



**Bii v Safaricom Limited (Cause 1271 of 2018)  
[2023] KEELRC 1290 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1290 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1271 OF 2018**

**JK GAKERI, J**

**MAY 24, 2023**

**BETWEEN**

**GLADYS CHELIMO BII ..... CLAIMANT**

**AND**

**SAFARICOM LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim filed on 31<sup>st</sup> July, 2018 alleging unfair termination of employment by the Respondent.
2. The Claimant avers that she was employed by the Respondent as Project Manager on 18<sup>th</sup> November, 2013 under a one year contract which ended on 17<sup>th</sup> November, 2014.
3. That by a letter of appointment dated 10<sup>th</sup> December, 2014, the Respondent employed the Claimant on permanent and pensionable basis in the position she previously held in the Transmission and IP Engineering Section of Technology Division under the same supervisor effective 15<sup>th</sup> December, 2014.
4. The contract provided for a 3 month probationary period and the Claimant completed the same.
5. That by letter dated 23<sup>rd</sup> March, 2015, the Claimant was laterally transferred to the Strategy and Innovation Division under a new supervisor.
6. That sometime in April 2015, the Respondent notified the Claimant that her performance had been found to be unsatisfactory, 5 months after the lapse of the former contract.
7. It is the Claimant’s case that alleged poor performance was fictitious as it included the expired contract.
8. That during the disciplinary hearing, the Claimant was not given an opportunity to defend herself and no evidence or particulars were provided by the Respondent and in particular, a performance appraisal.



9. That the Claimant was placed on a 3 months Performance Improvement Plan (PIP) effective end of May 2015 during which period the Claimant was constantly harassed and intimidated by the supervisor who frustrated her which made the work environment difficult.
10. That on 14<sup>th</sup> September, 2015, the Claimant was issued with a notice of non-confirmation of employment which terminated her employment with the Respondent.
11. That the termination was based on the probationary report dated 25<sup>th</sup> August, 2015.
12. The Claimant avers that the Respondent tarnished her professional record as an engineer.
13. That the Claimant appealed with the Head of Human Resource to no avail as the same was not appeal as it was dismissed.
14. That the termination of employment was effected 5<sup>1</sup>/<sub>2</sub> months after conclusion of the probationary contract.
15. The Claimant prays for;
  - i. A declaration that termination of employment by the Respondent was unfair and unlawful.
  - ii. An order that the Respondent desists from submitting false and bad references of the Claimant to potential employers.
  - iii. An order that the Respondent corrects the Claimant's employment records to eliminate false information regarding her performance and unlawful termination and update said records to reflect the true account of her employment terms.
  - iv. An order that the Respondent corrects and updates her employment record to reflect a true and accurate account of the dates and terms of her employment from 18<sup>th</sup> November, 2013 upto 31<sup>st</sup> August, 2015.
  - v. One (1) month's gross salary in lieu of proper notice ksh 138,000/=.
  - vi. 12 annual leave days earned but not paid during the permanent and pensionable contract ksh 52,800/=.
  - vii. Salary allowances and benefits upto last day of work 4<sup>th</sup> September, 2015 ksh 161,000/=.
  - viii. Pension accrued for 5 months between April 2015 to August 2015.
  - ix. 12 months compensation for unfair and unlawful termination ksh 1,656,000/=.
  - x. An order that the Respondent provides the Claimant with P9 forms on her PAYE returns for 2014 and 2015.
  - xi. Costs of the suit with interest from date of filing till payment in full.
  - xii. Any other or further relief the court may deem fit to grant.

### **Respondent's Case**

16. By its Memorandum of Response filed on 10<sup>th</sup> May, 2019, the Respondent admits having employed the Claimant under a contract dated 7<sup>th</sup> November, 2013, effective 18<sup>th</sup> November, 2013 to 17<sup>th</sup> November, 2013 as Project Manager and the Claimant did not receive a negative appraisal and was employed again in December 2013 as a Project Manager not Regional Project Manager and the contract had a 3 months probationary period.



17. It is the Respondent's case that the Claimant did not complete the probationary period successfully and was transferred as alleged due to her unsatisfactory performance.
18. That the Respondent invited the Claimant for a disciplinary hearing and the allegations were proper grounds for termination of employment and the process was fair and the Claimant was placed on a Performance Improvement Plan in June, July and August and the Claimant agreed to it due to her non-performance.
19. The Respondent denies having harassed, intimidated and frustrated the Claimant and the Claimant showed no improvement after the Performance Improvement Plan.
20. That the Claimant appealed the Respondent's decision and avers that the Claimant's appearance for the appeal was not necessary.
21. It is the Respondent's case that termination of the Claimant's employment was not actuated by malice or ill intentions and was lawful.
22. The Respondent prays for dismissal of the suit with costs.

### **Claimant's Evidence**

23. In her written statement, the Claimant faulted her termination on the basis of poor performance in that she was appraised from the period served previously as opposed to the duration of the new contract, was not provided with particulars relating to the unsatisfactory performance, no evidence was adduced at the hearing, hearing done during the first month after the transfer and had not been assigned annual targets by the Respondent.
24. That the termination was irregular because it was based on the earlier contract, was backdated, signed on 1<sup>st</sup> September, 2015 yet termination was on 31<sup>st</sup> August, 2015 and was given a one week notice applicable in probationary contracts.
25. On cross-examination, the Claimant confirmed that she had provided two contracts of service and had raised no issue with the contract that lapsed on 17<sup>th</sup> November, 2014 and the 2<sup>nd</sup> contract had a probationary period.
26. It was her testimony that the Respondent informed her of the poor performance and subjected her to a disciplinary hearing in April 2015 which led to the Performance Improvement Plan.
27. The witness confirmed that she had no evidence of bad recommendation by the Respondent or malice.
28. It was her testimony that she was appointed by another company in February 2016 but her employment was terminated and had a case against the employer that was concluded in 2021.
29. That she was claiming 12 days annual leave under the 1<sup>st</sup> contract ended on 17<sup>th</sup> November, 2014 and the alleged salaries and benefits had not been particularised.
30. That she was not given a payslip after August 2015.
31. On re-examination, the witness testified that probation ended on 15<sup>th</sup> March, 2015 but she was not given a confirmation letter and had no previous warning letter.
32. That the notice of non-confirmation was given to her about 5<sup>1</sup>/<sub>2</sub> months after completion of probation.
33. That she received the payments made by the Respondent after termination of employment.



34. That the pending leave days 12 were not specified on the payslip.
35. The Respondent adduced no oral evidence in support of its claim. Its counsel informed the court that it would not call a witness.

### **Claimant's Submissions**

36. Counsel isolated two issues for determination, namely; whether the Claimant was an employee of the Respondent on permanent and pensionable terms as at 31<sup>st</sup> August, 2015 and whether termination by the Respondent was unfair and unlawful.
37. As regards the 1<sup>st</sup> issue, counsel submitted that as at the date of termination, the Claimant was serving under permanent and pensionable terms as the probationary contract lapsed and the Respondent was silent while the Claimant continued rendering services.
38. Reliance was made on the decision in *Narry Philemons Onaya-Odeck v Technical University of Kenya* [2017] eKLR to urge that the Claimant's employment had transitioned to permanent and pensionable terms.
39. The sentiments of Ndolo J in *David Namu Kariuki v Commission for Implementation of the Constitution* [2015] eKLR were also relied upon to reinforce the submission.
40. On termination, counsel submitted that the Respondent terminated the Claimant's employment wrongfully, unfairly and unlawfully.
41. Reliance was made on the provisions of Section 43(1) and 45(2) of the *Employment Act*, 2007 to urge that the Respondent did not demonstrate that it had a valid and fair reason to terminate the Claimant's employment as the non-confirmation letter terminated her employment and it was unlawful as no evidence of the disciplinary hearing was availed to confirm the allegations of poor performance and was not accorded a hearing to defend herself.
42. Counsel further relied on the decision in *Jane Samba Mukala V Ol Tukai Lodge Ltd* (2013) eKLR to underscore the process of terminating an employee on the ground of poor performance.

### **Respondent's Submissions**

43. Counsel for the Respondent identified two issues for determination regarding termination and entitlement to the reliefs sought.
44. On the first issue, counsel submitted that as of April 2015, the Claimant's performance was unsatisfactory and a disciplinary hearing took place which gave rise to the Performance Improvement Plan for 3 months.
45. The decision in *Jane Wairimu Machira v Mugo Waweru & Associates* [2012] eKLR was relied upon on the duration of the Performance Improvement Plan.
46. Counsel submitted that poor performance was a valid ground for termination of employment.
47. Puzzlingly, counsel identified the areas in which the Claimant's performance was deemed wanting, such as poor management of issues, not following task through as per time slot, inability to manage own projects and unawareness of the current status of her projects.
48. Needless to emphasize, this is evidence the Respondent did not adduce in court and is of no probative value in this judgement.



49. According to counsel, the provisions of Section 41 of the *Employment Act*, 2007 were complied as a hearing took place.
50. As regards the prayers sought, counsel relied on the decision in *Le Monde Luggage t/a Pakswell Petze v Commissioner G. Dun & another*, Appeal Case no JA 65/205 on the compensation payable.
51. Counsel further submitted that the declaration sought were unmerited as due process was followed as enunciated in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.
52. On notice pay, counsel submitted that the Claimant was entitled to one (1) month's salary less the 14 days already paid.
53. As regards leave, counsel urged that the Claimant tendered no evidence of pending leave days or when the leave was earned. The decision in *Evans Sagwa Rumura v Insignia Kenya Ltd* was relied upon.
54. On the salary allowance and benefits, counsel submitted that the Claimant had not pleaded how the figure of ksh 161,000/= was arrived at as special damages must be pleaded and proved. The decision in *Richard Erskine Leakey & 2 others v Samson Kipkoech Chemai* [2019] eKLR was relied upon to urge that only gross salary is payable in compensation.
55. Counsel submitted that the Claimant was not a member of the Respondent's pension scheme and had not applied to join the scheme. The decision in *Helga Ohany v The German School Society* [2017] eKLR was relied upon.
56. Finally, on compensation, counsel relied on several decisions such as *Ronald Kimatu Ngeli v Ukulima Sacco Society Ltd* [2011] eKLR, *Peter Amolo Akuma Gould v Kenya Commercial Bank Ltd* [2014] eKLR among others to urge that the quantum of compensation was equivalent to the notice period.
57. The court was urged to apply the decision in *Gladys Chelimo Bill v Kenya Power & Lighting Co. Ltd* [2021] eKLR where the court awarded 2 months compensation.

### **Findings and Determination**

58. After careful consideration of the pleadings, Claimant's evidence and submissions by counsel, the issues for determination are;
  - i. What was the status of the Claimant's employment as at 31<sup>st</sup> August, 2015?
  - ii. Whether termination of the Claimant's employment was unfair and unlawful.
  - iii. Whether the Claimant is entitled to the reliefs sought.
59. On the 1<sup>st</sup> issue, the Respondent's counsel did not submit but admitted that the Claimant was entitled to one (1) month's salary in lieu of notice less the 14 days paid already by the Respondent.
60. It is common ground that the Claimant was first employed by the Respondent as a Project Manager under a one (1) year fixed term contract dated 7<sup>th</sup> November, 2013 effective 18<sup>th</sup> November, 2013 to 17<sup>th</sup> November, 2013 at a consolidated salary of ksh 120,000/= per month, 2 working leave days per month, leave entitlement for the duration was 12 days and the Claimant discharged her obligations diligently until the contract lapsed as envisaged by the parties.
61. That by a contract dated 10<sup>th</sup> December, 2014, the Respondent offered the Claimant employment as a Project Manager in the same Division reporting to the same Supervisor effective 19<sup>th</sup> December, 2014 at ksh 132,000/= as basic pay subject to a 3 months probation and confirmation subject to satisfactory



evaluation for the 3 months period, 24 days annual leave and termination by one (1) month's notice after confirmation but 14 days during probation.

62. It is not in contest that by letter dated 23<sup>rd</sup> March, 2015, the Claimant was laterally transferred to the Strategy and Innovation Division effective 1<sup>st</sup> April, 2015 as Project Manager under the same terms and conditions of service.
63. According to the Claimant, the Respondent notified her of the alleged poor performance, conducted a hearing and placed the Claimant on a Performance Improvement Plan for 3 months.
64. The Claimant averred and submitted that the alleged poor performance related to the previous contract yet the appointment letter of the second contract was clear that the evaluation of performance would be based on "the three month probation period" and no concerns had been raised under the expired contract.
65. The Respondent tendered no evidence to disprove the Claimant's evidence. A completed performance evaluation form would have settled the issue as it would have shown the targets, period and the performance of the Claimant.
66. Based on the evidence on record, it is clear that the Respondent had no demonstrable basis to place the Claimant on a Performance Improvement Plan or allege that her performance was poor.
67. More significantly, however, since the Claimant commenced the probationary contract on 19<sup>th</sup> December, 2014, probation ended on 18<sup>th</sup> March, 2015 and the only thing that appear to have happened that month was the transfer to the Strategy and Innovation Division by letter dated 23<sup>rd</sup> March, 2015 until 4<sup>th</sup> September, 2015 when the Respondent informed the Claimant that the probation report had revealed that her performance was below expectations and she would not be confirmed.
68. Instructively, the probation report was prepared and/or acted on in September 2015, almost 6 months later.
69. The salient question is whether the Claimant was still on probation?
70. In the court's view, it would be overstretching imagination to think so.
71. As correctly submitted by the Claimant's counsel, if the Claimant's performance was below the expected standard, the Respondent was at liberty to extend the probation as ordained by Section 42(2) of the *Employment Act*, 2007, but did not take that option and in the meantime the Claimant continued rendering services anticipating a confirmation letter.
72. In the court's view, since the Claimant's performance during probation was not appraised as provided by the letter of appointment dated 10<sup>th</sup> December, 2014, the Claimant had successfully completed the probation and her employment confirmed by operation of law as held in *David Namu Kariuki v Commission for the Implementation of the Constitution* (*Supra*), relied upon by the Claimant's counsel where Ndolo J held that;

"... The law requires an employer to confirm an employee upon satisfactory completion of probation and if for any reason, an employer requires more time to assess the performance of the employee, then the right thing to do is to formally extend the probation period for a specific period as provided under Section 42(2) of the *Employment Act*, 2007... Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time."



73. The court is further guided by the sentiments of Mbaru J in Narry Philemons *Onaya-Odeck V Technical University of Kenya* (*Supra*).
74. The foregoing sentiments of Ndolo J and Mbaru J apply on all fours to the facts of the instant suit.
75. For the above-stated reasons, the court is satisfied and finds that the Claimant's employment had transitioned from probationary to permanent and pensionable.
76. As to whether termination of the Claimant was unfair, it is evident that the relevant provisions of the *Employment Act*, 2007 were not complied with.
77. The provisions of Sections 35, 40, 41, 43, 44, 45 and 47(5) which generally prescribe the architecture of termination of an employment contract are unambiguous that for a termination of employment to pass muster, it must be demonstrated that it was substantively justifiable and procedurally fair. The sentiments of the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR and Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (*Supra*) are instructive.
78. In the latter, Ndolo J stated  

“However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

### **Reason for Termination**

79. Having found that the Claimant's employment was confirmed by operation of law, the non-confirmation of the Claimant's employment letter dated 25<sup>th</sup> August, 2015 was to all intents and purposes a termination of the Claimant's employment allegedly for non-performance, a fact the Respondent did not prove by evidence by its failure or refusal to adduce evidence of any nature.
80. The letter stated in part;  

“Reference is made to the probation assessment report received from your Manager on August 25<sup>th</sup> 2015. It was noted in this report that your performance during your probation period did not meet the expected standards.

In view of the above, we are not in a position to confirm you as Project Manager; and therefore notify you of the company's decision to terminate your contract with effect from the date indicated in this letter . . .”
81. The Claimant received the letter on 4<sup>th</sup> September, 2015 and the termination was effective 31<sup>st</sup> August, 2015.
82. In determining whether the Respondent had a valid and fair reason to terminate the Claimant's employment, the court is guided by the sentiments of Mbaru J in *Jane Samba Mukala v Ol Tukai Lodge Ltd* [2013] eKLR as follows;  

“This is important to note as where poor performance is shown to be a reason for termination, the employer is placed on 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. Section 5(8)(c) further outline the policy and practice guidelines that include having a performance evaluation system that can be



used by an employer in ensuring their employees get a fair chance when they are of poor performance . . .”

83. The Respondent had not demonstrated that it had an operative performance management system to appraise its employees generally. Relatedly, the alleged unsatisfactory performance by the Claimant was neither particularised nor demonstrated by evidence.
84. In light of the foregoing, it is the finding of the court that the Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant’s employment.

### Procedure

85. As held in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, Section 41 of the *Employment Act*, 2007 provides an elaborate and mandatory procedure to be complied with by the employer before termination of employment. It is the duty of the employer to demonstrate that it conducted the termination in accordance with a fair procedure as ordained by the provisions Section 45(2)(c) of the *Employment Act*, 2007.
86. The essential elements of Section 41 of the *Employment Act* were isolated by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR as follows;
- i. “. . . an explanation of the grounds of termination in a language understood by the employee;
  - ii. the reason for which the employer is considering termination;
  - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
  - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
87. The court is guided by these sentiments as well as those of Mbaru J in *Jane Samba Mukala v Ol Tukai Lodge (Supra)* as follows;
- “Beyond having 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 be given an opportunity to address their weaknesses. 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 and explained to such employee.”
88. Contrary to the Respondent counsel’s submission that the Claimant was invited for a disciplinary hearing, the Respondent adduced neither evidence of the invitation nor minutes.
89. The Claimant’s evidence that she was placed under a Performance Improvement Plan under a shambolic hearing based on the previous contract, no performance review report and did not defend herself was uncontroverted.
90. It is unclear as to whether the Respondent conducted a performance appraisal of the one (1) year contract effective 18<sup>th</sup> November, 2013 to 17<sup>th</sup> November, 2014 or a disciplinary hearing.
91. It is also evident that the appraisal report for the probationary contract was dated 25<sup>th</sup> August, 2015 and no other appraisal appear to have been conducted prior to this date.



92. The Claimant's employment was terminated on the basis of the alleged probation assessment long after the employment had been confirmed by operation of law.
93. Patently, the provisions of Section 41 of the *Employment Act, 2007* were not complied with.
94. For the foregoing reasons, it is the finding of the court that termination of the Claimant's employment was not conducted in accordance with a fair procedure as by law required.
95. In sum, the Respondent has failed to demonstrate that termination of the Claimant's employment was substantively justifiable and procedurally fair.
96. Finally, as regards the reliefs sought, the court proceeds as follows;
- i. Having found that termination of the Claimant's employment was unfair, a declaration to that effect is merited.
  - ii. With regard to prayer on bad/false reference to potential employers, the Claimant admitted on cross-examination that she had no evidence of the alleged bad or false recommendation.  
The prayer is declined.
  - iii. As regards the order for the correction and update of employment records, the Claimant adduced no evidence to show that the Respondent had incorrect or unupdated employment records.  
The prayer is declined.
  - iv. One (1) month's salary in lieu of notice
97. The Respondent admitted in its submissions that the Claimant was entitled to one (1) month's salary in lieu of notice less the amount paid for 14 days.  
The claim for one (1) month's gross salary is awarded less the amount already paid by the Respondent.
- v. 12 Annual leave days during the one year contract
98. The Claimant testified that the leave days claimed herein related to the earlier contract of employment itemised under 'Leave'. Since the said contract lapsed on 17<sup>th</sup> November, 2014, and the suit herein was filed on 31<sup>st</sup> July, 2018, the claim was filed outside the 3 years limitation period under Section 90 of the *Employment Act, 2007*.  
The prayer is declined.
- vi. 12 days annual leave under the permanent and pensionable contract
99. The Respondent adduced no evidence that it paid the Claimant accrued leave under the new contract effective 19<sup>th</sup> December, 2014 until termination of employment on 31<sup>st</sup> August, 2015 a duration of 8 months and 12 days.  
The same is awarded.
- vii. Salary allowances and benefits upto 4<sup>th</sup> September, 2015 ksh 161,000/=
100. On cross-examination, the Claimant admitted that she had not provided the essential particulars of this prayer. It is unclear how the amount was arrived at.  
The prayer is declined.
- viii. Pension accrued for 5 months (April to August 2015) unremitted by the Respondent



101. The Claimant adduced no evidence to establish this claim. It is declined.
- ix. 12 months compensation
102. Having found that termination of the Claimant's employment was unfair for want of reason(s) and procedural propriety, the Claimant is entitled to the discretionary relief under Section 49(1)(c) of the [Employment Act](#), 2007.
103. In determining the quantum of compensation, the court has taken into consideration the fact that the Claimant was an employee of the Respondent for a fairly short period of about one (1) year and 8 months under both contracts, the Claimant had no previous warning or disciplinary hearing for misconduct, the Claimant wished to continue in the Respondent's employment as exemplified by the appeal dated 9<sup>th</sup> September, 2015 and the employee contributed to the termination of employment.
- In the circumstances, the equivalent of 3 months gross salary is fair.
- x. As regards the Claimant's P9 forms for 2014 and 2015, the employer is bound to issue the same to facilitate the filing of the Claimant's tax returns.
104. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment was unfair.
- b. One month's salary less the amount already paid.
- c. 12 days annual leave.
- d. Equivalent of 3 months gross salary.
- e. Respondent to issue the Claimant's P9 forms for 2014 and 2015 within 30 days.
- f. Costs of this suit.
- g. Interest at court rates from date hereof till payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF MAY 2023**

**DR. JACOB GAKERI**

**JUDGE**

**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 [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.

**DR. JACOB GAKERI**

**JUDGE**

