



**Njoroge v Cold Solutions Kiambu Sez Limited (Cause E804 of 2022)
[2023] KEELRC 2686 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2686 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E804 OF 2022
SC RUTTO, J
OCTOBER 27, 2023**

BETWEEN

SERAH NJOROGE CLAIMANT

AND

COLD SOLUTIONS KIAMBU SEZ LIMITED RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a Human Resource Manager with effect from 14th February 2022. The contract was for a probationary term of six months. It is apparent that the employment relationship was short-lived seeing that the Claimant was terminated from employment on 3rd August 2022, on grounds of poor performance. The Claimant contends that her termination was procedurally and substantively unfair. Consequently, she seeks the sum of Kshs 4,200,000/= being maximum compensation for what she has termed as unfair, unlawful and malicious termination of employment. She further prays for the costs of the suit as well as interest on the award.
2. The Respondent opposed the Claim through its Response dated 16th December 2022, in which it avers that the Claimant was indeed terminated due to her poor performance which was unsatisfactory. According to the Respondent, the Claimant's termination was procedurally, substantively and legally fair. On this account, the Claimant has asked the Court to dismiss the suit with costs.
3. During the trial, which was conducted on 3rd July 2023, both parties called oral evidence.

Claimant's Case

4. The Claimant testified in support of her case and to start with, she adopted her witness statement as well as the list and bundle of documents filed alongside the Memorandum of Claim to constitute her evidence in chief.



5. It was the Claimant's evidence that on or about 19th July 2022, the Respondent issued her with a Notice of Hearing setting out various allegations against her, purporting poor performance on her part. Nowhere in the said letter did the Respondent indicate to her that it was contemplating terminating her employment on the grounds set out in the said letter.
6. She promptly and conclusively responded to the said allegations vide a letter dated 20th July 2022, concisely setting out exactly why the purported allegations made against her were untrue and unsubstantiated. In the same response letter, she indicated that some of the allegations against her were extremely generalized and lacked sufficient specificity to enable her respond conclusively.
7. Despite asking for further and better particulars ahead of the purported hearing, none was provided to her by the Respondent.
8. The Claimant further averred that she was subsequently invited for a hearing which was held on 21st July 2022 when she responded to the allegations levelled against her to the best of her ability, given the circumstances. At the hearing, she reiterated that some of the allegations made against her were too general and required specificity to enable her properly respond.
9. She contended that at the hearing, no evidence was presented to corroborate the allegations of poor performance that had been made against her.
10. That vide a letter dated 3rd August 2022, the Respondent terminated her employment on grounds of purported poor performance.
11. According to the Claimant, the particulars of purported poor performance were unsubstantiated and were never proved at the purported hearing.
12. She further stated that the purported performance review hearing, which was held on her fifth month of employment, and which led to the termination of her employment, was held prematurely and in breach of the express provisions of Clause 3 of the Employment Contract.
13. That prior to the purported hearing and termination, the Respondent never placed her on a Performance Improvement Plan as required by law before purporting to terminate her employment on the basis of purported poor performance.
14. The Claimant further stated there was never an objective or credible performance appraisal system in which her performance could be objectively measured, and based on which she could be terminated on the ground of purported poor performance.
15. She contended that in any event, as at the date of the hearing and subsequent to termination of her employment, she had fully and competently undertaken the four main tasks required of her in her first few months in office.
16. According to the Claimant, the decision to terminate her on the basis of poor performance was therefore unfair, not based on any objective evidence, unfounded and actuated by malice.
17. She further stated that one of the Respondent's Directors, who had chaired the hearing, had prior to the hearing, threatened her by stating that "things are not good for you Serah" which is evidence of malice aforethought and a pre-determined decision to terminate her employment.



18. Upon receiving the termination letter, she duly appealed vide an email dated 4th of August 2022. In her Appeal email, she clearly stated as follows:

“I cannot exhaust everything in writing however when granted my date and time of appeal shall explain further.”
19. She averred that despite the foregoing indication, she was never granted an oral hearing of the Appeal by the Respondent and she was never informed that they never intended to grant her an oral hearing of the appeal so she could put in a more comprehensive written appeal statement.
20. That prior to initiating the appeal process, she was locked out of the Respondent's premises and her work computer confiscated, her work email deactivated, thereby preventing her from accessing crucial documents and information that could have aided her appeal. That she had to send the Appeal email through her personal email. She raised the above issue in her Appeal email, but no assistance was accorded to her to assist her in preparing ahead of the appeal.
21. In the Claimant's view, her Appeal was defined and the Respondent's management upheld the decision to terminate her employment. This decision was communicated vide a letter dated 12th August 2022.
22. In the said letter resting her Appeal, the Respondent's Appeal Committee purported to add further grounds of termination which was never discussed at the initial hearing.
23. She further avers that the letter dismissing her Appeal did not set out reasons why the Appeal Committee upheld the decision to terminate her employment. Instead, the said letter merely regurgitated the grounds for termination set out in the termination letter.
24. She further stated that the letter dated 12th August 2022, did not indicate in what aspects her Appeal was lacking, and why the grounds set out in the Appeal email dated 4th August 2022, were insufficient.

Respondent's case

25. The Respondent called oral evidence through one of its Directors, Ms. Suki Muia, who testified as RW1. Similarly, she adopted her witness statement and the bundle of documents filed on behalf of the Respondent to constitute her evidence in chief.
26. RW1 stated in evidence that the Claimant's employment was subject to an extendable probation period of 6 months from the date of appointment to 14th August 2022. The agreement provided that during the probation period, the contract could be terminated by either party by giving one month's notice or at the termination of the probation period.
27. The Respondent terminated the Claimant's employment on or about 3rd August 2022 and in lieu of the one month notice, she was paid one month's salary.
28. RW1 further stated that at the time of termination of employment, the Claimant was still a probationary employee and her appointment had not been confirmed on a permanent basis.
29. It was RW1's testimony that the Claimant was terminated by reason that her performance was not satisfactory.
30. RW1 further averred that prior to her termination the Claimant was issued with a show cause letter as to why her employment should not be terminated on grounds of poor performance. She gave a written response to the show cause letter following which a meeting was held to discuss her responses and grant her an opportunity to present her views.



31. In the notice served upon the Claimant, she was informed of her right to invite a witness to accompany her to the hearing that was scheduled for 21st July 2022.
32. Further to the notice, the Claimant requested to be supplied with detailed information to enable her to make a conclusive response to the notice to show cause, which was provided.
33. That in the hearings scheduled thereafter, the Claimant was accorded an opportunity to make her representations which were discussed extensively and exhaustively.
34. After the hearing, the Respondent retreated to consider the Claimant's submissions and later on rendered the decision to terminate her for unsatisfactory performance.
35. According to RW1, the decision to terminate the Claimant was formally communicated to her. She was informed of her right to seek an appeal of the decision. The Claimant appealed the decision to terminate her and a further decision on appeal was rendered confirming her termination.
36. According to RW1, the Claimant's termination was fair hence she urged the Court to dismiss the claim with costs.

Submissions

37. It was the Claimant's submission that the Respondent made no attempt, at the internal hearing and the hearing before this court, to demonstrate that the purported reasons for termination were fair or even valid. That having failed to discharge its burden of proof, the irresistible finding in this matter is that there was no valid reason for the termination of her employment. On this score, the Claimant placed reliance on the case of [*Kenya Union of Commercial Food and Allied Workers vs Amus Motors Limited*](#) (Cause 1721 of 2017) [2023] KEELRC 860 (KLR)
38. It was further argued that in any event, even if the Respondent had been able to demonstrate the allegations against the Claimant, it is now a well settled requirement of law that before an employee can be terminated on grounds of poor performance, such employee must be put through a Performance Improvement Plan and granted an opportunity to improve, with the support of the employer. In support of this argument, reliance was placed on the case of [*Isdor Rachuonyo vs Brava Food Industries Limited*](#) (2021) eKLR.
39. The Claimant further submitted that the Respondent's failure to inform her that it was contemplating the termination of her employment was in breach of her right to due process as required under Section 45 of the [*Employment Act*](#).
40. The Respondent on the other hand submitted that in terminating the Claimant, it followed the procedure as required. On this score, the Respondent contended that the Claimant admitted that she was accorded a hearing in the process leading to her termination.
41. It was the Respondent's further argument that Section 41 of the [*Employment Act*](#) does not dictate that a show cause letter must have an express statement that an employer is considering terminating the employee. That instead, it dictates that the employer must state the reasons it is considering termination.
42. The Respondent further argued that the Claimant was accorded due process before terminating her probationary employment. The Respondent further maintained that whereas it is now established that employees under probation are also accorded equal protection of the law under Section 41 of the [*Employment Act*](#) as regards the right to a fair hearing, the burden of persuasion is upon the employee to demonstrate satisfactory performance. In support of this argument, the Respondent sought to rely



on the determination in the case of *Danish Jalang'o & another vs Amicabre Travel Services Limited* (2014) eKLR.

43. In further submission, the Respondent stated that even if the burden of proof was to be shifted, it has demonstrated unsatisfactory performance by the Claimant through the various explained shortcomings. It contended that all failures by the Claimant were of tasks expressly provided in her job description.

Analysis and determination

44. Flowing from the pleadings on record, the documentary and oral evidence presented as well as the rival submissions, the following issues stand out for determination: -
- i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
 - ii. Whether the Claimant was taken through a fair process prior to termination; and
 - iii. Is the claimant entitled to the reliefs sought?

Justifiable reason for termination?

45. The starting point in determining this issue is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Closely related to this provision is Section 45 (2) (a) and (b) of the *Act* which provides that a termination of employment is unfair if the employer fails to prove: -
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
46. In essence, beyond proving the existence of reasons to justify termination, an employer is required to prove that the said reasons were fair and valid and related to the employee's conduct, capacity, compatibility or its operational requirements.
47. In the instant case, the Claimant was terminated on grounds of unsatisfactory performance. According to the letter of termination, the Claimant's unsatisfactory performance centered on the following areas:
- a. Failing to develop a people strategy and to provide strategic guidance to the company's directors;
 - b. Failure to develop job specifications for the Respondent's staff;
 - c. Failing to develop Key Performance Indicators for the Respondent's staff; and
 - d. Poor employee relationship management.
48. In setting out the aforementioned areas of performance, it is noteworthy that the Respondent made reference to the Claimant's job description, which was annexed to her employment contract.
49. Turning to the Claimant's job description, it is instructive to note that it enumerates her duties and responsibilities which total 28. It is further notable that some of the duties and responsibilities constitute day to day activities that the Claimant would ordinarily be required to undertake. Further,



some duties and responsibilities are activities that are ordinarily undertaken periodically or on a one-off basis. A case in point is designing the Human Resource Policies and Procedures or employees' job description.

50. According to the Claimant, she had fully and competently undertaken the following four main tasks required of her in the first few months in office;
- i. Hiring of CO/MO which had been concluded;
 - ii. Compiling of Employee Records as from 2019 had been concluded;
 - iii. Payroll Administration and Processing which had been concluded; and
 - iv. KPI Development had been initiated and was still ongoing.
51. Notably, this was the Claimant's defence during her disciplinary hearing. It is also notable that the Respondent did not dispute the Claimant's assertions that the aforementioned, were her main tasks during the probation period.
52. On the same note, I must say that what I find to be conspicuously missing are the specific targets the Claimant was to undertake within the probation period. As stated herein, the Claimant's duties and responsibilities as per her job description were 28 in number. It therefore follows that there was need to reduce some of the Claimant's duties and responsibilities into measurable targets which were to be assessed periodically. In this regard, the targets would have been time bound.
53. Granted, the Claimant was aware of her duties and responsibilities. Nevertheless, for her performance to be assessed objectively and found to be wanting or otherwise, she needed to know what her targets were, how her performance against the same would be measured and within what period.
54. Indeed, the Respondent indicated that the Claimant's performance would be assessed and reviewed during her probation. The question is how was this assessment undertaken and against what targets?
55. As it is, the Respondent did not adduce evidence that the Claimant had been issued with specific measurable targets that she was required to meet within specified timelines. Further, the Respondent did not prove that it had put in place measures to evaluate the Claimant's performance against any set targets. More importantly, there was no report or such other document constituting the Claimant's overall performance evaluation during the probation period.
56. Indeed, one wonders how the Respondent was in a position to determine that the Claimant's performance was not satisfactory without any specific targets in place, measures to assess her performance and evaluation of her overall performance against such targets. It was therefore not surprising that the Claimant was categorical that she had performed satisfactorily while the Respondent opined otherwise.
57. On this score, I will follow the determination by the Court of Appeal in the case of *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR, where the Learned Judges reckoned thus:
- “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 Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;

“



- a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
- b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- c. Beyond having such an evaluation measure, and before termination on the 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.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

...We have considered the said reasoning in light of what we have set out above as the correct procedure for terminating an employee’s contract as restated by the Court in the *Janet Nyandiko case* (supra) and the observation of the ELRC in the *Jane Samba Mukala case* (supra). We find no basis for faulting the Judge’s finding that an appraisal ought to have been conducted on the respondent’s work performance in 2014 to confirm whether the respondent had improved on his 2013 performance rating before termination of his employment and that in the absence of such proof, termination of the respondent’s employment with the Bank was unfair.”

- 58. I wholly adopt the position taken by the Court of Appeal and find that for the Respondent to arrive at a determination that the Claimant’s performance was unsatisfactory, it needed to have put in place measures to assess her performance. This included but not limited to target setting and providing the manner of assessment of her performance against such targets. This was not evident in this case hence it follows that the decision by the Respondent that the Claimant had not performed her work satisfactorily was not arrived at based on an objective assessment.
- 59. All things considered, I am led to conclude that the Respondent has failed to discharge its evidential burden by proving that it had a fair and valid reason to terminate the Claimant’s employment based on her performance. To this end, her termination was not substantively justified.

Fair process?

- 60. Pursuant to Section 45 (2) (c) of the *Act*, an employer is required to prove that it terminated an employee’s employment in accordance with a fair procedure.



61. The specific requirements of a fair process are to be found under Section 41(1) of the Act which provides as follows: -

Notification and hearing before termination on grounds of misconduct

41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

62. From the record, the Claimant was issued with a Notice of Hearing dated 19th July 2022. The Notice highlighted the allegations against the Claimant referencing the quality of her quality of work and interactions with the Board of Directors. She was informed that the same was not as per the Respondent's expectations.

63. It bears to note that beyond listing the allegations against the Claimant, the Respondent did not state expressly that it was considering terminating her employment on account of the said allegations. Be that as it may, from the Notice of Hearing, the Claimant was made aware that she was going to face a disciplinary panel. In an employment context, a notice of disciplinary hearing serves as a signal that all is not well in the employment relationship. Therefore, one of the possible outcomes of a disciplinary hearing was termination of the Claimant's contract of employment.

64. Therefore, in my view, failure by the Respondent to inform the Claimant that it was considering termination of her employment was not fatal. The issuance of the notice of the disciplinary hearing on its own was a signal that termination of the employment contract was probable.

65. What is essential in my view is that the Claimant was notified of the allegations she was to face at the disciplinary hearing and was afforded an opportunity to appear in person and render her explanation to the said allegations. That is the spirit of Section 41 of the Act.

66. To this end, the Respondent cannot be faulted as it complied with the basic requirements of a fair hearing as stipulated under Section 41 of the Act.

67. All in all, despite the Respondent complying with the requirements of a fair process, it has not proved that it was justified in terminating the Claimant's employment on account of performance and to that extent, the termination was substantively unfair.

Reliefs?

68. As the Court has found that the Claimant's termination was substantively unjustified, hence unfair and wrongful, she is awarded compensatory damages equivalent to three (3) months of her gross salary. This award has considered the length of the employment relationship which I note was considerably short, as well as the circumstances attendant to the Claimant's termination from employment.

Orders

69. It is against this background, that I enter Judgment in favour of the Claimant against the Respondent and she is awarded: -

- a. Compensatory damages in the sum of Kshs 1,050,000.00 being equivalent to three (3) months of her gross salary.
- b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.



c. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

.....

STELLA RUTTO

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Stella Rutto

Judge

