



**Munyi v Hasbah Kenya Limited (Cause 764 of 2016)
[2022] KEELRC 1446 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1446 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 764 OF 2016
SC RUTTO, J
AUGUST 5, 2022**

BETWEEN

JANET NJERI MUNYI CLAIMANT

AND

HASBAH KENYA LIMITED RESPONDENT

JUDGMENT

1. It is not disputed that the employment relationship herein commenced on 13th May, 2014. According to the claimant, she was unfairly terminated by the respondent vide a letter dated 31st December, 2015 and which she avers, was delivered to her on 6th January, 2016. She avers that her termination was unfair, illegal and contrary to her contract of employment, *Employment Act* and rules of natural justice. She states that all her efforts to discuss her performance improvement plan with her immediate supervisor were rebuffed. She further states that she was not afforded the opportunity to appear and be heard by the respondent prior to her termination. It is on this account that she claims the sum of Kshs 836,000.00 being unpaid salary, notice pay, compensatory damages and unpaid leave days.
2. The respondent challenged the claim through its response filed on 21st July, 2016 and through which it avers that the claimant's termination was fair, legal and in accordance with her employment contract. That there were several warnings to the claimant including being placed under a performance improvement plan. Consequently, the respondent avers that the claimant is not entitled to the prayers sought hence it called for the dismissal of the claim with costs.
3. The matter proceeded for part hearing on 8th November, 2021 and later on 21st March, 2022, when the respondent closed its case. During the trial, each side presented oral evidence through one witness respectively.



Claimant's Case

4. The claimant testified in support of her case and at the commencement of the hearing, sought to adopt her witness statement, memorandum of claim and bundle of documents to constitute her evidence in chief. She also produced the said documents as her exhibits before Court.
5. In her evidence, the claimant stated that she worked until 6th January, 2016 when she was served with her letter of termination by the respondent's human resource assistant. She stated that as per her contract of employment, she was to be issued with a notice and warning prior to her termination. She further stated that she was hitting her targets at the time. That her performance was not assessed due to pressures at work and her supervisor advised her to proceed with her duties. That she made several attempts to discuss her performance improvement plan with her immediate supervisor but her efforts were rebuffed and did not materialise on account of her supervisor being "busy". She asked the Court to allow her claim.

Respondent's case

6. The respondent called oral evidence through its Operations Manager Mr. Abubakar Hassan Salim, who testified as RW1. At the outset, he also adopted his witness statement to constitute his evidence in chief.
7. RW1 stated that the claimant undertook her duties with much difficulty and/or always underwhelmingly performed the duties assigned to her below her employer's expectations. That in the spirit of good faith, and desire to help the claimant improve her work performance, the respondent opted to put her on a Performance Improvement Plan (PIP) for seven (7) months. That according to the confidential letter of 18th May, 2015, the objective of the PIP was to define the serious areas of concern, gaps in the claimant's performance, reiterate the respondent's expectations and allow the claimant opportunity to demonstrate improvement and commitment. That the said letter highlighted the following areas of concern; failure to implement JBPs as required, lack of the right SOS in stores, failure to know the customers on a month to month basis, lack of proper planning and focus and lack of confidence in her work. That the claimant accepted the contents of the letter by appending her signature.
8. That the claimant's performance continued to deteriorate showing laxity from her side and unwillingness to take her work seriously. That in the circumstances, the respondent had no option but to terminate her employment. That the claimant was informed that upon her clearance, her final dues if any, will be calculated and paid to her accordingly. That further, the respondent afforded the claimant opportunity to be heard on several occasions.

Submissions

9. The claimant contends that the respondent failed to follow the procedure laid out under section 41 of the *Employment Act*. That the respondent did not make any effort to review her performance after the issuance of the PIP. That the PIP and the alleged verbal warnings issued to the claimant did not constitute a notice or a hearing. To buttress its submissions, the claimant placed reliance on the findings in the case of *National Bank of Kenya vs Samule Nguru Mutonya* (2019) eKLR and *Everlyne Lynn Kagendo vs Statpack Industries Limited* (2013) eKLR. The claimant further submitted that failure by the respondent to hold a hearing denied her an opportunity to gain proper understanding of the cause of her termination and also failed to show that her performance was indeed poor after the issuance of the PIP. The case of *Simon Mbugua vs Ridhika Capital Limited* (2021) eKLR was cited in support of this position.



10. On the other hand, the respondent submitted that the claimant's termination was justified and lawful. That further, the claimant's witness statement was unsigned hence ought to be struck out together with her testimony based on the said witness statement. It was further submitted by the respondent that her continual and persistent poor performance had fundamentally breached her obligations under her contract of employment. It was further submitted that the claimant's termination met the requirements of section 45 of the *Employment Act* owing to her incapacity to perform her work as required. The respondent cited several authorities in support of its submissions including *Samson Kabuthiuri vs Ethics and Anticorruption Commission & 5 others* (2021) eKLR, *Ezekiel & Fisheries Research Institute* (2016) eKLR and *Kenfreight (EA) Limited vs Benson K. Nguti* (2019) eKLR.

Analysis and determination

11. Flowing from the pleadings on record, the documentary and oral evidence presented as well as the opposing submissions, it is clear that the court is being called to resolve the following questions: -
- i. Whether there was a justifiable reason to terminate the employment of the claimant?
 - ii. Whether the claimant was afforded procedural fairness prior to termination?
 - iii. Is the claimant entitled to the reliefs sought?
12. Before I delve into the issues isolated for determination, it is imperative to address an issue raised by the respondent in its submissions, to the effect that the claimant's witness statement was not signed hence should be struck out together with her entire evidence. With due respect, I find this to be a non-issue since the claimant adopted and relied not only on her witness statement but also on her Memorandum of Claim and documents filed, to constitute her evidence in chief. She further rendered sworn oral evidence before court. As such, her testimony is well on record and cannot be vitiated by failure to sign the witness statement.
13. That said, I now move to consider the issues for determination.
- Whether there was justifiable reason to terminate the services of the claimant?
14. The starting point in the determination of this issue is section 43(1) of the *Employment Act* (Act) which requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. In addition, section 45 (2) (a) and (b) of the Act 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; ...
15. The significance of the provisions of section 45 (2) (a) and (b) is that the reason for termination must pass the "fairness and "validity" test. Consequently, over and above proving existence of reasons to justify termination, an employer is required to prove that the said reasons were fair and valid.
16. Back to the case herein, it is apparent that the claimant was terminated on grounds related to her performance as can be discerned from her letter of termination which reads in part as follows: -

“RE: Termination of Services



For the past several months, your performance has been deteriorating despite guidance from your managers.

It is pointed out that you have no remarkable improvement in your performance regardless of being put on performance improvement plan (PIP) for the last seven months by the management. This show of laxity from your side depicts that you do not your work seriously.

In this regard, we regret to inform you that your services with Hasbah Kenya Limited will no longer be required. Therefore, your last working day with us will be on December 31 2015...”

17. As indicated in her letter of termination, the claimant had been placed on a Performance Improvement Plan (PIP) in the period leading upto her termination. The PIP process was communicated to the claimant through a letter dated May 18, 2015. Through the said PIP letter, the respondent set out areas of concern in the claimant’s performance and the improvement goals as well as the activity goals. In addition, the resources, expectations, support system and follow up updates were also provided for under the said letter. It was provided in part: -

“Effective immediately, you are placed on a 60-day PIP. During this time your performance will be reviewed periodically with your manger to ensure you are on track...we will meet gain on (sic) as noted above to discuss your performance improvement plan. Please schedule accordingly.

18. It is not clear what happened after the end of the 60 days period. As per the PIP letter, the respondent through the claimant’s immediate supervisor, was to review her performance systematically with the focus being on the areas highlighted. Further, it is instructive to note that the claimant was to be given support by her manager. The PIP letter provides as follows in this regard: -

“Support: listed below are ways in which your manger will support your improvement activities.

1. Training in class and in trade;
2. Planning and preparation.”

19. From the record, there is no evidence or indication from the respondent’s end to suggest that the claimant was accorded the necessary support by her supervisor as stated in the PIP letter.
20. There is further no proof that there was follow-up of the claimant’s performance by her immediate supervisor/manager as per the PIP letter.
21. It is also notable that the PIP was to be reviewed after the initial 30 days and thereafter after the end of 60 days. Nonetheless, there is no evidence that the respondent reviewed the claimant’s performance as required and gave her feedback on the same.
22. It bears to note at this juncture that the real reason for the claimant’s termination was that she had no remarkable improvement in her performance regardless of being put on PIP for seven (7) months.
23. Without any evidence of review of the claimant’s performance, one wonders how the respondent was in a position to establish that she had not made any improvement after the PIP process. Besides, this was after a lapse of almost seven (7) months while the PIP was for 60 days or in other words, two (2) months. How was the claimant’s performance being evaluated during this period?



24. It is the claimant's case that upon being placed on the PIP, she made attempts to discuss her performance with her immediate supervisor but was rebuffed on account that he was "busy". As it is, the respondent did not prove that the claimant's performance was reviewed as scheduled. Over and above, it was the respondent's initiative to place the claimant on PIP hence it was incumbent upon it to put in motion her appraisal process during this period. It was therefore erroneous for the respondent to place the burden of planning for the review appraisals, on the claimant.
25. In light of the foregoing, it is evident that the respondent failed to keep its end of the bargain by providing the claimant with the necessary support and reviewing her performance so as to track her performance. Indeed, it can be said that at the end of the day, the claimant could not tell if at all her performance had improved or not.
26. It was of no use if not ingenuine, for the respondent to place the claimant on PIP and later keep away from the process then purport to terminate her employment on account that she had not made any improvement in her performance.
27. The total sum of the foregoing is 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 as required under sections 43(1) and 45(2) (a) and (b) of the *Employment Act*. To this end, her termination was not substantively fair.

Whether the claimant was subjected to a fair process?

28. Pursuant to section 45 (2) (c) of the *Employment Act*, an employer is required to comply with the provisions of fair process and prove that it accorded an employee a fair hearing. The specific requirements of a fair hearing are provided for under section 41 of the Act which is in the following manner: -
 - (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.
 - (2) Notwithstanding any other provision 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."
29. The claimant avers that she was not afforded an opportunity to be heard prior to her termination. The respondent disagrees and states that it gave the claimant warnings and an opportunity to be heard including through the PIP process.
30. It bears to note that the notice contemplated under section 41(1) of the Act is one that is explicit and which clearly notifies an employee that the employer is considering terminating his or her employment, on account of the specified reasons.
31. By all means, a warning letter, which any event was not produced in Court, and a PIP process does not fit the notice contemplated under section 41(1) of the Act. It does not and cannot suffice in the circumstances.



32. A PIP is merely meant to put on an employee's performance back on track. It is only upon such an employee failing to meet the identified objectives/targets upon evaluation, that the process of termination can be commenced pursuant to section 41.
33. I must emphasize that a notice contemplated under section 41 (1) of the Act ought to be express and acts as a signal to an employee that all is not well in the employment relationship for one reason or the other, hence requiring him or her to respond explaining why his or her employment should not be terminated.
34. In the instant case, there is no evidence that the claimant was asked to explain why her termination should not be effected based on poor performance.
35. Further, it was mandatory to require the claimant to defend her performance either in writing or verbally in a disciplinary hearing. This was not done. The PIP process was not an end in itself and it was necessary to further subject the claimant to the process contemplated under section 41 of the Act. Anything short of that process, fell below the legal parameters established under sections 45 (2) (c) and 41 of the *Employment Act*.
36. On this score, I will draw guidance from the determination by the Court of Appeal in the case of *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR held where it was held as follows: -
- “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.”
37. And also, in the case of *Naumy Jemutai Kirui vs Unilever Tea Kenya Limited* [2020] eKLR the Court stated as follows: -
- “Before the employer can be found to reply on the provisions of section 43(2) with regard to solely relying on having genuine reasons existing to justify termination of employment, the due process of the law dictates that the employee must be notified of her poor performance



as an issue forming the basis of reasons for which the employer is considering termination of employment and thus allow the employee to give her defences in the presence of another employee of choice.

Upon the end of the PIP process, the employer must invoke the law by allowing the employee an internal process to address poor performance before termination of employment as the PIP contextualised is meant to give support to the employee to ensure work improvement. The PIP as a tool is not part of the disciplinary process.”

38. Based on the above determinations which I adopt and reiterate, I arrive at the conclusion that the respondent has failed to prove that the claimant was subjected to a fair process prior to termination of her employment.
39. In the circumstances, I cannot help but find that the claimant’s termination was procedurally unfair within the meaning of section 45 (2) (c) and 41 of the Act.
40. To this end, the claimant’s termination was neither fair nor lawful hence was unjustified.

Is the Claimant is entitled to the reliefs sought?

41. As the court has found that the claimant’s termination was substantively and procedurally unjustified, hence unfair and unlawful, she is awarded compensatory damages equivalent to six (6) months of her net salary.
42. The claimant is also entitled to one (1) months’ salary in lieu of notice as per her contract of employment.
43. The claim for salary for the days worked in January, 2015 also succeed as the respondent did not dispute the claimant’s assertion that she was at work during that period.

Orders

44. Against this background, I enter Judgment in favour of the claimant against the respondent and she is awarded: -
 - a. Compensatory damages in the sum of Kshs 360,000.00 being equivalent to six (6) months gross salary.
 - b. One month’s salary in lieu of notice being Kshs 60,000.00.
 - c. Salary for 6 days in January, 2016 being Kshs 12,000.00.
 - d. The total award is Kshs 432,000.00
 - e. Interest on the amount in (d) at court rates from the date of Judgement till payment in full.
 - f. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF AUGUST, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Nderitu



For the Respondent Mr. Oriwa

Court Assistant Abdimalik Hussein

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

