



Pius v Reckitt Benckiser Services Kenya Limited (Employment and Labour Relations Cause 937 of 2016) [2022] KEELRC 13160 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13160 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 937 OF 2016**

**K OCHARO, J
OCTOBER 31, 2022**

BETWEEN

APPHONCE KATUA PIUS CLAIMANT

AND

RECKITT BENCKISER SERVICES KENYA LIMITED RESPONDENT

JUDGMENT

1. By a memorandum of claim dated the May 17, 2016, the Claimant sued the Respondent for the following orders and reliefs:
 - i. A declaration that the Claimant's termination was unfair and unlawful;
 - ii. A declaration that the Claimant's right to Fair Labour Practices was violated by the Respondent;
 - iii. An order for compensation to the Claimant for unlawful termination amounting to 12 months' gross salary;
 - iv. An order for compensation under Article 23 of the *Constitution* for violation of the Claimant's right to Fair Labour Practices and reasonable working conditions;
 - v. An order for interest on [iii], [iv] & [v] at Courts rates from date of filing the claim until full payment.
2. Upon being served with summons to enter appearance, the Respondent did enter the appearance, and filed a memorandum of reply on the June 8, 2016, dated the even date.
3. At the close of pleadings, the matter got destined for hearing inter partes on merit. The Claimant's case was heard on the October 21, 2021, while the Respondent's on March 28, 2022.



4. All the full hearing of the parties on their respective cases this Court directed the filing of written submissions within specific timelines, directions which were complied with.

The Claimant's Case

5. At the hearing of the case, the Claimant urged this Court to adopt his witness statement dated May 17, 2016, as part of his evidence in chief, and admit the documents that he had filed under his list of documents of the even date, and the further list of documents dated July 29, 2016, as his documentary evidence. He then briefly testified orally in clarification of matters on the statement and the documents that he deemed necessary to, before he was cross-examined by Counsel for the Respondent.
6. The Claimant stated that at all material times he was an employee of the Respondent Company, a company duly registered under the Laws of Kenya and which carries business within the Republic.
7. He further stated that the Respondent Company also offers commercial services for the entire East Africa business services, Reckitt Benckiser Arabia Kenya Exports Fze [RB Arabia] a company registered in the United Arab Emirates [UAE] Dubai.
8. The Claimant testified that he came into the employment of the Respondent as Head of Supply East Africa, through a letter of offer of employment dated December 22, 2008. As at the time of employment, the Respondent was known as Reckitt Benckiser East Africa Limited. He was later confirmed into employment through the letter dated April 30, 2009.
9. He served the Respondent diligently and to the best of his abilities, and when the Respondent changed its name as afore indicated, his contract of service became encapsulated under the letter of employment dated December 16, 2011. His monthly salary was set at Kshs 787,731.00
10. The Claimant asserted that his performance was satisfactory, and that the same was reviewed positively every year by the Respondent, with a result of annual salary increments and rewards, thus:
 - i. In April 2010, he was awarded cash for contributing toward the Respondent achieving its Top Line and Company Operating Profit [COP] growth in 2009.
 - ii. In January 2011, the Respondent rewarded him with a salary increment for excellent performance in year 2010 which resulted in an outstanding revenue growth for Respondent.
 - iii. In 2012, his performance for 2011 was reviewed favourably and a salary increment resulted.
 - iv. In the year 2013, he was appraised satisfactorily, and upon basis of that his salary was increased.
 - v. In 2014, the Respondent recognised and appreciated his contributions to the business during the year 2013 and rewarded him with an increment in salary and other benefits, through a letter dated January 27, 2014.
 - vi. Through a letter dated January 7, 2015, the Respondent appreciated his contribution in the year 2014 and rewarded him.
11. The Claimant contended that during the normal performance reviews and appraisal sessions which were biannual, the Respondent, through his direct manager, one Bernardo Machado, never at any time identified or pointed out any weak areas in his performance which required improvement on his part.
12. He contended that when the time of appraising him came, the line manager never uploaded and shared his comments online regarding his performance as was required under the Respondent's online system, Performance Development Review [POR] Portal.



13. In the month of August 2015, the Claimant was startled when all over sudden, the Respondent took the position that his performance was poor and that he had to be put on a Performance Improvement Plan [PIP].
14. The purported [PIP] was to last for a very short period; 3 months without a possibility for extension. During this period, he was expected to turn the poor performance into excellent performance, in default a termination of his employment was to ensue.
15. He asserted that it surprised him that the Respondent which had a proper and predictable mechanism for appraisals and review of performance had decided to ignore the same and resort to a purported PIP despite the fact that not a single case of poor performance on his part had ever been noted during all the previous reviews.
16. The Respondent had an online based system for Performance Review and Appraisals, Performance and Development Review [PDR] Portal. Through this system the employee would rate his own performance against the set targets and give his comments then her or his direct manager would also rate and give his comments and feedback. It is after the direct manager gives and shows his comments and feedback that the employee being appraised gets to know the areas in which he needs to improve in or keep up.
17. That despite rating himself and sharing his comments through the system, the direct manager never gave and shared his comments or ratings of him online as was required. It is this, that informs his position that the sudden introduction of the PIP was prompted by malice and bad faith.
18. The malice and bad faith against him were fuelled by his persistent pieces of advice and complaints that he raised both formally and verbally against the Respondent's unlawful and bad corporate governance practices which were calculated to lead to tax evasion. This is exhibitable by the numerous correspondences he has placed before Court, he so testified.
19. The Claimant contended that the tax related malpractices and illegalities that aroused his concern were:
 - i. That the Respondent would allow and encourage one of its contract manufacturers 'Orbit Chemical Industries Limited' to purport to be selling directly, the products of the Respondent's sister company, Reckitt Benckiser Arabia, FZE to the Ugandan Tanzanian and Rwandan Customers by creating parallel dummy invoices to them.
 - ii. The actual or real seller of these goods to the said countries was RB Arabia FZE – The false invoices enabled the false seller to obtain an East African Certificate of origin for the goods as originating and sold within the East Africa Community by an East African entity.
 - iii. That once the certificate of origin is obtained, the goods were processed duty free and shipped to those countries. The Respondent at that point prepared an RB Arabia FZE invoice for the goods and sends to the customers who would then pay to the Dubai entity directly and not Orbit.
 - iv. That way, the corporate tax on profits would be evaded. Orbit on the other side invoiced RB Arabia for the same goods and gets paid from Dubai.
 - v. The Orbit invoice to RB Arabia was the correct invoice and was normally quite low compared to the prior invoice raised for the purpose of obtaining certificates of origin.
 - vi. The Respondent similarly allowed the Egypt suppliers to the East African countries to create parallel invoices that misrepresented facts to COMESA system that this manufacturer was



selling and dealing directly with the Respondent's customers. Once the certificates of origin were issued, the 'real invoices' were created by the manufacturer addressed to RB Arabia.

20. Following his insistence that the Respondent had to adhere to good corporate governance and legal practices, the Respondent devised a scheme to relieve him of his duties, which scheme was brought into effect when the Respondent finally created a unit in its South Africa Office which was parallel to and performed the same functions as his in Kenya. The South African Unit was in direct communication with his reports and performed its functions independently and without consultation, coordination with and or involvement of his Kenyan office, thereby causing confusion. The South Unit was fully in operation by June, 2015.
21. The Claimant asserted that as soon as the South African Unit became fully operational and the Respondent got contented that it had succeeded in having his duties performed from South Africa, the Respondent set the stage for his termination which came in August, 2015, barely two months after the South African Unit became operational.
22. The purported PIP was introduced despite the difficulties he faced in discharging his duties as a result of the parallel South African Unit. This much he explained to the Respondent who however did not take any remedial action.
23. Though a letter dated December 4, 2015, the Respondent terminated his employment on account of:
 - a. Failure to deliver against the expected performance objectives of his role even after thorough Performance Improvement Plan was concluded during the period August 13, 2015 to November 2015.
24. On the validity of this ground, the Claimant stated that the purported Performance Improvement Plan [PIP] was introduced in bad faith, unprocedurally and against the principles of Fair Labour Practice, with a predetermined outcome. The objectives set were practically incapable of implementation in many respects, inter alia that the PIP implementation was based on the South African business model rather than the Kenya model.
25. In South Africa, unlike in Kenya, there is a fully owned warehouse and fully owned distribution, therefore sales are made daily and there is the Electronic Data Interface [EDI] whereby the sales are automatically updated through the EDI which enables them to print out reports in real time.
26. The Claimant contended that the disciplinary inquiry that followed the PIP was equally unfair for the reason that:
 - i. Contrary to the contention in the termination letter that he had failed to deliver against the expected performance objectives thereby necessitating the introduction of the PIP in August 2015, the Respondent had recognized and rewarded his performance in the year 2014.
 - ii. The Respondent was in the process of putting in place new structures and reforms to find ways of achieving some of the objectives under the PIP but the reforms and structures had not been introduced by the time of introducing the PIP hence there was not yet a framework for achieving the PIP objectives.
 - iii. Prior to the introduction of the PIP, there was never drawn to his attention any single incident of poor performance either by warning or otherwise.
 - iv. The Respondent did not involve him in setting the performance targets or objectives of the PIP contrary to Labour Principles and Practice governing performance appraisals.



- v. The PIP and its 3 months period overlooked his broad job description which was wider than the responsibilities that were the subject matter of the PIP. The PIP was based on the false assumption that during the short 3 months, he was only supposed to perform the duties that were prescribed in the PIP yet at the same time he was also in charge of the supply chain which included local manufacturing, contracts management, engaging the local pack material suppliers for procurement and running the full New Product Development which rendered the achievement of all the PIP targets within 3 months impracticable.
- vi. For instance, under objective No 1, one of the actions required was present reports and the information to the management team bi-weekly so that decisions and action plans can be developed proactively. This action failed to take into account the fact that under the Kenyan Direct Shipment model reports were made only once in every month for the reason that the Kenyan model had activities only in the last one and half weeks of last month due to the business model and the shipping of full containers from the external overseas factories. There were no daily sales order deliveries because the Respondent had no locally owned warehouse.
- vii. In same reason, he was underrated even where he had fully archived, for instance actions under objective 3 was fully achieved and he scored 20.4% against a target of not more than 25% but instead of being rated excellent or very good, he was rated adequate. Adequate was the least rating and was equivalent to poor.
- viii. Achievement of some of the targets was dependent on the performance of third parties, some of whom he had no control over. For instance, action No 2 under objective No 2 could not be achieved in isolation or independently of the distributors.

Measurement of customer service levels of RB to distributors by understanding customer issues and developing a score-card to be reported weekly to get feedback on the Respondent's service delivery, could not be archived since:
 - a. There was no written binding contract between the Respondents and distributors spelling out the roles and duties of the distributors and setting out timelines within which certain actions had to be undertaken. Therefore, no criteria guidelines for holding the distributors to account or a guide for the developing of a score card to gauge the performance.
 - b. The distributors did not have a well-trained and highly skilled personnel working in their warehouses.
- ix. The target to ensure container utilization of not less than 80% for each consignment was not easy to achieve immediately or within the 3 months. The target did not take into account the fact that there existed a commercial understanding between the distributors and the Respondent to maintain stock holding within 10 weeks of both goods in transit. There was an understanding between the Respondent and distributors that the latter should not carry stock i.e stock in hand and goods in transit exceeding 10 weeks of last 3 months goods in market sales. This prevented supply from filling the containers.
- x. His direct manager, Mr Machado never uploaded online, his remarks or feedback, about his performance as was required.
- xi. By the time of introducing the PIP, his roles were being performed by a parallel unit in South Africa thereby resulting in confusion and duplication of duties. The South African unit was communicating directly with customers and his direct reports without consulting him.



- xii. Issues were introduced which were not part of the PIP, for instance the issue of having soap manufactured in Egypt instead of Kenya was raised during the purported disciplinary hearing.
27. On the Respondent's allegation that concerns had been raised against him regarding escalation of costs, the Claimant asserted that the accusations were unfounded as the same could not be attributed to him, but the poor manner that the finance reports were done. Initially only Ocean Freight was being considered as a freight cost, however, in the year of concern the road transport cost was now considered as part of the total freight value. Initially it was being taken as part of the cost of the goods.
28. Contrary to the Respondent's contention that in April 2014 and May 2014, the costs were up, the freight out document he presented to Court under his further list of documents, the cost went down. In April he was at 1.89% while in May 1.18% not 4.8% - 5.6%. The percentage on the Freight out document, a document that the Respondent was using to track costs, was within target.
29. On the accusation on underutilization of container, the Claimant testified that the same was as regards shipment of some goods from the Respondent's factory in UK. He was accused of allowing shipment of the goods in a 40 feet container. He asserted that he was wrongfully faulted. According to the email from one Monika, an employee at the UK factory, email of August 25, 2015, a 20 feet container would not easily be secured to ferry the goods to Kenya.
30. The Claimant contended that after he received the email above-mentioned, he kept pressing for shipment of the goods in a 40 feet container. However, through a further email, Monika was categorical that such a shipment to Kenya was impossible. The Claimant therefore, had no control over the decision to ship the goods as such. The decision was made by the factory.
31. The Claimant contended further that in the Kenyan shipment model, the goods were shipped directly to the customer after him or her placing an order. Therefore, whether or not the container was full, shipment had to occur.
32. On the accusation as regards re-stocking of the products, the Claimant contended that poor stocking was as a result of poor availability of the durex product in the global market. This is confirmed by an email dated September 8, 2015, by the country manager. This situation impeded him from re-stocking.
33. The Claimant testified further that in an email dated the August 28, 2015, by this line manager Bernardo, addressed to him, the latter appreciated the reason for lack of stock.
34. According to the Claimant the reason for the termination of his employment was not genuine. It was camouflaged.
35. Cross examined by Mr Makori Counsel for the Respondent, the Claimant reiterated that he first came into the employment of the Respondent in the year 2009. In 2012, following the change of the company name, the parties executed another agreement.
36. As at the time of joining the Respondent, he had 12 years in the engineering field. In 2014 while in employment he gained a master of Business Administration, Corporate Governance.
37. Referred to various internal email correspondences the Claimant held that they were largely on the tax issues that he was raising. Through an email dated June 22, 2015, Mr Wagadia Samir, in response to his, stated that he had asked a VAT specialist to look into the matter. the specialist was to look into the issue of double invoicing. As at the time he was separating with the Respondent in December 2015, the issue had not been resolved.



38. Referred to the minutes of August 13, 2015, the Claimant testified that they were in reaction to a Performance Improvement Plan; in the meeting and as reflected in the minutes, he was told that his performance was poor and that there was need for a formal Performance Improvement Plan. This was communicated by the Human Resource manager.
39. He had to improve within a period of three months. He committed himself to. He was supposed to set up review meetings weekly. He did so. There were a number of sessions held.
40. The Claimant testified that on the November 30, 2015, he received the notice of disciplinary enquiry that required him to attend a disciplinary enquiry on December 3, 2015 at 9.00 am.
41. The minutes of the incapacity hearing shows that the hearing was chaired by Damina Golubu, Head of Marketing. His supervisor, Mr Bernardo, and Alete Gikenye, HR representative were present. He acknowledges that the minutes indicate that he made a presentation at the disciplinary inquiry.
42. The process led to termination of his employment on account of poor performance.
43. Upon the termination he was issued with a certificate of service. He subsequently received all the sums that were put forth on the letter dated March 30, 2016; He acknowledged receipt of the same. The settlement was through cheque.
44. The Claimant testified that despite the fact that his functions were taken over by the South African Unit, his job description was not changed. He asserted that notwithstanding the new structure, the Respondent expected him to deliver.
45. He further testified that freight logistics were being controlled by the South Africa Unit. The personnel in South Africa were doing exactly what he was supposed to be doing.
46. The Claimant testified that he at the close of the financial year 2014, he received a personal bonus and a salary increment. Awards of bonuses were dependent on overall performance of the organization.
47. On the final review, he was rated 'strong'. There were four levels of rating, the lowest being poor. Strong rating was acceptable. It translated to like 75%. In the report, words like excellent as equivalent of 'very strong' are used.
48. The Performance Improvement Plan did put forth the areas that he was supposed to improve in. However, the targets that were brought on board the Performance Improvement Plan were different from those that he had set for himself in 2015.
49. He testified that he was not given an opportunity to appeal internally.
50. The Claimant in his evidence under re-examination stated that the pressure that he was mounting over the malpractice of double invoicing did not sit well with his supervisor. As a senior manager, corporate responsibility dictated that he raised the issues and put the pressure.
51. The Performance Improvement Plan was introduced on August 13, 2015. He was supposed to have been appraised in June 2015. He appraised himself but the Respondent didn't appraise him. The alleged comments on his appraisal were not published to him, he only came to see them on the August 13, 2015.
52. If he were to be put on PIP, the supervisor was supposed to call him for a meeting whereat a discussion would be held and how to improve agreed on.



53. The areas that were incorporated in the PIP, were not in accord with the targets that had been set in January 2015. The Claimant further contended that his signing on the PIP was indicative that he had received the document. It was not an acknowledgment of poor performance on his part.
54. He contended that neither Bonus nor salary increments would be accorded to an employee who was performing poorly. From the year 2009 through to 2014, he had salary increments.
55. The Performance Improvement Plan did not address the issue of the parallel unit in South Africa.
56. The minutes presented before this Court by the Respondent, of the incapacity hearing were not signed by him.
57. As an employee, he did not have the power to refuse to be put under the PIP.
58. The Respondent has not pointed out the targets of the year 2015 that were not met.

The Respondent's Case

59. The Respondent's witness was Bernardo Machado, its Regional Supply Chain Director Africa, at the material time. When the matter came up for defence hearing, he urged the Court to adopt his witness statement dated September 20, 2018 as his evidence in chief, and adopt the documents that the Respondent filed herein as its documentary evidence.
60. The witness stated that the Claimant worked as the Respondent's Head of Supply – East Africa between December 2008 and February 2016. His duties were clearly spelled out in his contract of employment.
61. The witness stated that as the Regional Supply Chain Director, Africa, he was the Claimant's immediate supervisor. The Claimant reported directly to him in the day-to-day discharge of his contractual duties.
62. It was asserted that from 2009 to 2013 the Claimant's performance was satisfactory. However, from 2014 the Claimant's performance started to deteriorate. On diverse dates in 2014 and 2015, he raised numerous concerns with regards to the Claimant's performance and duties inter alia; increase in costs and unwarranted delays; failed to meet deadlines and a lack of commitment to attend meetings; and stock rationalization.
63. The witness contended that costs went up from 4.8% to 5.8% during the period of April 2015 and May 2015. The Claimant had no focus in as far as the cost monitoring was concerned. That the Claimant would just sign invoices without interrogating the escalating costs.
64. The witness alleged that it later dawned on the Respondent that the escalating cost was inter alia attracted by the manner in which the containers were utilized. In August 2015, the Respondent discovered that the Claimant was allowing shipment of goods in 40 feet containers rather than 20 feet containers. This would result on occasions for shipment to be done in containers that were not full. He raised this issue with the Claimant and team through his email dated August 25, 2015.
65. In a bid to bring the freight costs down, the Respondent put measures in place, requiring the Claimant to report on:
 - a. How products/freight were being tracked and booked;
 - b. The function, role and effectiveness of people in department; and
 - c. What stock is being shipped and what stock is available at the local warehouses.



The Claimant failed to implement the measures.

66. In a further attempt to reduce the freight costs, the Respondent put in place a measure to align the supply chain strategy as at September 22, 2015, however, by the October 27, 2015 the Claimant was unable to meet the deadline.
67. The Claimant could not adhere to deadlines, the emails of 7th and June 9, 2015 are testament of this, emails between Claimant and the witness.
68. The witness stated that due to the Claimant's lack of operation control of stock, there were delayed shipments which lead to the Respondent's product being out of stock on shelves on several occasion during the years 2015 and 2016.
69. The witness contended that whenever the products were not available, the Claimant would fail to inform him of the stock shortage. He would not communicate what products needed to be restocked. For instance, by an email dated September 8, 2015, it was admitted that he had failed to restock on Durex, Strepsils Gariscon, thus leading to a loss in sales.
70. The witness contended that on various dates, he discussed with the Claimant various areas of non-performance and gave him an opportunity to improve, but the Claimant didn't.
71. In August 2015, the Claimant was placed on a Performance Improvement Plan [PIP] as his mid-year review for 2015 was not satisfactory. The PIP was formulated through input from the Claimant, Alice Gikenye [Human Resource] and him.
72. The witness contended that the PIP set out several developmental requirements that needed to be addressed. The developmental requirements related to skills that were required of the Claimant as an employee of the Respondent, inter alia:
 - a. Development of a reporting structure for supply chain operations East Africa;
 - b. Development of a weekly tracker to monitor performance on cost and container utilization.
 - c. Improve supplier chain mapping – understand inefficiency drivers of supplier, ownership and responsibility of top 5 customers.
 - d. Development of a stable and consistent sales phasing process and taking lead in the process.
 - e. Development of clear action plans, timelines and achievement of business performance trackers to be reviewed informally weekly and key performance indicators received monthly through the support of the Regional Supply Services Director-Africa.
73. The PIP began on the August 13, 2015 and was set to run for a period of three months. The Claimant was made aware that if the set targets were not met, he could be subjected to a disciplinary action.
74. The witness testified that during the stated period, the Claimant was to be evaluated by way of a formal review of progress against his PIP objectives on a forthrightly basis.
75. The Claimant's performance was reviewed regularly. The review sessions were conducted on the dates that were put forth on the PIP save for 12th and 26th October when he did not arrange for the same as was required of him.
76. The witness contended that the Claimant did not at any time object to the scope, duration or the very essence of the PIP process. At the end of the PIP, the Claimant's performance did not improve significantly to warrant him taken off the PIP.



77. The witness testified that by a letter dated November 30, 2015, the Respondent informed the Claimant that it was considering terminating his employment for failure to deliver against his performance objectives. The Claimant was invited to attend a disciplinary hearing on December 3, 2015. He was informed of his right to have a representative present, however, he agreed to proceed with the hearing without a representative.
78. At the hearing the Claimant was given an opportunity to make representations. The Respondent considered the representations and found them to be unsatisfactory. The Claimant was subsequently issued with a notice of termination of employment by a letter dated December 4, 2015. The notice took effect on January 31, 2016.
79. The Claimant served his notice period and left employment on January 31, 2016. He was paid all his dues upon termination.
80. The witness asserted that contrary to what the Claimant was contending, the report that the Claimant was required to put in place during the PIP period was not for sales but a reporting structure that was different from what the South Africa team was doing. He needed to come up with a structure that worked for Kenya.
81. The allegation by the Claimant that his role was usurped by the South Africa team is unfounded and untrue. The South Africa unit carried out roles completely different from that of the Claimant; most of the areas he underperformed had nothing to do with the South African unit; the South African Unit largely dealt with customer relations matters which may have touched on business in Kenya but only on 40% of the business in East Africa; and that the unit was purposed to handle more than customer relations.
82. The witness summed it up that the PIP process was elaborate and thorough. The Claimant embraced the process and the termination was proper.
83. The witness asserted that the Claimant's allegation on tax evasion is irrelevant to these proceedings. He never raised the issue during the PIP process nor at the show cause proceedings.
84. Cross-examined by Mr Wambora for the Claimant the witness testified that the Respondent's Headquarter was in Kenya and it had distributors spread over the East African countries. In Kenya it had two distributors.
85. He further testified that the Claimant's main responsibility and role as Head of Supply was to receive orders from the customers and place them with the manufactures and manage end to end organization of business in East Africa, respectively.
86. The witness admitted that the Respondent engaged a model, direct shipment, which was wider than the products going direct to customers. The Respondent was not doing any manufacturing in Nairobi.
87. The mutual mortation agreement presented to Court by the Respondent was not for the Claimant but an employee by the name Lucy Wanjiru. Consequently, it was not an agreement between the Claimant and the Respondent.
88. The Respondent had warehouses which it itself managed, and there were others which were co-managed.
89. The witness further stated that the job description exhibited by the Respondent shows the title of the employee as Head of Supply Services, a position that the Claimant was not holding.



90. The witness confirmed that the Respondent had a policy for performance management and appraisal and stated that under the Policy, at the beginning of the year, the targets to be achieved by an employee were set. The targets could be agreed between the employee and his line manager.
91. The witness further stated that the Respondent had mid-year reviews. In this review, the employee's performance would be reviewed, and if there were any shortcomings in his or her performance the same could be highlighted, and the performance in regard thereto reviewed at the end of the year.
92. The appraisal/review procedure started with the employee appraising himself, makes comments on the appraisal and then posts the same on the PDR system. The line manager would then appraise him, make comments and post his too on the system.
93. In his further testimony under cross examination, the witness stated that salary increments for an employee can be attracted by that employee's performance; For the years 2009, 2010, 2013 and 2014 the Claimant had salary increments due to his good performance.
94. The witness contended that the Claimant's mid-year review 2015, rated the Claimant's performance as adequate, meaning it was not satisfactory, and it is upon this rating that he was placed on the Performance Improvement Plan.
95. Shown the document at the Claimant's bundle of documents at page 26, the witness acknowledged the same as the interim review update. It reflects the targets that were set at the beginning of 2015.
96. Referred to the Claimant's bundle of document's page 38 – 48, the witness stated that the document related to the mid-year review 2015; Against every objective, the Claimant had reviewed himself and commented. However, he [the witness] did not make any comments on the document.
97. On credit notes the target was to have it maintained below 2%. According to the Claimant he achieved 1.6%. The freight target was to be kept at a minimum of 4.5%, he achieved 1.7%.
98. Referred to the Respondent's exhibit, performance discussion form. The witness testified that the period in issue is August 13, 2015. By this time, he had not shared his comments on the Claimant's performance in the system [PDR].
99. On objective 3 [VIM] Vendor Management Inventory in the Performance Improvement Plan, the witness stated that he would not tell whether or not the objective was one of those that were set at the beginning of 2015.
100. On the email obtaining at page 176 of the Claimant's further bundle of documents, the witness stated that the same was on the subject 'Poland Orders', by the Respondent's transport expert in Poland. The expert was of the view that 20 feet containers are impossible to send to Kenya.
101. On the email dated July 14, 2015, by Makgalaka Velly, the witness testified that the same was to the effect that all Kenyan orders were to be processed in South Africa. Going forward the Claimant was not to be generating orders for the distributors. The email was not copied to the Claimant.
102. The witness contended that the distributors were not to deal with the South African office. The processing of orders was part of the Claimant's role. The role was transferred from him before the PIP.
103. In his evidence under re-examination by Mr Makori, the witness asserted that mid-year performance review depended on when the discussions were concluded. The Claimant's mid-year review for 2015 was for the 1st five months of the year. He admitted that he did not give the review his comments.



104. The Claimant in his employment was charged with full end to end supply management. This involved the flow of goods from the manufacturing units to the Respondent's warehouses, that were being co-managed with its distributors.

The Claimant's Submissions

105. The Claimant's Counsel submitted that the Claimant's employment was terminated on account of failure to deliver against the expected performance objectives of his role even after a thorough Performance Improvement Plan was concluded during the period August 13, 2015 to November 13, 2015; The reason was not valid. The Respondent had a clear performance management and review policy entailing procedures to be followed and criteria for determining and rating an employee's performance during any period in review, Performance Development and Review Policy and Procedure.
106. Under the Policy the Respondent was supposed to conduct biannual reviews i.e. mid-year and final year performance review on its employees. The Respondent terminated the Claimant's employment without subjecting him to a mid-year performance review contrary to its own Policy.
107. The Claimant's Counsel submitted that mid-year performance reviews are geared towards ascertaining whether or not the employee is on the right track towards achieving the annual targets, and if there are any identified challenges, they be addressed early enough so that the employee is not derailed from attaining the annual targets.
108. It was only after the mid-year performance review that the Claimant would be placed on a Performance Improvement Plan. In absence of this review, there was no objective, formal and legal basis for reaching the conclusion that the Claimant's performance was one that called for a PIP on him.
109. The Respondent's witness' allegation to the effect that the Claimant was placed on PIP as his mid-year review was not satisfactory was untrue. The averment at paragraph 13 of the memorandum of reply too.
110. The Claimant submitted that the PIP included targets which were unrealistic and unachievable. The Respondent accused the Claimant of a failure in container utilization. The Respondent accused him of not cutting freight costs as he contrary to what was expected of him shipped goods in 40 feet containers instead of 20 feet containers, yet even the Respondent's own Transport Specialist had advised the Respondent that shipping of goods in 20 feet containers to Kenya was impossible. The Respondent's witness admitted that the issue of container utilization was part of the PIP.
111. The above premise notwithstanding the Respondent went ahead and made container utilization an item in the final review and rated the Claimant poorly on it.
112. To demonstrate that the PIP was ill motivated, the Claimant's Counsel submitted that the Respondent included in the PIP targets on areas that had been removed from the Claimant's docket. By the time of placing the Claimant a bulk of his functions had been transferred to South Africa, and the role of implementing VMI. It was therefore unfair for the Respondent to purport to review the Claimant on roles that were no longer under his docket.
113. Taking away roles from the Claimant without amending his contract and job description, or more importantly, amending his targets under the PIP/Final year review for the 2015 to reflect the reduction of his roles was a violation of the Claimant's right to Fair Labour Practice.
114. The Claimant's Counsel submitted that the Claimant was assessed of poor performance flowing from delays in orders for Durex for Distributor Harleys Limited yet it is clear from the emails



correspondences that distributors were no longer placing orders through the Claimant but through the South Africa office.

115. Submitting on the Claimant's claim on Unfair Labour Practice, Counsel submitted that Article 41 [2] of the Constitution provides that every worker has the right to reasonable working conditions. In breach of this right, the Respondent created hostile and unreasonable working conditions for the Claimant which included transferring his functions to South Africa and blaming him of poor performance on those same functions.
116. It was further submitted that the employer is placed under an obligation under the provisions of Section 45 [1] & [2] of the Employment Act to prove that the reason for the termination of an employee's employment was valid and fair. Considering the totality of the circumstances of the matter, it can be concluded that the termination was without a valid and fair reason.
117. It was further submitted that considering that the Respondent placed the Claimant on a Performance Improvement Plan, without adhering to its own Performance Review Procedures and Policy, the termination must be said to have been procedurally unfair.
118. To buttress his submissions on the legal burden bestowed upon the employer by dint of the provisions of the Employment Act, Counsel placed reliance on the decision in Machafu Isundu vs Lavington Security Guards Limited [2017] eKLR.
119. On the reliefs sought, Counsel for the Claimant submitted that since the termination of the Claimant's employment was unfair, he is entitled to a compensatory relief under Section 49 of the Employment Act to an extent of 12 months' gross salary, Kshs 9,452,772.
120. Submitting that there were numerous violations of the Claimant's right to fair hearing, Counsel for the Claimant proposed that the Court does award the him general damages of Kshs 5,000,000. [Kenya Shillings Five Million].

The Respondent's Submissions

121. The Respondent's Counsel identified three broad issues for determination in this matter, namely;
 - a. Whether the Claimant's termination on account of poor performance was based on valid reasons/grounds.
 - b. Whether the procedure that was followed in terminating the Claimant's contract was fair.
 - c. Whether the Court should grant the prayers sought in the claim.
122. On the 1st issue it was submitted that through the notice to show cause dated November 30, 2015, and the disciplinary hearing of December 3, 2015, Respondent did bring out the particulars of the Claimant's poor performance. Considering those instances, it is clear that the Claimant failed to meet the deliverables in the PIP and the objectives that were set out in the performance discussion form.
123. It was further submitted that the Claimant's performance was below par in his 2015 final year review. In all aspects, his performance was either 'adequate' or 'developmental' which represented a performance of between 0 – 5%.
124. It was further submitted that Section 43 and 45 of the Employment Act 2007 required of an employer to establish reasonable grounds for termination of an employee's employment. To bolster this submission



the Court of Appeal's holding in the case of *Kenya Revenue Authority vs. Reuwel Waithera Gitabi & 2 others [2019] eKLR* was cited, thus;

' The standard proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee's services. That is a partly subjective test. In *Bamburi Cement Limited vs William Kilonzi [2016] eKLR* thus Court expressed itself on the nature of proof required as follows: The question that must be answered is whether the Appellant suspension was based on reasonable and sufficient grounds. The test to be applied is now settled.'

The Respondent genuinely believed that the Claimant's performance was poor warranting disciplinary action.

125. It was contended in the submissions that on various intervals during his reviews, the Claimant admitted that he had not done his best at work. The following instances were cited:
- a. That at page 47 of his documents, he is quoted having said that he needed to improve his ratings to very strong and above.
 - b. The Claimant gravely delayed with preparations of daily reports and a presentation on the issues of costs with regard to container utilization.
 - c. On the issue of supporting the achievement of company fulfilling financial targets in areas of NR/COGs/COP, the Claimant admitted that he had a target of reducing NR costs to 1.75%. He had failed to put additional measures to contain the costs and the manager attributed this to his lack of reporting on a regular basis as agreed in the SLT meeting. That the Claimant in his evidence under cross-examination admitted that the costs were higher than the targeted 1.75%.
 - d. The Claimant missed several deadlines, lacked understanding of the assignment, failed to delegate duties, and failed to ensure adequate products in stock i.e. Durex leading o frustration of partner relationship with Harley's Limited who were distributors of the product.
126. In a matter where the employer alleges that the termination of an employee was on account of poor performance, he or she has to establish a couple of factors, it is now settled. In support of this submission, the Respondent's Counsel placed reliance on the holding in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited, Industrial Cause No 823 of 2010; [2012] LLR 255 [ICK]* [September, 2013], where the Court expressed itself:
- 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.
 - b. It is imperative on the part of the employer to show what measures were in place to enable them access the performance of each employee and further, what measures they have taken to address poor performance once the Policy and Evaluation System has put in place. It will not suffice to just say that one has been terminated for 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 in the presence of an employee of their choice, the reasons for termination shared with the employee.'
127. The Respondent submitted that from the material placed before this Court it is discernible that it established all the factors.
 128. On the issue of container utilization, it was submitted that in August 2015, the Respondent became aware that the Claimant was sending goods using 40 feet container rather than a 20 feet container, which would entail that on occasions a container may not be shipped on full capacity leading to escalation of costs. That the Respondent's witness contended that anyone in the Claimant's position would have been innovative to increase goods transported instead of shipping out a container not filled to capacity.
 129. It was submitted that the disciplinary process against the Claimant was lawful and fair. The Claimant was notified of the allegations against him, given ample time to prepare for the hearing, was heard and accorded the right to accompaniment. The Claimant does not contend that the disciplinary process suffered destituteness in procedural fairness. To buttress his submissions Counsel cited the case of *Pius Machafu Isundu v Lavington Security Guards limited* [2017] eKLR.
 130. On the reliefs sought by the Claimant, it was submitted that since the Claimant has failed to demonstrate that the termination of his employment was unfair, none of the reliefs sought should be availed to him. The decision in *Dalmas B Ogonye v KNTEC Limited* [1996] eKLR was cited.
 131. That however, should the Court find it necessary to award the Claimant the compensatory relief, the Court should award up to 3 months' gross salary. Counsel cited [*CMC Aviation Limited v Mohammed Noor* \[2015\] eKLR](#) where the Court of Appeal awarded one month's gross salary and [*Dorcas Keunto Wainaina v IPAS* \[2018\] eKLR](#) where the Court awarded two months' salary for unfair redundancy.
 132. On the claim for damages for the alleged breach of Fair Labour Practices, it was submitted that as a general rule, general damages are not recoverable in cases of alleged breach of contract. The case of *Securicor Courier [K] Limited vs. Benson David Onyango & another* [2008] eKLR, was cited on the proposition that general damages are not allowable in addition to qualified damages as such would amount to duplication.

Analysis and Determination

133. From the pleadings by the parties, their respective evidence, and submissions on record, the following issues present themselves for determination;
 - a. Whether the termination of the Claimant's employment was procedurally fair.
 - b. Whether the termination of the Claimant's employment was substantively fair.
 - c. Whether the Claimant is entitled to the reliefs sought.Whether the termination of the Claimant's employment was procedurally fair.
134. As this Court stated in the case of [*Lydia Moraa vs Tusker Mattress Limited* \[2021\] eKLR](#) Section 41 of the [*employment Act*](#), 2007, provides the structure of Procedural Fairness in the Kenyan situation.



135. Severally Judicial attention has been given on the provisions of the above stated section. The section provides for a mandatory procedure that must be adhered to by an employer whenever he or she contemplates to summarily dismiss an employee from his employment or terminate a contract of employment of an employee. Too, the steps that must guide the employer up to the time of effecting the contemplation.
136. In *NBI ELRC Cause No 1035 of 2017 Daniel Mutuku Njuguna vs Kenya Institute of Mass Communication* this Court stated:
- ' 93. The Section provides, and I find this to be in sync with the constitutional provisions on the right to a fair hearing, that the employer contemplating as hereinabove stated, must explain to the employee reason[s] for which he intends to cause the termination, and give the employee an opportunity to make representation on the reasons. In other words, to defend himself against the accusations levelled against him.'
137. Through a notice of disciplinary enquiry dated November 30, 2015, the Claimant was invited to attend a disciplinary enquiry that had been slated for the December 3, 2015 to present his case on the charge:
- ' Failure to deliver against the expected performance objectives of your role even after a thorough Performance Improvement Plan was concluded during the period August 13, 2015 to 1November 3, 2015.'
138. There is no dispute that on the above stated date, the Claimant did appear in the meeting that was chaired by Mr. Gulab Dominika, and was accorded an opportunity to explain himself on the broad charge.
139. The notice of disciplinary enquiry expressed to the Claimant his right of accompaniment. It is not denied that he opted not to be accompanied by a colleague during the hearing.
140. To this end I am convinced that the Respondent discharged its obligation under Section 45 [2] of the *Employment Act*. It has demonstrated that the process leading to the termination was procedurally fair. Whether the termination of the Claimant's employment was substantively fair.
141. Section 43 of the *Employment Act*, 2007 places a legal obligation upon the employer to prove the reason[s] for the termination of an employee's employment, whenever such termination is in dispute. Imperative to state however, that Section 45 of the Act places a further legal burden on the employer to prove that the reason[s] for the termination of the employee's employment was valid and fair.
142. Section 45 of the Act provides:
- ' No employer shall terminate the employment of an employee unfairly.
2. A termination is unfair if the employer fails to prove –
- a. That the reason for termination is valid.
- b. That the reason for the termination is a fair reason –
- i. Is related to the employee's conduct, capability and compatibility; or
- ii. Based on the operational requirements of the employer.'



143. It is not in dispute that the Claimant's employment was terminated on account of an alleged poor performance. Without much ado, I state that where an employer is alleging that the reason for termination of an employee's employment was poor performance of the employee, it is now trite law that the employer must establish a couple of things. In the defaulting, the termination shall be deemed unfair. The requirement is in line with the burdens that the employer is expected to discharge under Section 43 and 45 of the Act. In the case of *Jane Samba Mukala v OI Tukai Lodge Limited* [2013] eKLR [supra], the Court stated and I am persuaded, thus:

' It is important to note that where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under Section 8 of the *Employment Act* to show that at arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy and practice on how to measure good performance and 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.

Therefore, it is imperative on the part of the employer to show that measures were in place to enable them assess performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option to abuse.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called again and in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee.'

144. Before I delve deeper into whether or not the factors were established, I think it's important from the onset to point out and consider two issues that the Claimant raised, which two issues the Respondent considered were not relevant and important to the proceedings herein.

145. It was the Claimant's case that the termination of his employment was ill prompted. That the Respondent just wanted to do away with him, as a result of his stand against a vice that was thriving within the Respondent organization, tax evasion. In essence he was stating that the termination was retaliatory.

146. The Court has not lost sight of the fact that the Claimant went all the way to explain in detail how the tax evasion would be perpetuated by the Respondent.

147. In my view the allegation was a serious allegation that needed more than the casual response that the Respondent gave in regard thereto. The Respondent's witness in his witness statement just stated:

' 40. The Claimant's allegation on tax evasion is irrelevant to these proceedings. As can be confirmed from the PIP documents and the show cause proceedings, was never raised during the PIP process and it was not one of the reasons for termination of his contract of employment.'

148. The Respondent failed to answer to the details of the tax evasion and more specifically the aspect of double invoicing and the consequential illegal generation of certificates of origin for purposes of the evasion, to disabuse the Claimant's assertion that he had taken a stand on the vice, stand that did not



- sit well with his line manager and the Respondent, attracting a retaliatory action of terminating his employment.
149. I have considered the Claimant's evidence that as at the time of the termination the matter of the tax evasion malpractice by the Respondent was a live matter, and that he was placed on the PIP only two months after he had raised the matter. The internal email correspondences over the issue, placed before this Court are testament of this. I come to an inescapable conclusion that the timing is not a matter that can be wished away.
 150. It is my firm view that contrary to the Respondent's assertion, the matter of tax evasion is relevant and important to the proceedings herein, considering the purpose for which the Claimant raised the same, purpose which seems to have evaded the Respondent. The Respondent did not rebut sufficiently or at all the Claimant's assertion that the action of the Respondent to place him under PIP and the consequential termination of his employment was retaliatory.
 151. By reason of the foregoing premises coupled with others that shall come forth shortly hereinafter, I am persuaded that the termination of the Claimant's employment was on a camouflaged reason.
 152. Second, the Claimant contended and the Respondent did not deny it, that shortly before he was placed under the purported Performance Improvement Plan, the Respondent created a South African Office to handle some of its businesses. The Claimant went ahead to strongly assert that the creation of that South African Unit was influenced by his opposition to the tax evasion malpractice. That the Respondent transferred some of his functions to the Unit, transfer of functions which definitely had an effect on his ratings in the purported PIP and the final year performance review. That the Respondent did not sufficiently shake off the allegations, shall reveal itself shortly hereinafter as the Court interprets the validity and fairness of both the purported Performance Improvement Plan, its reviews, and the final year review 2015.
 153. It was common cause that the Respondent held an established Performance Evaluation Policy and System in place. That appraisal of employees' performance was biannual. There was a mid-year performance review and final-year review. In both evaluations, the employee would evaluate himself on the targets that were mutually set between him and his line manager at the beginning of the year, post the evaluation on the system- performance development review [PDR], and upon it, the line manager will evaluate him and post his evaluation with comments on the system.
 154. It was the Claimant's case as I got it that the evaluation process whether mid-year or final review at the end of the year, could only be complete with the line manager's evaluation and comments. Performance evaluation being a process that must involve the employer's representative, [the supervisor/line manager of an employee] and the employee. On this assertion, the Claimant is on the mark.
 155. The Claimant contended that contrary to the Respondent's own policies, there was no complete mid-year performance evaluation on him, as after evaluating himself and posting the same on the system, the line manager did not evaluate him and post his evaluation with comments. The Respondent's witness was cross examined on this issue. He acceded to the position taken by the Claimant. He admitted that by the time the Claimant was being put on the Performance Improvement Plan, he had not done his part as concerns the mid-year evaluation.
 156. The Claimant pleaded, testified and submitted that the Respondent in breach of its own policies and with a motive that was ulterior placed him on a Performance Improvement Plan. The move to so place him, was with a predetermined outcome.



157. The Respondent had pleaded in paragraph 13 of its memorandum of response, thus:

' 13. The Claimant's mid-year review for the year 2015 was 'adequate'. This was not satisfactory rating in line with the Respondent's policies, as a result of which the Claimant was subjected to the Performance Improvement Plan [PIP] to mitigate the drop in performance during the first half of the year.'

And in his witness statement [turned evidence in chief], the witness stated:

' In August 2015, the Claimant was placed on Performance Improvement Plan [PIP] as his mid-year review for 2015 was not satisfactory. The PIP was formulated through the input from the Claimant, Alice Gikenye [Human Resource] and myself.'

158. Having pleaded and stated as hereinabove mentioned, it was onus upon the Respondent to demonstrate to Court to the requisite standards that indeed there existed a mid-year performance evaluation on specific performance targets and personal development plans that had been agreed between the Claimant and his line manager to be achieved during the year, and that from the evaluation the Claimant missed on some targets and personal development plans.
159. Evaluation reports have to be documentary, the Respondent did not place before the Court any document from which one can discern the set targets and development plans, the evaluation matrix and the evaluation results on each of those targets and development plans, agreed to be achieved during the year in question. Essentially therefore, the Claimant's contention that there was no mid-year performance review contrary to the Respondent's own policies, was not successfully rebutted. The Respondent's contention that the review was done was not proved. In any event the Respondent's witness' evidence under cross examination as pointed out hereinabove, was at variance with its pleadings.
160. Having stated this, I conclude that true as the Claimant asserted, contrary to the Respondent's own policies, the purported Performance Improvement Plan was not preceded by any performance evaluation. It was not a product of a need to improve on identified and discussed performance gaps noted during such a review.
161. In the employee performance and personal development systems, Performance Improvement Plan sets in after identification of a below par performance by an employee on set standards [read targets and development plans].
162. In situations like the Claimant's where an employee alleges that both the PIP and the termination of his employment were in retaliation for otherwise a protected conduct, and that he or she should have never been placed on PIP in the first place, the employer must defend the assailed removal by establishing that the employee had unacceptable performance before the PIP and continued to do so during the PIP. Otherwise, the employer could establish a PIP in direct retaliation for protected conduct and set up unreasonable expectations in the PIP in the hopes of anchoring termination or dismissal of an employee on them without even being held accountable for the original retaliatory conduct. The employer's power to dismiss on account of poor performance can be easily misused.
163. Therefore, in a matter like is this, an employer must prove by substantial evidence that the employee's unacceptable performance continued, that is it was unacceptable before the PIP and remained so during the PIP. Where there is an evaluation system or policy, the employer can only be said to have discharged this duty, by availing substantial evidence and if only he or she demonstrates that indeed there was a pre-PIP evaluation of the employee's performance.



164. The Court has used the word 'continued' deliberately. The targets and or objectives that are to be set for the PIP must flow from demonstratable failed targets and objectives in the pre-PIP performance.
165. Having found as I have hereinabove, that the Respondent did not produce any pre-PIP evaluation that would help the Court ascertain that there were specific non-performed areas. I am unable to agree with the Respondent that prior to the alleged PIP the Claimant's performance was below par on some aspects and that the Claimant was put on the Performance Improvement Plan to remedy the poor performance on those areas and or aspects.
166. The Respondent's witness stated in his witness statement thus:

' 9. From 2009 to 2013, the Claimant's performance was satisfactory. From 2014 the Claimant's performance started to deteriorate. On diverse dates in 2014 and 2015, I raised numerous concerns with regards to his performance and duties. [page 8 to 15 of the Respondent's bundle of documents]. The areas of concern included but was not limited to the following issues:

- a. Increase in costs and unwarranted delays;
- b. Failure to meet deadlines and a lack of commitment to attend meetings.'

The impression created is that the Respondent was trying to demonstrate that pre-PIP, there was poor performance on the part of the Claimant on those aspects. But the question that he failed to answer is how was the performance weighted and against which targets? I hold that it was not enough for the witness to state that the performance of the Claimant on those areas was deficient.

167. It has not lost the Court's sight that the Respondent has placed reliance on internal correspondences to demonstrate deficiency in the performance of the Claimant, Pre-PIP. The documents do not suggest in any manner the deficiency rates weighted through an evaluation system. The documents are in my estimation not helpful to the Respondent's case, considering the total circumstances of this matter.
168. To further demonstrate that the PIP and the subsequent decision thereon was ill motivated, the Claimant contended that the Respondent deliberately put illogical and unreasonable targets therefore. For instance, the Respondent made it an objective and target of the PIP, the full implementation of the VMI project, yet this role had been transferred to the South African Unit, way back in June 2015. He contended that the Respondent's witness' email of June 12, 2015 is testament of the transfer. The email read in part:

' Dayne effective from 1st June is supporting the supply chain structure, his role will be:

- i. Build a comprehensive centre of information that supports clearly operations, reduces manual work load and will improve our daily and management decisions with transparency and more control.
- ii.
- iii.

Dayne will also be supporting the VMI implementation and key project supply chain in 2015.'



169. The Claimant asserted that as at the August 13, 2015, 40% of his functions as Head of Supply, East Africa, had been transferred to South Africa. The Court finds that this fact was admitted in the Respondent's witness statement herein at paragraph 37[d] thus:

' The South Africa Unit majorly deals with customer relations which may have touched on the business in Kenya but only 40% of the business in East Africa.'

170. Faced with the two assertions hereinabove, one would expect the Respondent to place evidence before this Court in demonstration first that, the implementation of the VMI was not transferred to the South African Unit for handling by Mr Dayne, and if it was, the Claimant had roles to undertake on it during the PIP period for rating in the performance evaluation following completion of the period. Second, that the transfer of the 40% of the roles to the South African Office as admitted by the Respondent, did not have an impact on the performance appraisal, that is PIP/final year review, which could ordinarily be on targets that were set at the beginning of the year, predicated on existence of 100% discharge of the function of the Claimant's office as the Head of Supply Chain East Africa. Was there a need to adjust the targets after the transfer? This essential question was not answered.

171. The Respondent pleaded, and its witness testified that in August 2015, the Respondent became aware that the Claimant was allowing shipment of goods using a 40 feet container rather than a 20 feet container. That this was one of the central factors that led to the cost escalation and that the Claimant failed to control the same. It was a factor that counted to the poor performance rating, no doubt. I have carefully considered the Claimant's rejoinder on these accusations, and I am persuaded that this is an accusation that was wrongfully directed against him, and a pointer that the PIP was not in good faith. Monika Seczkowska, was a Transport Specialist in one of the Respondent's sister companies, the Respondent's witness admitted this in his evidence in chief. This Specialist in reply to the Claimant's request for shipment in 20 feet containers instead of 40 feet, in her email of April 8, 2014 stated in part:

"Hellman confirmed that 20 'R containers are impossible to send to Kenya. None of the forwarders ship that kind of containers, only 40 'R.

So please decide whether we send another 40 'R loose [because it will not be enough to send these pallets]. As far as I know the difference in price for 40 'R and 20 'R is not significant.'

The Respondent's witness did not deny the contents of the above stated email of the Respondent's Transport specialist.

172. When this issue was raised by the Respondent's witness in August 2015, the Claimant through his email of August 25 responded:

' 2. The 40 feet refer containers from Europe [Poland and UK] respectively where we consistently received communication from Factory that 20 feet refer to Kenya from Europe is not easy to get. We therefore always used the 40 feet ref. Now with both factories as were as Hellman and your support we will fix it.'

The Claimant was asserting that he had no control over this aspect, in the circumstances, and I am persuaded.

173. The Respondent's witness testified that the Respondent did put in place measures to lower the freight costs, by placing an obligation on the Claimant to report on; how products/freights were being tracked and booked: The function, role and effectiveness of people in the department; and what stock was being shipped and what stock was available at the local warehouses. However, the Claimant did not



adhere. It was further alleged that he failed to inform the Respondent's witness of stock shortage and advise the Respondent on what products needed to be restored.

174. The Claimant contended that discharge of the stated obligations was at the time of the PIP out of his realm. They were being discharged by the South African Office. I have carefully considered an email dated July 14, 2015, produced by the Claimant, email by one Makgalaka from the South Africa Unit, which read in part:

' Hope this email finds you well,

As you have already been informed that all orders for Kenya will now be processed in South Africa, below is the new process depicting the steps that will be involved. Going forward Fredrick from Kenya will not be generating orders for distributor, the distributor will have to place their own quantities and send them to customer service for processing.'

True the impression given by the contents of the email is that the obligations were no longer under the realm of the Claimant.

175. On the Claimant's failure to inform him on matters stock, the Respondent's witness, the Respondent's witness cited an example of a failure to restock Durex, product inter alia – he cited an emails correspondence of September 8, 2015. The Court notes that the witness did not at all refer to the email correspondences preceding it, between its officers, who the Claimant contended were of the South African Unit, on the subject matter, which clearly demonstrate that the issue was being handled by the South African Office, in line with the new structure hereinabove stated to the exclusion of the Claimant.
176. By reason of the premises foregoing, I am impelled to conclude that the placement of the Claimant on PIP, having not been preceded by a performance review in accordance with the Respondent's Policy, having not been influenced by a discernible failure by the Claimant to meet agreed targets and development plans was irregular, unfair and unequitable. It was not called for in the first place. The same was influenced by ulterior motive[s].
177. Further that the evaluation that flowed therefrom, the PIP/Final year 2015, was not objective, reasonable and logical.
178. Consequently, it is this Court's view that the decision to terminate the Claimant's employment on account of poor performance, a result of the PIP that has met the description hereinabove, was not on a valid and fair reason. The termination lacked substantive justification.

Of the reliefs

179. The Claimant sought for a declaration that the termination was unfair and unlawful. Having found that the termination lacked substantive justification, I so declare.
180. The Claimant has sought for a compensatory relief equivalent to 12 months' gross salary for unlawful and unfair termination. Section 49 [1] [c] of the *Employment Act*, bestows upon this Court the authority to accord the relief like sought by the Claimant. However, it is imperative to state that the awarding is discretionary. It is dependent on the peculiar circumstances of each case. The extent of the award is too dependent on the circumstances. I have considered the fact that; the termination was substantively unjustified; flowed from a PIP that was initiated with an ulterior motive; based on actions that pass for Unfair Labour Practice; and that the Claimant had worked with the Respondent for a period of six years with consistent good performance and find that he is entitled to the relief and to an extent of 7 [seven] months' gross salary, Kshs 5,515.117.



181. The Claimant further sought for a declaration that his right to Fair Labour Practice under Article 41 of the Constitution was breached. An Unfair Labour Practice means, a practice that is capricious, arbitrary or inconsistent. Considering how the PIP was initiated and for what purposes it was, the targets that were set in regard thereto, and the premises hereinabove concerning the targets and the PIP evaluation, I have no hesitation that all to bring the Respondent's conduct under the description. Consequently, I am persuaded that there was a breach of the Claimant's Right to Fair Labour Practice.
182. The Claimant sought for general damages for the breach of his right to Fair Labour Practice where a Court of law finds that an individual's constitutional right has been violated, it has authority under the provisions of Article 23 [3] [c] of the Constitution of Kenya to award compensation for the breach. I therefore see no gag that would impede this Court from awarding damages for the breach. I am not persuaded that the decision of Dalmas B Opiyo v KNTC Limited [1996] eKLR, a decision that is pre, the 2007 Labour Law Regime and the 2010 Constitutional dispensation, will bind this Court. I, under this head award the Claimant general damages of Kshs 100,000 for the breach of his Constitutional Right to Fair Labour Practice.
183. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms:
- a. A declaration that the termination of his employment was unfair substantively.
 - b. A declaration that the Claimant's right to Fair Labour Practice, was violated by the Respondent.
 - c. Compensation pursuant to the provisions of Section 49[1][c] of the Employment Act, 7 [seven] months gross salary, Kshs 5,515.117.
 - d. General damages for breach of the Claimant's Right to Fair Labour Practice, Kshs 100,000.
 - e. Interest on [c] and [d] above at Court rates, from the date of this Judgment till full payment.
 - f. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Wambora for Claimant.

Mr. Makori for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 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 has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of



the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

