of the [Employment Act](#); Appeal was pursuant to the PIP process and outcome.
60. The Court is persuaded that termination of the Claimant’s contract was not based on valid reason under Section 43 of the [Employment Act](#). PIP was conceived and executed irregularly. Termination was not preceded by a hearing under Section 41 of the [Employment Act](#). The Claimant merits redress.
61. Remedies. It is declared that termination was unfair and unlawful.
62. The Claimant had worked for the Respondent and its associates, in Kenya and Dubai, for a total of 11 years. This is not disputed by the Parties. She did not contribute to the circumstances leading to termination of her contract. Until she was alleged to have performed poorly at the end of her service, there were no complaints made against her performance in Kenya or Dubai. There were no complaints against her, of a disciplinary nature, for the better part of 11 years. Her contract dated January 18, 2016, was for an indefinite term. She mitigated her loss of employment, by securing another job after termination.
63. She was paid notice of 3 months, at Kshs. 1,326,572. She was paid accrued annual leave. She was availed the Certificate of Service.
64. She is not entitled to damages claimed outside compensation for unfair and unlawful termination. Compensation for unfair termination is made for loss of employment, which includes loss of employment benefits. There is absolutely no justification, in asking for damages for loss of employment and career opportunities and progression, as well as damages for loss of medical cover, annual bonuses and commissions. Loss of employment goes with loss of employment benefits.
65. The Claim herein is not a constitutional litigation. It is a dispute concerning contractual obligations. It is entirely resolvable under the [Employment Act](#), without recourse to the [Constitution](#) of Kenya. The invocation of Articles 41 and 47 of the [Constitution](#) is misplaced.



66. The Claimant had worked for 11 years. She is granted compensation for unfair termination, equivalent of 11 months' salary, at Kshs. 541,000 per month, amounting to Kshs. 5,951,000.
67. Costs to the Claimant.
68. Interest allowed at court rate from the date of Judgment, till payment is made in full.
69. In sum, it is ordered
 - a. It is declared that termination was unfair.
 - b. The Respondent shall pay to the Claimant equivalent of 11 months' salary in compensation for unfair termination at Kshs. 5,951,000.
 - c. Costs to the Claimant.
 - d. Interest allowed at court rate from the date of Judgment till payment is made in full.

Dated, signed and released to the Parties electronically at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 24th day of March 2023.

James Rika

Judge

