



**Kariuki v Karina (Sued as the Chief Commissioner of Kenya Girl Guides Association) & 2 others (Cause 1262 of 2018) [2023] KEELRC 2088 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2088 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1262 OF 2018**

**K OCHARO, J  
MAY 31, 2023**

**BETWEEN**

**DAVID NAMU KARIUKI ..... CLAIMANT**

**AND**

**JENNY KARINA (SUED AS THE CHIEF COMMISSIONER OF KENYA GIRL GUIDES ASSOCIATION) ..... 1<sup>ST</sup> RESPONDENT**

**LYDIA NJOROGE (SUED AS THE EXECUTIVE OFFICER OF KENYA GIRL GUIDES ASSOCIATION) ..... 2<sup>ND</sup> RESPONDENT**

**KENYA GIRL GUIDES ASSOCIATION ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant came into the employment of the 3<sup>rd</sup> Respondent through a letter of appointment dated June 27, 2017 as its Chief Financial Officer. The appointment was for a fixed term of 3 years with effect September 1, 2017. The contractual term didn't run its full course as the Claimant's employment was terminated on the July 23, 2018. Charging that the termination was unfair and unlawful, he instituted the claim herein against the Respondents seeking the following reliefs;

- a. A declaration that the termination of the employment was unfair and unlawful.
- b. An order directing the Respondent to with immediate effect reinstate the him to employment in the status he was before.

In the alternative

- c. Salary for the 23 days in July 2018.....Ksh.268,334.
- d. Notice period as per the contract..... Ksh.350.000.
- e. Leave earned and not taken..... Ksh.256,667.



- f. 12 months compensation for the unlawful or the unfair termination/dismissal..... Ksh.4,200,000.
  - g. Gratuity Prorata  $11/12 \times 350,000$ .....Ksh 320,834.
  - h. Interest and cost of the suit.
  - i. Certificate of service.
  - j. Any other relief this honourable court may deem fit to grant.
2. The statement of the Claim was filed contemporaneously with the Claimant's witness statement, and a list of documents dated the July 27, 2018, under which the documents that the Claimant intended to place reliance on as documentary evidence, were filed.
  3. Upon being served with court process, the Respondents entered appearance on the August 6, 2018 and filed a response to the Claimant's claim on October 31, 2018. In the response, the Claimant's claim and his entitlement to the reliefs sought, were denied.
  4. At the close of the pleadings, the matter got destined for hearing inter-partes on merit. The Claimant's case was heard on the April 26, 2022 while the Respondent's case was heard on the June 23, 2022.
  5. When the matter came up for hearing, the parties urged the court to adopt their witness statements as their evidence in chief and the documents filed as documentary evidence. The statements were so adopted and the document admitted, respectively.

**The Claimant's case.**

6. The Claimant averred that through a thorough and competitive selection and recruitment process he was employed by the 3<sup>rd</sup> Respondent under a three-year fixed term contract with effect from September 1, 2017 for a monthly salary of KShs. 350,000.
7. He further contended that upon taking the employment he was confronted with a financial system which was poorly kept, a matter which was further compounded by lack of, hand over notes from the 3<sup>rd</sup> Respondent's accountants and, cooperation by its former external auditors. This notwithstanding he embarked on putting right the system.
8. His confirmation into employment was subject to a successful probation period as per the stipulations of Clause 3 of the contract of employment. The appointed date for the lapse of probationary period was February 28, 2018. At the lapse, the Respondent did serve him with any letter extending the same.
9. The Claimant further stated that he was asked to fill in a KGGA appraisal, form which he filled. Besides him, the form was supposed to be signed by his supervisor, the 2<sup>nd</sup> Respondent and the Deputy Chief Commissioner. Upon submitting the form, the 2<sup>nd</sup> Respondent asked him to change the final authorizing signatory from Deputy Chief Commissioner to the National vice Chair, Ms. Terry Chebet.
10. .Subsequently, he was invited to the boardroom to discuss his appraisal by the 2<sup>nd</sup> Respondent and the National vice Chair. They went through the appraisal forms, and the only issues that continuously cropped up time and again was about membership and Funds Drive. No one doubted his vast experience and articulation in matters finance and administration.
11. .The Claimant testified and urged the Court to note that prior to joining the employment of the 3<sup>rd</sup> Respondent, he was serving and continued to serve as a Council Member of Laikipia University,



- and in the Council, as Chairman of the Audit, Governance and Risk Management Committee. The appointment was by the Ministry of Education. The National Vice Chair was also a Public University Council Member, therefore his peer in ranking in the Ministry of Education. It left him wondering how the Respondents would select his peer to appraise him.
12. On the July 9, 2018, he eventually signed the appraisal, and thereon indicated how those areas of concern were to be addressed.
  13. On the July 22, 2018, the 2<sup>nd</sup> Respondent invited him through a text message for a meeting that was slated for the following day. On the July 23, 2018 he reported to work as usual only to be unable to access emails totally. At around 9: 20 a.m he was ushered into the Board Room, whereat he met the Trustees Officer Ms. Clare. After the usual morning greetings, he was handed over an un-dated termination letter which indicated that he had been terminated with effect July 20, 2017. The letter also expressed that he was to be paid his terminal dues.
  14. It was the Claimant's case that he was not given any warning letters nor a notice to show cause. Further he was not informed the reasons for the termination, this breach of the Agreement.
  15. He testified that he was terminated on account of failure to meet the work expectations. He was terminated on the July 23, 2018 vide an undated letter, a period of 10 months after his employment. Further that at the expiry of the 6 months' probation period, he automatically got confirmed into employment.
  16. According to him though the employment contract provided for a probation period of six months, it didn't have performance indicators. After signing the performance appraisal, the Respondents didn't get back to him on the same or at all.
  17. In his evidence under cross-examination, the Claimant stated that the termination stated the reason for termination as failure to meet the expectations of the Association. The letter didn't mention anything concerning poor performance.
  18. The termination letter that the Respondent placed before this Court is dated July 20, 2018, unlike the one which he was issued with, which had the effective date as July 20, 2017. That though the termination letter indicated that he was to be paid his terminal dues, the Respondent didn't settle the same.
  19. The Claimant testified that the probation clause provided for termination by notice. Payment of gratuity wasn't a term of his employment contract.
  20. The Claimant further testified that his supervisor was the Executive Officer of the 3<sup>rd</sup> Respondent, and that after the appraisal, she recommended that his probationary period be extended and that he be placed under a performance improvement plan.
  21. Referred to the minutes of the Executive Committee meeting that was held on the April 16, 2018, he stated that in minute number 09/06, it was reflected that the members were not impressed by him. Further that prior to joining the Respondent's workforce, he had worked for two entities both of whom had unfairly terminated his employment. Suits for unfair termination resulted against them.
  22. On re-examination he told the court that he was not paid his dues. He was not given any letter of extension of the probation period by the Respondent.
  23. He further testified that according to the Supervisor's assessment, he was very competent. There were only two areas where he had underperformed, raising members and fund development. There was no



recommendation that he be dismissed from employment. The recommendations by his Supervisor were made four months after the probationary period had lapsed.

24. He asserted that, though the minutes presented by the Respondents before Court indicate that as the month of April 2018, the appraisal process was ongoing, he wasn't at any time made aware of any ongoing appraisal.

### **The Respondent's case**

25. The Respondent presented Professor Faith Nguru, the Vice Chancellor Academics Daystar University and Chief Commissioner of the 3<sup>rd</sup> Respondent to testify on its behalf. The witness adopted the contents of her witness statement dated April 25, 2022 as part of her evidence in chief. She stated that indeed by a letter of appointment dated the June 27, 2017 the Claimant was employed as the Association's Chief Finance Officer for a period of three years with effect from the September 1, 2017.
26. The witness stated that the said contract provided for a probationary of six months and that confirmation of the Claimant into employment was subject to a satisfactory performance during the period. According to the contract, either party had the liberty to terminate the contract during the by giving a 30 days' or paying one [1] month salary in lieu of notice.
27. The witness stated that at all material times, the Claimant's contract was governed by the contract of employment as well as the 3<sup>rd</sup> Respondent's Human Resource Policies and procedures Manual.
28. The Chief Finance Officer's position played an integral role in the 3<sup>rd</sup> Respondent Association; supervising its Finance unit; assisting the Head of programme on all strategic and tactical matters as they relate to the budget management, cost benefit analysis, forecasting and securing of new funding; and assisting in performing all tasks necessary to achieve the organization's mission and help execute staff succession and growth plans.
29. The witness stated that from the onset of the Claimant's employment, it was noted by his immediate supervisor then, Lydia Njoroge and who brought it to the attention of the larger 3<sup>rd</sup> Respondent's management that she had noted various challenges when working with him, thus; two months into employment, the Claimant alleged that a KShs. 88 million deliverable was a trap to set him up, rather than putting in place mechanisms to achieve the objective; as at December 2017, he was already expressing fears that he was not likely to be confirmed, urging that strategies be placed in place to tame some stakeholders who he held were very powerful; rampant absenteeism and or lateness to work; reporting to work smelling of alcohol; delay in submitting management accounts despite constant reminders; an impolite, arrogant and laid- back attitude towards his colleagues and third parties.
30. The witness stated that the Claimant's immediate supervisor conducted a primary appraisal of his performance, then submitted the same to the National Vice -Chairperson for secondary review. The appraisal was marred with delays at the occasioning of the Claimant. The process was initiated on the March 1, 2018, the Claimant furnished with a self-assessment form which he was supposed to complete and return by March 5, 2018, prior to a performance review meeting that had been slated for March 7, 2018. He didn't do it in time.
31. The witness further stated that after the secondary deliberations and appraisal, it was decided that his employment would not be confirmed, owing to the difficult working relationship the secretariat had working with him. The Claimant was stationed at the 3<sup>rd</sup> Respondent's Headquarters which was run by a relatively small Secretariat of barely 18 members of staff, confirming him into employment with the already deteriorated relationship between him and them, would negatively affect the operations of the 3<sup>rd</sup> Respondent.



32. The witness further stated that after the decision was made, the 3<sup>rd</sup> Respondent invoked the relevant provisions of the letter of appointment and terminated the employment of the Claimant with effect from the July 20, 2018 subject to the payment of; salary up to and including July 20, 2018; One month's salary in lieu of notice; and leave earned but not taken as at July 20, 2018. The termination letter expressly required the Claimant to handover to his Supervisor and to duly complete clearance form to enable facilitation of payment of his terminal dues. He never did that.
33. The Claimant's employment was terminated procedurally and lawfully under the contract of employment and the Human Resources Manual.
34. It was the Respondent's case that the decision not to confirm the Claimant's appointment was collectively made by its Executive Committee, based on the appraisal and properly communicated to the Claimant and it was their position that the termination was lawful and procedurally fair.
35. When cross-examined, she testified that reason for the termination was that the Claimant had not met the expectations of the 3<sup>rd</sup> Respondent in his performance. The reason related to performance therefore. According to clause 10 of the letter of employment.
36. Clause 10 of the letter of appointment gave reasons that formed the basis for the termination, material breach and gross misconduct and thus poor performance was a breach of the terms of the contract, poor performance was a ground for termination of the employment contract.
37. The probation period was to run from September 15, 2017, to February, 2018. During this period, the Claimant's employment was not terminated. There was no communication to him that the period had been extended.
38. She testified that the appraisal was initiated on the March 1, 2018, subsequently there was an appraisal meeting on the March 7, 2018. This was about ten months of the date of commencement of the Claimant's employment.
39. In the appraisal report, his immediate Supervisor had suggested that his probation period be extended up to September, 2018, and that he be put on a performance improvement plan. As at the time of this recommendation, the probation period had long lapsed without any expression of intention by the 3<sup>rd</sup> Respondent to extend the period.
40. The witness testified in admission that the termination was not in line with the recommendations by the supervisor. She wouldn't tell whether or not the recommendations were communicated to the Claimant.
41. The witness testified further that she chaired the meeting of the April 16, 2018. The Claimant was present in the meeting. As at this time the probation period had already lapsed. The 3<sup>rd</sup> Respondent had an adverse report against the Claimant, and according to her a decision had been made to terminate his employment though it was not communicated to him.

### **The Claimant's submissions**

42. The Claimant's Counsel confined his submissions to two issues for determination, thus; whether the Claimant's employment was unfairly terminated; and whether the claimant is entitled to the reliefs sought.
43. It was submitted that notwithstanding the fact that the Claimant's letter of employment didn't have a provision for termination on account of poor performance, there is no doubt that his employment



was terminated on this account, as can be discerned from the termination letter. The threshold for severance of an employer-employee relationship on account of performance was not met.

44. On the requisite threshold, reliance was placed on the holding in the case of *Jane Samba Maka vs Oltukai Lodge Limited* (2010) LLR thus;

“where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* to show that in arriving at this 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.”

45. It was the Claimant’s submission that the 3<sup>rd</sup> Respondent didn’t terminate his employment in the course of the probation period. At the end the period, it did not extend the same. By reason of this premise, he constructively got confirmed into employment.
46. The Claimant’s evidence that prior to the termination he was not accorded any hearing was not challenged. It should be concluded therefore that the precepts of Section 41 of the *Employment Act* were not adhered to.
47. The termination of his employment was in the circumstances unfair, entitling him to all the reliefs he has sought.

### **The Respondents’ submissions**

48. The Respondents filed their written submissions with three issues for determination thus;
- i. Whether the Claimant’s services were terminated during his probation.
  - ii. Whether the Claimant’s termination was procedurally fair.
  - iii. Whether the Claimant is entitled to the reliefs sought.
49. For the first issue the Respondents submitted that appraisal was initiated on the March 1, 2018 and the claimant was furnished with a self- assessment which was to be completed and forwarded by March 5, 2018 and the said delays was occasioned by the Claimant’s failure to complete the appraisal on time as required. Despite the delays, the performance appraisal was conducted and the deliberations were made by the Committee.
50. It was the Respondent’s submission that despite the delays occasioned by the claimant, as at the time of being issued with his termination letter, he was aware of the fact that his employment was still not confirmed. The Respondent relied on the case of *Benjamin Nyambati Ondiba vs Egerton University* (2014) eKLR and the case of *L vs British Columbia (Interior Health Authority)* 2017 BSSC.
51. Addressing the issue whether the Claimant’s contract was terminated fairly, the Respondents’ Counsel submitted that the termination letter expressly stated the reason why his services were being terminated, failure to meet the expectations of the 3<sup>rd</sup> Respondent. The Supervisor didn’t recommend for confirmation but that he be placed on a performance improvement plan, and a review for his performance during the period under Performance Improvement Plan was fixed for September 2018.
52. Counsel urged this court to take note that the performance appraisal was done and the Claimant was given an opportunity to comment on the same.
53. It was further submitted that an employee’s whose contract is subject to probation, under Section 42[2] of the *Employment Act*, can be terminated without the application of Sections 43 and 45



of the Act, with regard to procedural and substantive fairness. The termination of the Claimant's employment was lawfully done within the provisions of Section 42 of the Act. To support this submission the case of *Danish Jalango & Another vs Amicabre Travel Services* (2014) eKLR.

54. As to whether the Claimant is entitled to the reliefs sought, the Respondents submitted that in the circumstances of the matter, the relief of reinstatement is not deserved, considering his conduct at the workplace, attitude towards his colleagues and the 3<sup>rd</sup> Respondent's Donors, his failure to meet key deliverables and that generally his performance didn't get the expectations of the employer.
55. Counsel further submitted that an order for reinstatement would be tantamount to imposing an irretrievably broken-down employer-employee relationship on the 3<sup>rd</sup> Respondent. The Respondent had absolutely lost confidence in the Claimant as regards delivering on his core mandate. Reliance was placed on the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR where Maraga JA [as he then was] held:

“As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3)(vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.”

56. On the reliefs sought, it was further submitted that though the Claimant prayed for compensation for unutilized leave days, he didn't lay forth sufficient evidence to establish entitlement to an award of the same, as having stated that he had utilized twelve days, he was not clear for what period the days were and further that leave compensation being a special damage, the Claimant needed to specifically plead the same, a thing that he didn't. To fortify this point, the reliance was placed on the holding in the decision in *Rogoli Ole Manadiegi vs General Cargo Services Limited* (2016) eKLR where it was stated:

“It is, the Court restates, the duty of the Respondent to keep employment records which would include annual leave records. But as stated above the Employee must endeavour to prove his case on the balance of probability, even where such records are not made available. The Appellant did not do this, instead claiming annual leave days for the entire period in employment, while at the same time, conceding he was away for weeks. He did not give the frequency of these weeks when he was away. It was not a requirement of the Wage Order or the *Employment Act* that the annual leave days are taken at once, so that the one week, or two weeks, the Appellant states he was away, could be part of his annual leave entitlement. He needed to give forthright evidence explaining the time he was away from duty, on account of both the claim for overtime pay and annual leave pay. It is not proper for the Appellant to submit, which was not the case during trial, that the days he was off-work were days of “sick leave or emergency.”



57. On the relief, gratuity prorata, the Respondents submitted that the *Employment Act* 2007 does not make it mandatory for employers to pay gratuity to employees. The Respondent relied on the case of *Bamburi Cement Ltd vs Farid Aboud Mohamed* (2016) eKLR where the court held:

“Gratuity denotes a gratis payment by an employer in appreciation of service. The employee does not make any contribution towards this payment.”

58. Similarly, in the case of *Nelson Kesbei vs Narok County Government & Another* (2019) eKLR the court held:

“[Gratuity] denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the *Employment Act*. It is usually payable under terms set out in a contract of service or collective bargaining agreement.”

59. The Claimant’s employment was terminated fairly, he cannot therefore be availed the relief sought for compensation for unfair termination, it was submitted. However, should the Court be inclined to make an award under the head, a three months’ gross salary compensation shall suffice in the circumstances of the matter. Reliance was placed on the case of *Samsom Buluma Mumia vs DPL Festive Ltd* 2012 eKLR where the court held:

40. The last head of relief sought by the Claimant is Kshs 99,960/- being the maximum twelve months compensation for unfair termination. The statutory basis for this relief is found in section 49(1)(c) of the *Employment Act*, 2007. In my considered view an award of compensation under this section is discretionary. Indeed, the Court is allowed the latitude to grant any or all of the three different remedies set out in section 49(1)(a);(b) and or (c). And because the grant of any or all of these three remedies is discretionary, it is not automatic that whenever the Court holds that a summary dismissal or termination of contract was unjustified, it is under an obligation to award the any or maximum compensation. The discretion must be exercised within the 13 parameters set out in section 49(4) of the *Employment Act* and also judiciously. And being an exercise of judicial discretion the effect of the compensation upon an employer’s need also to be considered.”

60. The Respondents urged this court to dismiss the claimant’s cause costs.

### **Analysis and determination**

61. Having read the pleadings, evidence on record and the submissions by Counsel for the parties, the following issues present themselves for determination:

- i. What was the status of the Claimant’s employment at the time of termination?
- ii. Whether the termination of the Claimant’s employment was unfair?
- iii. Whether the Claimant is entitled to the reliefs sought?
- iv. Who should shoulder the cost of the suit?

What was the status of the Claimant’s employment at the time of termination?

62. There isn’t a dispute that the Claimant first came into the employment of the 3<sup>rd</sup> Respondent as a Chief Finance Officer vide letter of appointment dated the June 27, 2017 for a period of three years. The letter expressly provided that the first 6 months of his employment shall be treated as probationary



period. For the reason as will emerge shortly hereinafter, it is imperative to bring out verbatim how the relevant clause was couched, thus;

“

“3. Probation Period

The first 6 months of your employment shall be treated as probationary period and during this time the contract may be terminated by either party giving to the other one [1] months’ notice or paying one [1] months’ salary in lieu of notice.”

63. In my view, the wording of the Clause in no uncertain terms suggest that the termination of the Claimant’s employment would only be terminated in the course of the probation period, not unless the same was being extended pursuant to Clause 2.2.6 [d], of the 3<sup>rd</sup> Respondent’s Human Resource Manual.

64. A look at Clause 2.2.6[c] of the manual clearly supports my view above. The Clause provides;

“The purpose of the probation is to assess the suitability of the employee for the job. During the probation period a conscious decision must be made by the employee’s immediate manager whether he/she is to be retained in the job or not. Before the end of the probation period, the organization will inform the employee in writing whether he or she has successfully completed the probation.”

65. It is my view that by reason of the forestated stipulation, any assessment regarding suitability of the Claimant for the job was to be undertaken, and any decision flowing from the assessment whether positive or negative on the Claimant had to be communicated in writing, before the lapse of the probation period.

66. From the material placed before this Court, there cannot be any doubt that neither the assessment nor the communication was done before the lapse of the probationary period. The Respondent’s witness asserted that the Performance appraisal was initiated by the Claimant’s Supervisor on the March 1, 2018. The probation period had ended on the February 28, 2018. Assuming one were to hold it true that the initiation was done on March 1, 2018, an answer could be required from the 3<sup>rd</sup> Respondent as regards why the process was being commenced after the lapse of the period in violation of its own Human Resource Manual. The Respondents did not provide this vital answer. I have carefully scanned through the documents presented before this Court by the parties, I see none from where it can be discerned that the process was initiated on 1<sup>st</sup> of March 2018.

67. Considering the material before me, one cannot be off mark to conclude that the Claimant could continue working for Respondent in an unconfirmed into employment situation, after the appointed lapse date of the probation period, only where the probationary period was extended pursuant to the provisions of Clause 2.2.6[d] of the Manual which provided;

“Probation may be extended in exceptional circumstances and only with the approval of the Chief Commissioner. A probation period should not be extended by any period longer than the original probation period. In the event the probation period of an employee is to be extended, the employee will be advised in writing that the period of the probation is being extended.”

68. The Claimant asserted that his probation period was not extended, and that there was no communication to him to the effect that his probation had been extended. The Respondents did not



controvert this evidence. Section 42 of the *Employment Act* places an obligation upon the employer who wants to extend an employee's probationary period to seek, and do it with, the concurrence of the employee.

69. The 3<sup>rd</sup> Respondent having not, terminated the probationary employment of the Claimant within the period stipulated in its Human Resource Manual or extended the same in accord with Clause 2.2.6[d] thereof and the provisions of the *Employment Act* stated above, I am impelled to find that at the lapse of the probationary period, the Claimant constructively got confirmed into employment. Consequently, as at the time of the termination he was deemed an employee who was already confirmed into employment.
70. In the case of *David Namu Kariuki v Commissioner for Implementation of the Constitution* [2015] eKLR, Justice Ndolo held and I agree, that:

“ 18. Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time [see *Jane Wairiumu Macharia vs Mugo Waweru and Associates* cause No. 621 of 2012]. That said, the Court finds that the Claimant was confirmed in his appointment upon expiry of the probation period set out in the letter of appointment. This claim is therefore properly before the Court.”

#### **Whether the termination of the Claimant was unfair?**

71. In addressing the presence of fairness or otherwise in termination of an employee's employment or the summary dismissal the court must consider two aspects, the substantive justification and the procedural fairness. The two form the total unit of fairness in termination or summary dismissal. Absence of these components or any of them shall render the termination or summary dismissal unfair.
72. In the case of *Bamburi Cement Ltd v Farid Mohammed* [2016] eKLR, the Court of Appeal stated;

“ Where a party makes a claim for unfair termination, the court must be satisfied of two things; the procedure employed in terminating the party's service and the reason or reasons assigned to the termination. The procedural requirement includes the termination notice under section 35 and the disciplinary hearing under section 41 of the Act. Where the employer does not issue the requisite notice under the law or accord with the terms of an employment contract, the employee is entitled to payment of salary in lieu of notice. On the other hand, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity, or before summarily dismissing an employee, the employer is required to explain to the employee the reason for the intended action in the presence of another employee, the employer is required to explain to the employee the reason for the intended action in the presence of another employee or a union official. Thereafter, the employer must hear the employee's representation before taking any disciplinary step. Termination is unfair under Section 45 of the Act if the employer fails to prove that the reason for the termination is valid, that the reason for the termination is fair in relation to the employee's conduct, capacity or compatibility, or based on the operational requirement of the employer, and that the employment is termination in accordance fair procedure.”

73. Section 41 of the *Employment Act* provides for the procedure that an employer contemplating to terminate an employer should follow. It is now trite that the procedure is a mandatory and any deviation from it shall render the termination unfair even if there were any substantive justification.



74. The procedure encapsulated in the above stated provision embodies three components; the notification component- the employer must inform the employee that he or she intends to act and the reasons fermenting the contemplation; the hearing component- the employer must allow the employee to make a representation on the grounds, in this component the right to accompaniment is conjoined; Consideration component- the employer must consider the representation made by the employee and or the accompanying person, before making taking a decision on the intended action.
75. From the evidence on record it is clear and evident that; the Claimant was not informed that by the 3<sup>rd</sup> Respondent that it was contemplating to terminate his employment on such and such ground; he was not at any time invited for a hearing and accorded an opportunity to defend himself against the reason[s] that eventually formed the basis for the termination or at all and; the decision to terminate was arrived at without consideration of his representation.
76. Counsel for the Respondent submitted that the Claimant made his comments on the appraisal form, and therefore he cannot be heard to claim that he wasn't heard. I find considerable difficulty in understanding this line of argument, they are deliberately or otherwise in ignorance of the stipulations of Section 41 of the *Employment Act*. Matters emanating during the appraisal process, are matters pre-the process contemplated in the stated provision, at best they can only be for the consideration during the hearing process. In the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR the Court of Appeal held;
- “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 No. 823 of [ 2010] LLR 255[ICK,2013]* the Court observed as follows;
- “a. Where poor performance is shown to be the reason for termination, the employer is placed at a higher 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 that poor performance of an employee, they had put in place 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 evaluation system has been put in place. It will not just suffice to 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. [Emphasis mine].
- 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 own choice, the reasons for termination shared with the employee.”[Emphasis mine]



77. In view of the above, I have come to an inescapable conclusion that the termination of the Claimant's employment was procedurally unfair.
78. Now, I turn to consider the other component, substantive fairness. However, before delving further into this, it is important to point out that the Respondents raised an issue in their submissions, issue which needs comment on. They asserted that the provisions of section 43 and 45 of the Employment Act are not applicable to probationary employments, in essence suggesting that the rights and protections accorded therein aren't available to employees on probation. It is my considered view that this argument isn't one aligned to the provisions of the Constitution of Kenya 2010. The two sections of the law, in character are designed to avail fairness to employees. To allow the argument shall be to diminish the purpose for the design, and affront such employees' right to equal protection under the law as enshrined in the Constitution.
79. In a dispute concerning termination of an employee's employment, the employer is enjoined by the law, Section 43 of the Employment Act, 2007 to prove the reason[s] for the termination. Imperative to state that upon discharging the burden contemplated in this provision, the employer has to go further and prove that the reason[s] were valid and fair in discharge of another legal burden under Section 45 [2] of the Act. Where the employer fails to discharge both of the burdens or one of them, the termination shall be considered substantively unfair.
80. It is not in dispute that Claimant's employment was terminated with effect July 20, 2018, through a letter which read in part, that;

“We refer to your appointment of employment dated September 1, 2017 and having completed your probation, wish to inform you that your performance assessment indicates that you have not met the expectations of the Association for your role. Consequently, your appointment will not be confirmed and your services are hereby terminated with effect from July 20, 2018.”

From the foregoing, it is clear that the reason for the termination was failure on the part of the Claimant to meet the expectations of the 3<sup>rd</sup> Respondent.

81. I have not lost sight of the fact that the Claimant had an immediate manager who for purposes of Clause 2.2.6 of the manual had the mandate of appraising him for purposes of making a conscious decision as regards confirmation of the Claimant into employment or not. It was the Respondents' evidence that the manager made a decision for him to be put on a performance improvement plan, and that a review of his performance be done in September 2018. It is clear to the Court that the termination occurred before the appointed date for the review and that therefore the review was not conducted. However, it is not clear to the Court; whether the preliminaries for the Performance Improvement Plan, for instance a discussion between the manager and the Claimant were undertaken; whether targets were set for the plan; what prompted the change of mind on the part of the 3<sup>rd</sup> Respondent to an extent that the Claimant was denied an opportunity to save his position through the performance improvement plan? and ; when was the decision to terminate notwithstanding the manager's recommendation made? Answers for these vital questions are lacking in the material that was placed before me by the Respondents. By reason of this I am impelled to find that they failed to prove that the reason was valid, and that in the circumstances no reasonable employer would terminate an employee whose supervisor has put on a performance improvement plan before the appointed date for review, not unless on an account other than performance.
82. In my view, an employer places an employee on a performance improvement plan to enable him or her make good the weaknesses noted by the Supervisor. Basically, it gives the employee a lifeline



to save his or her job. To unilaterally terminate the employee's employment in the middle of the performance improvement plan, without any evaluation, meets no better description than unfairness, and destituteness in equity.

83. The Respondent's witness in her evidence under cross examination stated that she was not sure whether or not the termination was at the recommendation of the Claimant's immediate manager. In essence she was stating that "I am not sure of the very reason why his employment was terminated".
84. Lastly, I need to say that an employer giving a vague and too general a reason for termination of an employee's employment cannot be considered to have discharged his or her burden under Section 43 of the Act. I note the reason given in the termination letter, in my view, the reason is too general.
85. By reason of the premises, I am not persuaded that the 3<sup>rd</sup> Respondent did demonstrate that the reason for the termination of the Claimant's employment was valid and fair. The same was therefore substantively unfair.

### **Whether the Claimant is entitled to the reliefs sought**

#### a. An Order for Reinstatement.

86. The Claimant urged this court to issue reinstatement orders. Section 49 (3) (a) of the *Employment Act* provides for the reinstatement of the employee if the termination or the summary dismissal is found to be unfair. However, section 12 (3) (vii) of the *Employment and Labour Relations Court* provides that an order for reinstatement is only permitted within three years after the separation. Further under section 49 (4) 9c) & (d) of the Act provides that the said order of reinstatement is only issued considering its practicability and if any exceptional circumstances exist.
87. By operation of the law, Section 12[3][vii], the Court is impeded to grant an order for reinstatement considering that it is now beyond three years after the date of separation. However, it is my view that it is high time that this provision got aligned to the Constitutional right of equal protection under the law, and more specifically where it appears clearly that an employee filed his claim within a reasonable time, and that the delay in having the matter concluded was not courtesy of his actions or omissions.

#### Salary for the 23 days in July 2018

88. It is evident that the letter of termination was to take effect from the July 20, 2018 and as per the evidence on record, the Claimant was called on the July 23, 2018 for a boardroom meeting and after the usual morning greetings a termination letter dated the 20<sup>th</sup> July was handed to him. With this the Claimant had worked for 22 days as opposed to the 23 days as alleged by him.
89. The Claimant is hereby awarded salary for the 22 worked days as tabulated  $8/30 \times 350,000 = 116,667$   
 $= (350,000 - 116,667) = \text{Ksh.}256, 667$ .

#### b. Salary in lieu of Notice.

90. The letter of appointment provided for a one month's termination notice or salary in lieu of the notice. In this matter, I have no doubt that the notice was not issued. Consequently, in line with Section 35 as read together with Section 36 of the Act, and the stipulations of the appointment letter, the Claimant is hereby awarded Ksh.350, 000, salary in lieu of notice.

#### c. Leave earned and not taken



91. The claimant sought payment for leave earned and not taken. The 3<sup>rd</sup> Respondent in the termination letter indicated that the Claimant was entitled to leave earned but not taken as at 20<sup>th</sup> July 2018, an admission that the Claimant had unutilised leave days. The Court awards him a prorated amount of Kshs. 204,167.

Compensation for the unfair termination at 12 months gross salary

92. The Claimant sought compensation for the unfair termination. The authority to make this award flows from the provisions of Section 49 of the *Employment Act* and the same is dependent on the circumstances of each case. Having noted that the termination of the claimant was both procedurally and substantively unfair, that the termination was in manner that one can describe as insensitive and inhuman and further considering the length of the Claimant's employment at the Respondent organization, I conclude that the Claimant is entitled to 5 months gross salary for unfair termination, thus Ksh.1, 750 ,000.

d.Gratiuity prorated

93. The Claimant urged this court to award him gratuity Prorated tabulated as 11/12 X 350,000 thus Ksh.320, 834.

In the case of *Bamburi Cement Ltd vs Farid Aboud Mohamed* (2016) eKLR the court held as follows:

“Gratiuity denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the *Employment Act*. It is usually payable under the terms set out in the contract of service or Collective Bargaining Agreement.”

94. I have carefully looked at the Contract of Employment and it is clear to me that it provides not for gratuity. Consequently, I decline to make an award under this head.

95. In the Upshot, judgment is hereby entered in favour of the Claimant against the Respondents in the following terms:

- i. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
- ii. Salary for the 22 days worked in July 2018.....Ksh.256, 667.
- iii. Salary in lieu of notice.....Ksh.350, 000.
- iv. Leave earned & not taken.....Ksh. 204,167.
- v. Compensation pursuant to section 49 of the *Employment Act*.....Ksh.1, 750,000.
- vi. Cost of the suit
- vii. Interest at court rates from the date of this judgement till full payment.
- viii. The Respondent to issue Certificate of Service within 30 days of today.

**Read, Signed and Delivered Virtually at Nairobi This 31<sup>st</sup> Day of May 2023.**

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**OCHARO KEBIRA**



**JUDGE.**

**In presence of;**

**Mr. Ayugi for Ojienda for the Claimant.**

**Mr. Wanga 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.

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**OCHARO KEBIRA**

**JUDGE**

Page 16 of 16 JUDGMENT NRB CAUSE 1262 OF 2018

