



**Keter v Unilever Tea Kenya Limited (Cause E007 of 2021)
[2022] KEELRC 1093 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1093 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E007 OF 2021
ON MAKAU, J
MAY 11, 2022**

BETWEEN

JULIUS KIPRUTO KETER CLAIMANT

AND

UNILEVER TEA KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 27th July, 2021 alleging that his employment had been terminated by the Respondent for no valid reason and without following a fair procedure. The suit seeks the following reliefs:
 - a. The termination of the Claimant from employment with the respondent was unfair, unprocedural and wrongful.
 - b. A declaration that the Claimant be forthwith reinstated as an employee of the respondent in the same position or similar capacity held prior to his termination without loss of his benefits.
 - c. Payment of arrears of terminal dues as particularized hereunder; -Leave pay for 15 days Kshs. 167,482.93. Leave pay erroneously deducted Kshs. 44,462.12. Annual bonus award-Kshs. 131,055.40 One-month salary in lieu of Notice- Kshs. 322,663.21. Total Amount due—Kshs. 665,664.38
 - d. Payment of salary in full from the date of dismissal until reinstatement/retirement.
 - e. Damages for unfair/wrongful and or unlawful termination.
 - f. General damages for psychological suffering.
 - g. Maximum of 12 months' compensation for wrongful termination of his employment.
 - h. Costs of claim.



2. The summary of the Claimant's case is that, he was employed by the Respondent vide the letter of appointment dated 20th December, 2018 to the position of Assistant Security Manager. His appointment was confirmed on the 3rd July, 2018.
3. On 9th September, 2020 he received a letter dated 9th August, 2020 signed by his Line Manager Mr. John Ogot, informing him of the Respondent's decision to put him on Performance Improvement Plan (PIP) for 3 months commencing on the 9th September, 2020 till 10th December, 2020. This plan was to be reviewed every month on the 13th October, 2020, 10th November, 2020 and 10th December, 2020 respectively.
4. The Claimant contends that the review meetings were not carried out as scheduled rather that they were haphazardly done on short notices on the 28th October, 2020, on 24th November, 2020 and 10th December, 2020. The final meeting was however rescheduled due to unpreparedness on the part of the Line Manager to 16th December, 2020.
5. The Claimant avers that he became unwell sometimes in October, 2020 and sought to utilize his balance of 2019 leave days. He commenced his leave on 18th October, 2020 to 22nd December, 2020. He then took his 2020 leave beginning 23rd December, 2020. The leave was to run for 30 days but he was recalled on 23rd January, 2021, leaving a balance of 5 leave days unutilized.
6. Subsequently, the final PIP review was carried out on 2nd February, 2021, but according to the Claimant the remarks by the Line Manager did not reflect a true position of his performance according to the key performance indicators (KPIs) of the PIP process. The Claimant avers that he rebutted the said results and the Respondent's Human Resource and Business Partner, Mercy Wanyonyi, directed the Claimant to share his final self-assessment on 3rd February, 2021 and his Line Manager to make comments on the Claimant's self-assessment on the 4th February, 2021. Thereafter the parties were to hold a final review meeting to verify the actual status of every target before ending the PIP process, however no further meeting was ever carried out.
7. On 23rd February, 2021, the Claimant received another letter from his line manager notifying him of a disciplinary inquiry scheduled for 2nd March, 2021. The letter was silent as to charges levelled against him and what was expected from the Claimant. On 2nd March, 2021 the Claimant appeared before the disciplinary inquiry panel which was made up of his Line manager (John Ogot), Human Resource and Business Partner (Mercy Wanyonyi) and Security manager (James Kimani). His line manager, John Ogot prosecuted the charges on behalf of the respondent. The panel then asked him several questions but did not ask his Line manager any question.
8. On 9th March, 2021 the Respondent terminated the Claimant's services on the basis of poor performance which letter was also signed by John Ogot, his Line manager and the witness in the performance inquiry.
9. The Claimant contends that the termination was unfair in the way in which the proceedings were conducted on the 2nd March, 2021. He further averred that the termination was pre-meditated because Mr. John Ogot, his Line Manager, signed the PIP letter one month before the decision to place him on performance improvement plan. The said manager became the prosecutor, witness and the judge for the Respondent throughout the PIP process, because Mr. Ogot was the one that signed the PIP letter, notification of disciplinary inquiry, prosecuted the case and signed the termination letter.
10. The Claimant also contended that he was not given an opportunity to call all his 13 witnesses who were ready to give testimonies. It is also contended that the Respondent took into consideration comments of persons who were not part of the process. He added that the PIP process was introduced out of



nowhere as the same is not provided in the Human Resource Manual. The Claimant then stated that the disciplinary inquiry was not preceded by any charges to enable him prepare for hearing.

11. The Claimant also stated that the performance indicators were biased as the Respondent capitalized on the issue that were beyond his control such as fencing which required capital allocation from the Respondent, yet he had performed well on other areas such as nyumbatanoinitiative that had been impended by Covid-19.
12. The Respondent entered appearance on the 17th September, 2021 and filed a response to claim on the 9th November, 2021, averring that the termination of the Claimant was based on sound ground after following due process.
13. It is stated that the Claimant was in charge of a sensitive department with a budget of close to half a billion Kenya Shillings and any laxity hadnegative ramification in the Respondent and its assets.
14. The Respondent avers that the Claimant performed dismally in the areas such as;poor weekly situational reports that lacked visibility and quality, failure to develop security alternative to minimize assaults and injuries to guards, failure to update a number of security PAR sites, limited cross functional engagement and reduction of Sex and Gender based violence (SGBV), failure to prepare control room manual, poor managerial skills, lack of coordination and implementation of fencing and lack of social transformation and failure to involve the stakeholders.
15. Due to the above lapses and owing to the sensitivity of the Claimant's department the Claimant was placed on a three (3) months Performance Improvement Plan with effect from 9th September, 2020 to 10th December, 2020. The respondent averred that the improvement plan was monitored by the Human Resource Department, the Security Department and the Top Management and not the Claimant's Line Manager as alleged.
16. The Respondent further averred that the Claimant was informed of the PerformanceImprovement Plan, his shortcomings, the process to be undertaken and key performance indicators and the target to be achieved by him. Among the key performance indicators were; timely and quality reporting, develop alternative security plan, update all PAR sites, conceptualization of key tasks, involve all stakeholders, map out and identify all high risk villages, coordinate and implement fencing of 20 villages and come up with customized control room manual. An agreement was then reached between the Claimant, the Chief Security Manager and Human Resource and Business Partneron how the said performance was to be measured.
17. The Respondent contended that the Claimant was taken through numerous coaching sessions, materials and guidance but he failed to make any improvement in his performance. As a result he was served with a disciplinary inquiry notice informinghim of the charges against him. He was then afforded an opportunity to defend himself before a disciplinary panel which was managed by independent people apart from the Claimant's Line Manager. The Claimantadmitted to having shortcomings both in the Performance Improve Plan process and in the disciplinary inquiry meeting. Therefore, the respondent maintained that the termination was fair because it was based on poor performance.
18. As regards terminal dues, the Respondent averred that it paid the Claimant his salary till the last day worked, two months' salary in lieu of notice, pro-ratapay for leave earned and not taken, and any monies owed to him. Further, it directed the Claimantto collect his pension from the Pension Fund office. He was then granted one-month notice to vacate the company's house.



19. The matter went to full hearing where both parties gave evidence and thereafter filed written submissions.

Evidence

20. The Claimant testified as CW-1 and adopted his witness statement dated 26.7.2021 as his evidence in chief. He also produced his bundle of 29 documents as Exhibits. He then added that his problems began on the 7th August, 2020 when he raised concerns that his Line Manager was not giving him an opportunity to express himself. The said concerns were not taken well by his line manager and from 8th August, 2020 he stopped picking his calls and whenever he picked, the Line Manager recorded him without his knowledge.
21. On 9th September, 2020 he held a monthly performance discussion with his Line Manager. The Human Resource & Business Partner, Ms. Mercy Wanyonyi, and the Security Manager Mr. James Kimani were in attendance. During the meeting, Ms Wanyonyi informed him that his Line Manager had raised concerns about his performance. He stated that on the 28th July, 2020 a verbal review had been carried out and his Line Manager had awarded him 85%. However, on 9th September, 2020 his performance was rated at 50% and that is when a decision was made to put him under Performance Improvement Plan.
22. He stated that during the PIP period, his performance was to be reviewed after at least 4 weeks however that the last meeting was done before the lapse of 4 weeks and he was ambushed. He also stated that on the said review his Line manager was dealing with matters which were not his duties. He told this Court that he objected to the performance evaluation given and instead demonstrated to the panel his achievements. He then did his own assessment on 3rd February 2020 as directed by the panel and sent to the Line Manager for comments and onward transmission to the directors for records. However, he never received any feedback from the Line Manager.
23. On the 23rd February, 2021 he received an email attaching the final Performance Improvement Report which was returned without signature. There was to be a meeting for review and signing. However, the intended review and signing was never done and as such the process was not completed. Instead he was summoned to a disciplinary inquiry meeting before panel comprising HR & Business Partner, Ms Mercy Wanyonyi, His Line Manager, John Okoth and Security Manager, James Kimani. He was told that the meeting was just a discussion to verify his views and the views of his Line Manager about the targets.
24. The Line Manager together with the Security Manager were asked to give their view of his performance in 2020 but they were neither asked questions by the panel nor was he given opportunity to cross examine them. However, when he made his presentation he was asked questions on every target and he demonstrated that he had achieved all his targets save for a few. He blamed the delay on the frustration by his Line Manager who did not want him to complete the PIP and achieve the targets on time.
25. The Claimant contended that the integrity of the inquiry was questionable observing that the transcript did not reflect what was discussed at the meeting. He maintained that the PIP was a retaliation against him by the Line Manager because of the concerns he raised on 7th August 2020. He maintained that the manager did not give him any support during the PIP.
26. After the inquiry, he received a dismissal letter dated 9th March 2021 signed by his Line Manager. He admitted payment of 2 months' salary in lieu of notice only but urged the court to grant the reliefs sought in his suit. He contended that he had 5 leave days for the year 2020 plus 10 days earned in year 2021. He contended that his terminal dues were deducted Kshs.44,000 as excess leave taken.



27. He also prayed for bonus of Kshs.131,055.40 for the year 2020 basing the claim on the letter by his Line Manager which was produced as exhibit 20. Finally he prayed for reinstatement contending that his dismissal was unfair and it had caused him to fall sick.
28. On cross examination by Muchella advocate, the witness admitted that he was a management staff and that his contract incorporated the HR Manual by dint of Clause 11 of the Appointment Letter. However, he could not remember being given any addendum to his contract by which the notice period before termination was reduced from 3 to 2months.
29. He contended that he was placed under the PIP after his self-assessment but before any evaluation between him and the line manager. He further stated that the PIP document was never given to him fully and that he only saw the same during the evaluation. He stated that he was taken through the PIP document briefly but he never protested that he did not understand. He further admitted that he was being advised in every step except the issue of the meeting with the Managing Director which never took place.
30. He contended that during the review of 24th November,2020, he was told that the next review was to be done after four weeks. He further stated that he has produced correspondences to prove that he had protested to the HR & Business Partner about the rescheduling of the review meetings without sufficient notice. He contended that even his Line manager was not ready for the third meeting on 10th December,2020 and as such the meeting was rescheduled.
31. He stated that he attended the disciplinary hearing with 13 witnesses but he was not given an opportunity to call them to testify. After the termination he never appealed because in his view the matter was outside disciplinary process. However, he admitted that during the initial meeting he was told that the possible outcomes of the PIP was dismissal, demotion or transfer.
32. He maintained that he was not paid for 5 leave days for 2020 and 10 days for 2021. He contended that he was to be paid bonus together with the salary for March 2021. He stated that the company had the practice of paying bonus in March. He explained that the bonus was declared by the management and it was recommended by his Line manager due to his good work. However, he contended that his Line manager recommended for his PIP because he was hell-bent to see his exit.
33. The Respondent lined up two witnesses.BeatriceBett who is the respondent's Human Resource and Business partner testified as RW-1and adopted her witness statement dated 12th January,2022. She also produced 8 documents in the list of even date. In brief she stated that the Claimant was dismissed for failing to perform upto par. He testified that the letter dated 9/8/ 2020 placed the Claimant under PIP. She contended that the letter was computer generated and therefore the date was erroneous.
34. He contended that the Claimant was taken through the work plan and all that which was expected of him during the PIP. There were also coaching sessions and four review were done; the first on 11th November, 2020, 24th November, 2020, 10th December, 2020 and the last one on 2nd February, 2021. The reviews were done to assess the Claimant's performance however, the Claimant at all review points had failed to meet his target and he was dismissed.
35. She also stated that the Claimant went on leave during the PIP and when he returned, he failed to fulfil all the performance targets. As a result he was served with a notice to attend disciplinary hearing on 2nd March 2021 and he attended with a representative. Thereafter he was dismissed by the letter dated 9th March 2021. She stated that the possible outcomes of PIP is termination, demotion or continuation. She contended that termination occurs if the employee fails to achieve targets like in this case.



36. The witness further testified that the Claimant had overdrawn his leave days and the system indicated 4 leave days. On the claim for bonus pay, she stated that the same was at the discretionary of the Respondent and based on good performance. In this case, she contended that the Claimant was not entitled to any bonus because of his poor performance.
37. On cross examination by Sambu Advocate, RW-1 stated that the Claimant joined the Respondent in the January 2019 and his performance dwindled in 2020 because he failed to meet most of his targets. She stated that job evaluations are done quarterly by the line managers and if performance of any employee is wanting, then they are placed under PIP.
38. She stated that when an employee fails to meet targets, the line manager highlights the same to the HR and a decision is made by a panel to place the employee to PIP. Such decision cannot be made by one person. She referred to the minutes dated 9th September, 2020 by which the Claimant was placed under PIP by a panel.
39. He maintained that the Claimant had exhausted his leave days since he carried forward 10 days from 2020 and utilized 19 days for 2021 instead of 15 days therefore being in excess of 4 leave days.
40. The respondent's Head of Security, James Kimani, testified as RW-2 and he also adopted his witness statement dated 12th January, 2022 as his evidence in chief. In addition, he stated that the Claimant was placed on PIP for three reasons including; timely delivery of the key performance objective in the first 6 months of 2020, standard of leadership that is, collaboration with director and other department, and quality of work. He denied that the Claimant was victimized by the line manager.
41. He testified that the Claimant was made aware of these issues by his line manager but most of the issues which were to be used to assess his performance were not complete at the end of the PIP. The incomplete issues included; coordination and implantation of security fencing at the villages, the Control Room Manual, implementation of alternative security operation plan for mitigating against physical assault on security officers in Kericho and nyumbatanosecurity in the villages to check on burglaries in the villages.
42. He contended that the purpose of a PIP is to place the employee on a path with focus to achieve targets and improve on his leadership qualities. The employee undergoes monthly coaching and monthly reviews. He contended that the Claimant was placed under PIP with the aim of improving his performance while supporting the business.
43. On cross examination by Sambu Advocate, the witness testified that the Claimant was to carry out fencing using poles which were available but the wire was to be purchased upon the Claimant liaising with the procurement and finance. He maintained that the Claimant managed to fence only 7 out of 20 villages and prepared the control room manual. The witness also admitted that the nyumbatanoinitiative had been affected by covid-19 pandemic in early 2020 but contended that assessment in late 2020 showed no improvement.
44. He further admitted that during the disciplinary inquiry, the Claimant and his line manger gave contradictory submissions prompting the panel to grant them more time to align their submissions. He maintained that before an employee is placed on PIP, Heads of departments meet and evaluated their performance. He added that the recommendation to place the Claimant on PIP was not done by Mercy Wanyonyi alone.
45. On re-examination, Rw2 contended that the control room manual prepared by the Claimant was cut and paste from Nairobi office which was not applicable in Kericho.



Claimant's Submissions

46. The Claimant submitted that his termination was unfair for want of valid reason and fair procedure. He argued that before an employee is terminated on poor performance, his performance must be measured to find out whether it was below the expectation of the employer, then the employee is placed on performance improvement plan and if no improvement then termination can be considered. In support of his argument the Claimant relied on the case of *National Bank of Kenya V Samuel Nguru Mutonya* [2019] eKLR.
47. In the instant case, the Claimant submits that he was not properly evaluated before being placed on performance improvement plan. He further argues that his assessment was signed on 17th November, 2020 after he had been placed into Performance Improvement Plan and therefore his placement on PIP cannot be said to be based on poor performance.
48. He further argues that there was no proper system of evaluation at the Respondent and clause 18.2.3 of the Policy Manual was not well elaborated to inform how the said evaluation was to be carried out.
49. On whether there was procedural fairness, the Claimant argued that the PIP process took longer than anticipated and that it never adhered to the set timelines. He argued that the process was successful during the first two reviews however the last review was postponed due to Line manager's unpreparedness. He also argued that the final review was to be done in presence of the Managing Director and the Security Director Africa but the said meeting was never held. Instead the matter escalated to disciplinary process without completing the PIP process.
50. The Claimant contended that the Notice for disciplinary inquiry never indicated the specific charges against the Claimant neither did it give the particular areas where the Claimant had performed poorly. Therefore, it was difficult for the Claimant to prepare properly for the inquiry.
51. It was submitted that as much as the Respondent alleged that the PIP process was not a disciplinary tool, the same was used to the contrary in that the Respondent had made a note in the final Performance Improvement plan suggesting termination of the Claimant when the said process was ostensibly aimed at improving the Claimant performance as envisaged under the law.
52. The Claimant also took issue with the fact that his Line manager signed all the documents leading to his placement to PIP and the subsequent termination. Consequently, he argued that the terminated was orchestrated by his Line manager who acted as the complainant, the witness, the prosecutor and the judge.

Respondent's Submissions

53. The Respondent on the other hand submitted that the Claimant was dismissed for a valid and fair reason. It was argued that before the dismissal, his performance was assessed in the first quarter and gaps were noted prompting the Respondent to place the Claimant on performance improvement plan in line with clause 18.4.1 of the Human Resource Policy Manual. The respondent denied that the PIP was prematurely imposed before assessment of his performance and submitted that the Claimant admitted during cross examination that he did his self-assessment and thereafter held a meeting with his Line manager dubbed Future Fit before the next meeting held on 9th September, 2020 where his performance was also discussed.
54. It was argued that the Claimant performed badly even after being placed under Performance Improvement plan and he even admitted in evidence before this court that he had performance gaps. Therefore the respondent submits that the termination on account of poor performance was justified



and fair. In support of the foregoing argument the Respondent relied on the case of *Jane Samba Mukala v OlTukai Lodge Limited* [2013] eKLR where the court considered poor performance as a basis for termination.

55. As regards the remedies sought, the Respondent submitted that the Claimant is not entitled to any contending that he has failed to prove that the termination was unfair. Furthermore the respondent submitted there are no exceptional circumstances demonstrated to warrant the reinstatement sought. For emphasis, it relied on the case of *Co-operative Bank of Kenya Ltd V Banking Insurance & Finance Union* [2016] eKLR.
56. As regards the prayer for leave days, the Respondent submitted that the Claimant had utilized more than the days he was entitled to for the year 2021 and his leave balance was in the negative. On the Bonus sought it was argued that once an employee was placed on performance improvement plan, then he was automatically removed from the Bonus scheme.

Analysis and Determination.

57. I have carefully considered the pleadings, evidence and the submission presented by both parties. There is no dispute that the Claimant was employed by the respondent as Assistant Security Manager vide the letter dated 20th December, 2018 and worked until 9th March 2021 when his services were terminated on account of poor performance. The issues for determination in this matter are as follows: -
- a. Whether the termination was grounded on a valid and fair reason.
 - b. Whether fair procedure was followed.
 - c. Whether the reliefs sought should be granted.

Reason for the termination

58. Section 45(1) and (2) of the *Employment Act* makes the following provisions concerning unfair termination of employment—

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer 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 employee’s conduct, capacity and compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

59. The above provisions of the law have been reinforced by case law including the case of *Walter Ogal Anuro –v- Teachers Service Commission* (2013) eKLR where the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment



of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

60. In the Court of Appeal case of Pius *Machafu Isindu vs. Lavington Security Guards Limited* [2017] eKLR the Court of Appeal stated as follows;

“There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination / dismissal (Section 43); prove reasons are valid and fair (Section 45)... among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”

61. The reason advanced by the Respondent for terminating the Claimant’s employment was poor performance. The Court of Appeal in *National Bank of Kenya vs. Anthony Njue John* [2019] eKLR cited the case of *Jane Samba Mukala v Ol Tukai Lodge*, Supra, on dealing with the issue of termination on account of poor performance and 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.”

62. In this case the Claimant was terminated for poor performance. The Respondent argued that an assessment was carried out on the the Claimant’s mid-year performance and the same were shown to have dwindled. The Claimant’s Line Manager, as empowered under the Respondents Human resource policy manual, raised the concern with the Human Resource Business partner and a Performance Improvement plan was set up.

63. The Claimant denied that he was assessed before being put on PIP. However, during cross examination, he admitted to carrying out self-assessment in July, 2020 followed by an oral evaluation by the Line Manager on 28th July, 2020. He further admitted to holding another meeting with the Line Manager on 7th August 2020 to discuss ‘Future Fit’ in which there was some disagreement. Both parties alluded to



- two assessments that were normally done mid-year and the end of the year, demonstrating that indeed there were assessment measures put in place by the Respondent before placing the Claimant under PIP.
64. The placing of the Claimant on Performance Improvement plan was communicated to him vide the letter dated 9th September, 2020. There were 9 areas that needed improvement as captured by the Respondent in his response to claim at paragraph 11. These areas of improvement were not challenged by the Claimant. When the Claimant was placed in the said Improvement plan the Respondent put in place measures to assist the Claimant him in improving performance. It was stated that the Claimant was coached on various areas, taken for bench making on the development of the Control room manual and even advised on how to approach his senior in order to make his work easier.
 65. The Claimant on the hand argued that he faced several challenges in meeting his target including the fact that his Line manager was not picking his calls. The Line Manager was also not supporting him complete the PIP successfully but was hell-bent to have him exit the company. Further there was delay by the procurement in purchasing fencing material. Besides he tried addressing these issues to no avail, as evidenced by the emails and text messages exchanged between him and to Mercy Wanyonyi, which were produced as exhibits herein.
 66. From the facts of this case, it is true that there are areas that the Claimant performed poorly. It is also true that when he was placed under performance improvement plan he tried his best and as admitted by his line manager, an improvement was noted in the 1st and 2nd Review though not to the satisfaction of the Respondent.
 67. During the final review of the PIP process the meeting was adjourned on account that the Line manager had not carried out his review on the Claimant's performance. The adjourned was later marred with challenges when the Claimant fell ill and took leave which run up to January, 2021.
 68. The Claimant's final assessment was then carried out on 2nd February, 2021 to basically allow the Line Manager give comments on the self-assessment done by the Claimant in December, 2020. The Line Manager indicated that only one task had been achieved fully, two partially achieved which were rated 40% and two not achieved at all. However, Claimant raised objection on the Line Manager's rating and on the contrary he indicated that he fully achieved all the tasks save for then Fencing and guard house which were curtailed by funds. Due to that discrepancy the Claimant and the line manager were given more time to align their assessment and the final report was to be served upon the Claimant.
 69. From the record, there is nothing to show that the respondent got back to the Claimant with the final report on the PIP process. There is however evidence that the report was given to the respondent's Directors and the recommended for a separation. The Claimant was then served with Disciplinary Inquiry Notice dated 23rd February, 2021 for the hearing on the 2nd March, 2021 that led to termination on account of poor performance and insubordination vide the letter dated 9th March 2021.
 70. In cases of poor performance like in this case, all an employer has to prove is that the employee was aware of the applicable standards of performance and efforts were put in place to support the employee with time to allow for improvements. It is not in doubt that the Claimant was aware of the applicable standard, it is also not in dispute that the Claimant was to some extent supported by his Line Manager through coaching in creating alternative security plans and preparing the control Room manual.
 71. However, the court has noted from the record, the emails and text messages exchanged between the Claimant and the respondent's HR and Business Partner in which the Claimant was complaining about lack of support from the Line manager. The line manager did not give evidence to rebut the allegation by the Claimant that they had differed during the meeting of 7th August 2020 and that he failed to give the necessary support during the PIP process. The purpose of placing an employee under



PIP is meant to yield improved performance through support and guidance by the supervisor. It is not a process of exit from employment at the whim of the supervisor. The employee must demonstrate good faith and genuine support.

72. I must agree with the Claimant that he performed well during the 1st and 2nd review but thereafter, the line manager abandoned him. He was therefore not for the successful completion of the Claimant's PIP but rather hell-bent to see him fired. It is not enough to place an employee under a PIP, the employer must prove by evidence that the employee was afforded all the necessary support but still failed to achieve the set performance targets. Consequently, I find and hold that the respondent has failed to prove that the reason for terminating the Claimant's employment was valid and fair as required by section 43 and 45 of the *Employment Act*.

Procedure Followed

73. Section 41 of the *Employment Act* provides for mandatory procedure which an employer must follow before terminating employment contract of an employee, thus: -

- “(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 shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

74. The Court of Appeal upheld the above provision in the case of *Kenfreight (EA) Limited V. Benson K. Nguti* [2016] eKLR, when it held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that the reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

75. Section 41 above presupposes that poor performance is a valid and fair reason for dismissing employee. Consequently, once an employer is satisfied, that an employee's performance is below par, the employer must comply with the mandatory procedure set out under section 41. Failure to do so entitles the employee to sue for unfair termination.



76. In this case, there is evidence that the directors considered the performance report of the Claimant and made recommendation that the Claimant's services be terminated. It is admitted that the Claimant was served with a letter inviting him to disciplinary inquiry and he attended. He was accorded the right of being accompanied by a fellow employee of his choice and call witnesses. He gave his evidence before the Panel in his defence. Although he alleged that he had 13 witnesses who were denied audience, the court wonders why he did not even call them before this court.
77. It is clear from the evidence that the Claimant was informed of the charges before him and he defended himself in the presence of his colleagues. He was also given right of appeal but he declined. Consequently, I find and hold that the respondent has proved on a balance of probability that the termination was done in accordance with a fair procedure.

Reliefs sought

78. In view of the finding that the respondent has failed to prove a valid and fair reason for terminating Claimant's employment, I hereby declare that the termination was unfair and wrongful.
79. The Claimant sought to be reinstated to employment. The Respondent on the other hand opposed the reinstatement and argued that the Claimant has not demonstrated any special circumstances to warrant his reinstatement as was held in the case of *Co-operative Bank of Kenya Ltd V Banking Insurance & Finance Union* [2016] eKLR, thus: -

“Our understanding of the Act is that the prescribed remedies, including reinstatement are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word “may”, which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies, including reinstatement are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his losses, ...”

80. I agree with the Respondent that the Claimant has not pleaded any special circumstances that would warrant his reinstatement. I therefore decline the prayer for reinstatement.
81. The Claimant further sought for 15 leave days not utilized but he tendered evidence to the contrary which in fact show that he had used in excess of 4 leave days. In light of the evidence before this Court demonstrating that the Claimant had indeed utilized his leave days, I decline the prayer for leave days' pay.
82. The Claimant stated that he was entitled to bonus pay as per the Bonus Award and annual increment notice addressed to him by his Line Manager John Ogot. The respondent, on the other hand, stated that the Claimant was not entitled to any bonus as he was under Performance Improvement Plan. The last paragraph of the letter placing the Claimant to PIP indicated expressly that the Claimant was not



entitled to Bonus award for the year 2020 during the period he was under Performance improvement plan. On that basis I decline the Bonus award sought.

83. On the prayer for one-month salary in lieu of Notice, it was argued by the Respondent that there was an addendum to the effect that the Notice period was reduced to 2 months from the 3 months indicated in the Appointment letter. The Claimant denied knowledge of the addendum though he admitted receipt of 2 months' salary in lieu of Notice. The Claimant's appointment letter provides for 3 months' Notice. Since he was paid for 2 months I will award the Claimant One-month Notice in lieu to add upto the three as provided under the Appointment letter.
84. Having found the termination to be unfair, I will award the Claimant 3-month salary as compensation for the unfair termination considering his short period of service.
85. The prayer for payment of salary till retirement and the prayer for general damages are dismissed for lacking basis in law.
86. In conclusion I enter judgment for the Claimant in the following terms:
Notice Kshs. 322,663.21
Compensation Kshs. 967,989.63
Total Kshs. 1,290,652.84
87. The above award is subject to statutory deductions but the Claimant is awarded costs and interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF MAY, 2022.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

