



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 907 OF 2017**

**ISDOR RACHUONYO.....CLAIMANT**

**=VERSUS=**

**BRAVA FOOD INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Through its letter dated 8<sup>th</sup> July, 2016, the Respondent made a formal offer of employment to the Claimant on the terms and conditions that were stipulated therein. The Claimant did on the 12<sup>th</sup> July 2016, accept the offer by executing the letter thereby getting into the employment of the Respondent as an Area Sales Manager. It was a term of the letter *inter alia* that the Claimant was required to serve a probationary period of Three [3] months from the commencement date, 11<sup>th</sup> July, 2016.
2. Through its letter dated November 25, 2016, the Respondent terminated the Claimant's employment with immediate effect, citing an account of poor performance. The Claimant feeling aggrieved by this, commenced the suit herein contending that the termination was unfair and unlawful. In his memorandum of claim filed herein on the 16<sup>th</sup> May, 2017, that originated the suit, he seeks a number of reliefs and orders against the Respondent.
3. The Respondent filed a response to the memorandum of claim, denying the claimant's claim and the Claimant's entitlement to the reliefs sought in toto. A stage for the hearing of the matter on merit was thereby set.

**Claimant's case**

4. When this matter came up for hearing, the Claimant sought and he was allowed to rely on his witness statement dated 22<sup>nd</sup> March, 2011, largely as his evidence in Chief. However, he briefly testified orally in clarification of parts of his statement that he thought it was necessary to. He produced the documents that had been filed under the list of documents dated 22<sup>nd</sup> March, 2017 as his exhibits. The documents so produced were, the employment letter, the termination letter, his pay slip for the month of August 2016, a letter of employment from his former employer- Jetlak Foods Limited, Jetlak Foods Limited Manager's performance scheme and a demand notice.
5. He stated that he was employed by the Respondent on 8<sup>th</sup> July 2016 as an area sales manager. His salary was Kshs. 210,000/=and that on 25<sup>th</sup> November 2016, while on duty he was served with a termination of employment letter dated the same day without any written and/or oral explanation or reasons for the said action. The reasons for termination were stated to be poor performance, expressing views which to the Respondent were negative giving an impression that he had given up on his job, mentioning that there was a distributor who was threatening to cease to be one such a distributor without mentioning his or her name, misuse of the company car, and generally not meeting the core requirements of the job. The claimant deemed the contents of the letter and the reasons to be too vague.
6. The claimant avers that prior to this, he was neither issued with a warning letter nor a notice to show cause on any deficiency in performance. He states that the termination was unlawful, unfair and un-procedural as he was not accorded an opportunity be heard by the Respondent. There was no meeting convened between him and the Respondent to discuss the issue of poor performance.
7. He asserted that these reasons were camouflaged and merely an excuse to cover up the unlawful dismissal from employment. That the action by the Respondent was arbitrary, and upon grounds unknown to the Employment Act, 2007.
8. Prior to taking up the employment with the Respondent, he was employed at Jetlak Foods Limited as an Area Sales Manager earning a monthly salary of Kshs. 120,000/=. That being given an opportunity by the Respondent forced him to resign from a job he would have had until his retirement.

9. He further asserts that the Respondent was a new entrant in the market and lacked resources both in tools and finances for an environment that could enable any serious sales. As an employee, he could not be expected to perform beyond the available resources. Without good reason and justification, the Respondent denied him his entitlements and a certificate of service.

10. Cross examined by counsel Wanjiku for the Respondent, the Claimant stated that he voluntarily left his earlier job. That though he made an application for the job, the application had been preceded by negotiations. The act of applying was just a formality. He further stated that one of his duties pursuant to the contract of employment was to maintain and increase the sales of the Respondent's products in the market. On counsel's suggestion that he failed to discharge this, the Claimant stated that he never failed.

11. He stated that he never failed to control people under his supervision. He was confirmed in employment because of good performance. He stated further that he was not given any certificate of service. He however admitted that he did not demand for it, until his counsel did through a demand letter.

12. In re- examination by his counsel, the Claimant stated that that he was sought for by the human resource manager of the Respondent because of his experience. Testifying to his good performance, he stated that he got nine distributors for the Respondent and engaged sales persons, however, the sales persons were not enough. He intimated this to the Respondent but, the Respondent did not act due to constrained finances.

13. In the circumstance that the company was new in the market, it was unreasonable for one to be employed in July and be dis-employed in November.

14. Another reason for the unattractive figures was that the Respondent never supplied enough products into the market. It was an on and off affair. There weren't enough vehicles, and there was no sufficient advertisement of their products.

### **Claimants Submissions**

15. Counsel for the Claimant submitted that though Respondent's witness testifying on the Claimant's alleged poor performance, stated that the Claimant's performance was at 17% against target she was however unable to explain how the percentage was arrived at, and what the target entailed.

16. That the Respondent had just confirmed the Claimant into employment, meaning that his performance was satisfactory. He submitted that the witness admitted that prior to the termination the Claimant was given any notice to show cause. The alleged appraisal was done on the 24<sup>th</sup> November, 2016 and he was dismissed the following day in total disregard to Clause 22 of the Employment contract that provided;

***“should your performance be found to be below the required standard at any one time, the company shall require you to remedy your performance within a specified reasonable time and thereafter should you fail to comply with the requirements the company reserves the right to terminate your employment on account of poor performance.”***

17. In the manner it handled the Claimant's matter, the Respondent was in breach of the mandatory provisions of Section 41 and 44 [2] of the Employment Act and that the termination was therefore unlawful.

18. On poor performance, counsel relied on the case of **Peter Kamau Mwaura and Another Vs. National Bank of Kenya (2020) eKLR** where the court quoted **Jane Samba Mukala Vs. Oltukai Lodge Limited [2010] KLR 225** the Court observed that–

***“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.”***

19. On compensation, counsel submitted that while the Claimant had acknowledged receipt of payment in lieu of notice, he had not received his full salary for the month of November. The Claimant only received Kshs.177,694, a reduced figure without a justification from the Respondent for the deduction. He urged the court to order for the payment of the balance. Kshs. 32,306.

20. Counsel concluded by submitting that the Claimant had been headhunted by the Respondent from Jeflak Foods Limited where he had a legitimate expectation of earning up to a retirement age of 60 years. As such he submitted that a compensatory award of 12 months' gross salary under Section 49[1][c] of the Act shall serve justice. He also prayed for the issuance of the Certificate of Service.

### **Respondent's case**

21. In addition to the Reply to the Memorandum of Claim, the Respondent filed a Witness Statement by its Human Resource Manager-Ursula Kevogo dated 30<sup>th</sup> July 2021. At the hearing, the witness testified briefly, moving the Court to adopt her stated statement as her evidence in chief. She briefly highlighted on a few aspects of the statement before she was subjected to cross examination by counsel for the Claimant. She tendered the documents that the respondent filed under the list of documents dated 25<sup>th</sup> July 2017 and the additional list dated 30<sup>th</sup> day July, 2021 as exhibits 1 - 16.

22. The Respondent avers that the Claimant's under performance resulted in economic loss on it and that he was unable to manage the distributors within his jurisdiction yet it is a fundamental duty for sales managers. He too failed to manage sales representatives as was required under the terms of his employment.

23. The witness stated that during the Respondent's weekly performance review meetings, the Claimant exhibited lack of commitment to the job. That the Claimant requested for 6 [six] more months to turn things around but he failed to. The respondent failed to realize a return for investment.

24. It was further stated by the witness that the Claimant without permission travelled outside his Jurisdiction without the authority or consent of the Respondent, this in breach of the terms of his employment.

25. The witness asserted that the Claimant was paid salary for November and a one month's salary in lieu of notice. In addition, she stated that the Claimant's certificate of service has always been available for collection.

26. The termination letter clearly explained the outcome of the weekly meetings on the Claimant's performance. The termination was justified and free from any malice, she asserted.

27. Cross examined by counsel Ngania for the Claimant, the witness confirmed that at the material time, the Respondent was a new entrant in the market. That before the Claimant joined the Respondent he was working with another beverage company within Nakuru.

28. Asked about minutes of the various meetings she had alluded to, the witness stated that she only had minutes for the meeting of 24<sup>th</sup> November, 2016, therefore for one meeting. She stated that she signed the minutes on the 24<sup>th</sup> November, 2016 after the meeting. She however admits that the minutes in the earlier bundle filed in court is unsigned. The signed minutes were given to the Respondent's counsel upon request for a signed copy.

29. She confirmed that the Claimant was confirmed on the 10<sup>th</sup> October, 2016 one month before termination for want of a satisfactory performance. His poor performance of 17% was an average of all his realizations from the time he started working. That 17% was an average of four months. In October, his attainment was at 6% while in November it rose up to 20%.

30. According to clause 22 of the employment contract, the witness stated there was a provision, that any poor performance must be brought to the attention of the employee, with a requirement that he must improve within a specified time. She admitted that though targets relate to numbers, she did not supply court with any. As to whether or not the Respondent had adequately invested in marketing, she said she is not the proper person to answer the question.

31. The witness in her evidence under cross examination stated that, yes, an employee is entitled to a notice to show cause, however, the Respondent did not extend any to the Claimant.

32. In her evidence under re-examination, the witness stated that the Claimant was not paid full salary for the month of November because the termination came in on the 25<sup>th</sup> November, the salary was prorated.

33. She contended that the Claimant was aware that his employment could be terminated without notice.

### **Respondent's Submissions**

34. Counsel for the Respondent submitted that the termination of the Claimant's employment met the requirements set out under Section 41 and 45 of Employment Act. Substantive justification was present in the termination as required by section 43 and 45 of the Act. She further submitted that despite being given opportunities to improve his performance, his performance remained poor. That the respondent carried out weekly performance review meetings to gauge the performance of all its eight sales managers deployed within the national region. This was confirmed by the Claimant in his evidence under cross-examination.

35. It was further submitted that the Claimant's sales target for the Month of September, October and November were 50,692 but he managed to sell 8,084 which was an average of 17%. The employment contract under its clause 10 provided for a forthwith termination in case of incompetency by the Claimant. Citing the decision in **National Bank of Kenya Vs. Pipelastik Samkolit[K] Limited & Another [2001]eKLR**, Counsel submitted that it is trite that courts of law do not rewrite contracts for parties.

36. Counsel placed reliance on the cases of **David Gichana Omuya Vs. Mombasa Maize Millers Limited (2014) eKLR**, to support his argument that the section 41 of the Act is not a mechanical rote process where an employer is supposed to keep a checklist.

37. It was further submitted that in determining the appropriateness of the decision to terminate, the question that the Court should ask itself is as to whether a reasonable employer would dismiss an employee in the circumstances. Fortification was found in the holding in **British Leyland UK Ltd Vs. Swift [1971] IRLR**.

38. He cited the case of **Walter Ogal Anuro Vs. Teachers Service Commission [2013] eKLR**, where the Court held

*“.....For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”*

She summed up her submissions by stating that the termination was not absent of substantive justification and procedural fairness.

39. On the reliefs sought, counsel submitted that given that the termination occurred on the 25<sup>th</sup> November 2016, one could not expect the

Claimant to be paid full salary for the month as though he had worked for a full month.

40. On remedies available to employees whose contracts have been found to have been unfairly terminated, Counsel submitted the package is not intended to enrich the employees unjustifiably. To buttress this the case of **Elizabeth Wakanyi Kibe Vs. Telkom Kenya Ltd [2014] eKLR** was cited, in which the Judge with approval cited the holding in **D.K. Marete Vs. Teachers Service Commission Cause No. 379 of 2009** to the effect that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees, they are meant to redress economic injuries in a proportionate way.

41. Reacting to the Claimant's submission on the compensatory award of 12 months, Counsel submitted that owing to the period worked by the Claimant before the termination which is far shorter than the 12 months, making an award to the extent sought, shall be equal to enriching the Claimant unjustifiably. Reliance was placed on the case of **Abraham Gumba Vs. Kenya Medical Supplies Authority [2014] eKLR**.

42. Regarding the Certificate of service, counsel maintained that the same has been ready for collection all through, and on the damages claimed upon the alleged non-issuance of the certificate to the Claimant, it was argued that the Claimant has not produced any evidence that he has been unable to secure employment as a result of a lack of the certificate. He relied on the case of **Naumy Jemutai Kirui Vs. Unilever Tea Kenya Limited [2020] eKLR** where court held:

*“With regard to the issuance of a certificate of service, such certificate is due unconditionally pursuant to the provisions of section 51 of the Act. where the failure to issue a certificate of service to an employee is prejudicial, it has been requested and not issued and has caused damage with regard to the employee being unable to secure a new employment as a result, this is an issue which must be addressed with the evidence in court. The failure to issue the certificate of service and the resulting consequences should form the basis of evidence. The pleadings for the issuance of the certificate is not sufficient. The nature of loss and or damage must be gone into for court to award as held in Angela Wakobi versus Tribe Hotel Limited Cause No. 1712 of 2014 [Nairobi]. In the case the required certificate should issue with the letter of termination for the duration of service.”*

43. On the claim for damages for loss of employment, that the Claimant terms accumulated uncompleted earning years of up to 60 years, counsel submitted that there is no legal basis for an award in the nature sought.

#### **Analysis and Determination**

44. Before I delve into the issues that I consider issues for determination in this matter, I consider it imperative to state the role of the Court in matters like the instant one, where parties have taken positions that are diametrically opposed, on principal issues. On this, this Court stated in **Lydia Moraa Obara Vs. Tusker Mattresses Limited [2021]eKLR** thus: -

*“41. In determining the appropriateness of dismissal this Honourable Court is enjoined to take into account the totality of the circumstances of this matter and the fact that the burden of prove of fairness of the dismissal rests with the employer. In the persuasive decision, in Theewaterskloof Municipality Vs. Salga [2010] 10 BLLR 1216 (LC) 1223, South Africa Labour Court, Tip AJ aptly sums up this as follows:-*

*“The core inquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of employee challenge of it. That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer's decision was fair.”*

45. The following issues are the issues that present themselves as issues for determination in this matter, namely: -

- (i) Whether the dismissal of the claimant from employment was procedurally fair?
- (ii) Whether the dismissal was substantially fair?
- (iii) What remedies are available, if any, to the claimant in the circumstances of this matter?
- (iv) Who should bear the costs of this suit?

#### **[i] Whether the dismissal of the Claimant from employment was procedurally fair.**

46. Section 35 (1) (c) of the Employment Act, 2007, provides: -

“A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be: -

*a) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing;*

*and Section 35 (4) provides:*

*“Nothing in this section affects the right –*

a) of an employee whose services have been terminated to dispute lawfulness or fairness of the termination in accordance with the provisions of section 46 or,

b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law. (emphasis mine).

47. Section 36 of the Act provides for payment in lieu of notice thus: -

***“either of the parties to a contract of service of which section 35 (5) applies may terminate the contract without notice upon payment to the other party of the remuneration which would have been issued by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.”***

48. The Respondent’s witness testified that the Claimant knew that his employment contract could be terminated without notice. Further that he was paid one months’ salary in lieu of notice. This and the Respondent’s Counsel’s submissions suggest that having been paid a one month’s salary in lieu of notice, the Claimant has no cause of action.

49. I do not agree with the Respondent’s position. The same appears to me a product of reading certain provisions of the Act in isolation from the others, consequently blurring their eyes from seeing the whole picture on the matter. The position is also as a result of a failure to appreciate the structure and texture of our current regime, on matters employment rights and duties, and labour relations, - **Paul Katuku Muthengi Vs. SMEP Micro Finance Ltd [2021] eKLR**.

50. The provisions too cannot be read in isolation from those stipulations of the Constitution of Kenya, more specifically those that relate to fair hearing and fair labour practices. The postulations of the Fair Administrative Actions Act, too.

51. To this Court, the provisions of Employment Act, 2007, on unfair dismissal displaced the ability of employers at common law to dismiss employees without cause. At common law, an employee would be dismissed without reasons if he or she was given reasonable notice or pay in lieu of notice.

52. One can confidently assert that the unfair dismissal outfit consists of expansive protection to employees.

53. Section 47 (3) opens the way for employees to seek for and enjoy the full remedial package Parliament created for them, by providing;

***“The right of the employee to present a complaint under this section shall be in addition to his right to complain to the industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.”***

54. In **Wilson Vs. Atomic Energy of Canada Limited 2016 SCC 29 Abella J**, aptly captures this point as follows: -

***“..... The foundational premise of the common law scheme – that there is a right to dismiss on reasonable notice without cause of reason – has been completely replaced under the Code by a regime requiring reasons for dismissal. In addition, the galaxy of discretionary remedies, including most notably, reinstatement, as well as the open-ended equitable relief available, is utterly inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the code without providing adequate severance pay, there is virtually no role for the plurality of remedies available to the adjudicator under the unjust dismissal scheme.”***

55. Section 41 of the Employment Act, 2007 which has been found by courts to be in character mandatory provide what fair procedure entails thus: -

***(1) subject to section 42 (1), an employer shall, before terminating the employment of an employee, on 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 preferring 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 representation 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.”***

56. To my mind, this provision is in consonance with the provisions of the Constitution of Kenya 2010, regarding the right to fair hearing, and those of the Fair Administrative Actions Act.

57. In cross-examination, the witness while appreciating that an employee is entitled a notice to show cause, admitted that the Claimant was never issued with one and that he was not invited to make a representation on the alleged poor performance.

58. The witness alleged that there were weekly performance evaluations on the regional sales managers’ performance. However, pressed to demonstrate by way of documents in form of meeting minutes, or reports demonstrating that the Claimant was involved in those meetings, she stated she did not have.

59. From the material placed before me, I see no correspondence or material by the Respondent, making an indication to the Claimant that it

was contemplating terminating his employment, specifically stating the grounds upon which it was contemplating to affect the termination and inviting him to make a representation as contemplated in section 41 of the Act, and that he was accorded sufficient time to prepare for the presentation.

60. Section 45 (2) (c) places upon the employer an obligation to prove that, the employment was terminated in accordance with fair procedure. In the defaulting the employer's termination is concluded to be unfair. This is what the Court of Appeal found in, ***National Bank of Kenya Vs. Samuel Nguru Mutonyi [2019]eKLR***, where they stated:-

***“we fully adopt the above position in law that the Bank ought to have invoked when contemplating termination of the claimant's employment. None of the above procedures were outlined by DW1 as having been undertaken by the Bank before terminating the claimant's employment. We therefore find no basis for interfering with the Judge's finding that the procedure employed by the Bank to terminate the claimant's employment was unprocedural.”***

61. I conclude that the respondent failed to discharge its statutory obligation in demonstrating that the laid down procedure was followed. In fact, the witness (DW1) was very categorical. They did not follow the procedure. Consequently, I agree with the Claimant, and find, that the termination was procedurally unfair.

#### **Whether the termination was substantively fair**

62. Section 45 of the Act Provides: -

***“(1) 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) related to the employee's conduct capacity or compatibility; or***

***(ii) based on the operational requirements of the employer.***

63. Section 45 (5) cloths courts with the authority to determine whether an employer's decision was just and equitable.

64. It is not in dispute that the claimant's employment was terminated on what the Respondent termed as poor performance. In situations where an employer is obligated by law to give the reason for termination, it is not enough to cite a reason from the catalogue under the foretasted provision and say that an employee was dismissed on one of the accounts contemplated therein. More is required of the employer.

65. Candidness, forthrightness, good faith, justifiability and reasonableness, is what one expects to see when determining validity. As shall come out shortly hereunder, these were lacking totally.

66. The claimant in his evidence states that the reason for his dismissal was camouflaged. He does not believe it was due to poor performance. His performance was above par at all material times. He stated that this notwithstanding, the performance would have been better if the Respondent had sufficiently invested in marketing of its products through the media, if there were sufficient motor vehicles for distribution of the products and if he had been enabled with more sales persons. These are matters that he raised from the onset, however, looking at the witness statement of the Respondent's witness, which was filed almost four years after the filing of this suit, it does not address them critically or at all. In fact, when she was cross examined on these, she stated clearly that that fell within the ambit of the marketing department of the Respondent, and therefore she was not the best person to answer that.

67. In a bid to discharge its burden, the Respondent's witness suggested in her evidence that the respondent had an elaborate performance evaluation scheme, the respondent did not at all either through its witness or in any allowable form put before me any document from which this would be discerned. Yet it was really imperative that the same be tendered as evidence, in the circumstances of the matter.

68. There is a dispute as to how the 17% was arrived at, and how the alleged poor performance was determined. Had the Respondent placed, the document/Policy documents, regarding performance of its employees and evaluation thereof, one could find it easy to agree or disagree with its position. They found it necessary not to tender it in evidence, I cannot avoid to draw an adverse inference.

69. The Respondent's witness sketchily testified to a fact that the claimant perennially performed below expectation. She stated that this constrained the Respondent to terminate his employment. The Respondent's witness however was unable to put before me any documents showing that on various dates the Claimant was evaluated and that results therefrom indicated an unsatisfactory performance.

70. It has not escaped the Court's mind that the termination on the account of poor performance, came shortly after the claimant's confirmation into office, in fact just a month after. The Claimant maintained that the same was as a result of good performance. In ***Peter Kamau Mwaura and Another Vs. National Bank of Kenya*** Justice Makau citing ***Jane Samba Mukala Vs. OI Tukai Lodge Ltd [2010] KLR 225*** observed;

***“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 in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5(8) [c] further outlines 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.”***

The Honorable Judge proceeded to conclude;

***“ I am satisfied that the claimants were excellent performers before 2014 and that that is why they were rewarded under the performance management policy and received promotions. I am further satisfied that the respondent did not prove that the claimants’ performance became poor abruptly to warrant an immediate exit.”***

Clause 22 of the offer of employment and contract provided for **performance and personal development** in the following manner;

***“At the beginning of every year you will be required to agree with your line manager on specific performance targets and personal development plans to be achieved during the year. Your performance against Targets will be measured periodically and on on-going basis. Your continued employment with the Company will be dependent on your good performance among other matters. Should your performance be found to be below the required standards at any one time, the Company shall require you to remedy your performance within a specified reasonable time and thereafter, should you fail to comply with the requirement; the Company reserves the right to terminate your employment on account of poor performance.”***

71. From this contractual term one would expect the Respondent to demonstrate to court that; there were specific agreed annual targets between the Claimant and his line manager; the Claimant’s performance was measured periodically against the agreed targets; where a deficiency in his performance was noted, the same was brought to his attention; where such deficiency was noted, he was given an opportunity to remedy; there was in existence a performance improvement plan, and clear specific efforts that the employer [Respondent] put in place to aid the employee [Claimant] improve his performance including but not limited to training and redeployment, and timelines within which improvement must be shown. All these were absent in the material that the Respondent placed before this court.

72. The Respondent’s witness stated in her evidence that in the meeting that was held on the 24<sup>th</sup> November, 2016, the Claimant did request for a period of 6 months to turn around the situation, but the Respondent declined. From the document titled minutes of meeting to discuss Isdor Rachuanyo’s performance, in declining it was stated:-

***” ..... the company does not have six months for trial and error.”***

Out of this, it is my view that the Respondent contrary to the contractual term hereinabove stated, denied the Claimant an opportunity that he was entitled to, to improve the performance [if at all it was an issue]. I am of the view that a reasonable employer would have granted the opportunity, or a reasonable time for improvement, owing to the fact that the Respondent was new in the market and that the Claimant was barely a month into the post probation period.

73. The Respondent’s witness testified to the letter of termination; it came a day after the foretasted meeting. The Court has considered the contents of the alleged minutes of meeting, and does not find it difficult to conclude that the Respondent had a predetermined mind to terminate the Claimant’s employment.

74. The Respondent’s witness alleged that the Claimant was not able to manage the distributors, that he had occasioned financial loss to the Respondent and that he had failed to manage the sales persons under him. However, there in to material that was put forth to elaborate this assertion, the minutes themselves cannot come to anybody’s aid in this, they are too sketchy, they do not reflect that there was a discussion in the meeting. Further the reason that was given by the Respondent’s witness as to why the minutes that were earlier on filed by the Respondent did not have any signature, yet the one that was filed later almost four years after had, was not convincing at all, and in my view the stirs doubt in the courts mind regarding how genuine this minutes are.

75. All the above premises speak to lack of validity in the reason for termination, lack of justification and equity, and lastly lack of fairness in the termination.

76. By reason of the premises a foregoing, and guided by the court of Appeal decision in ***National Bank of Kenya Vs. Samuel Nguru Mutonya (2019)eKLR***, I come to a conclusion that the dismissal was not substantively fair.

#### **Of the reliefs**

77. The claimant sought for a one month’s salary for the month of November 2016 in the figure of 210,00, alleging that the same was not paid. However, in the course of the proceedings, it emerged that the Respondent was able to demonstrate that for that month, the Claimant was paid Kshs. 177,694. The Respondent’s witness explained this figure. It was a prorated figure consonant with the number of days that the Claimant had worked in the month, namely 25 days. The Claimant made a shift, he submitted for Kshs. 32,306, calling it the unpaid salary amount. I am convinced by the explanation given by the Respondent. I am not able to see a justification upon which I can grant the same. Consequently, I make no award under this head.

78. The Claimant sought for one month’s salary in lieu of notice, alleging that his employment was terminate in a manner that was forthwith, therefore without any notice. However, the Respondent was able to establish that the notice pay was made. The Claimant’s prayer is therefore declined.

79. Having found that the termination was procedurally and substantively unfair, I am inclined as I hereby do to award the claimant compensation pursuant to the provisions of section 49 [1] [c] of the Employment Act to an extent of 2 months gross salary. Therefore Kshs. 420,000/= (Four Hundred and Twenty Thousand). In awarding this figure, I have taken into consideration the fact that there are all indications that the reason for termination was camouflaged, the fact that equity and fairness was absent in the decision to terminate the Claimant's employment, and the short period that he was in the employment of the Respondent.

80. The Claimant seeks for damages for loss of employment accumulated uncompleted earning years of up to 60 years to be assessed at Kshs.210,000 per a month in lieu of reinstatement. I have found a lot of difficulty in understanding, what really is being sought under this head, and the justification for it. The Claimant never led any evidence towards demonstrating the basis for this prayer. I have carefully considered the galaxy of remedies provided under section 49 of the Employment Act, I see none as this sought by the Claimant. This court is of the view that to find in favour of a claim such as under this head shall be tantamount to reinforcing a thinking that employments are for life.

81. On the general damages sought on the account that the Respondent failed to issue the certificate of service forthwith at the termination of the employment, justification for the grant of what the Claimant terms a fine, and the proposed figure of Kshs. 100,000 [One Hundred Thousand]. I appreciate that Section 51[4] makes non-issuance of the certificate in circumstances that are willful and by neglect a criminal offence, and that if an employer is adjudged guilty of the offence he is liable *inter alia* to a fine not exceeding one Hundred Thousand, however this cannot be for a forum like here. It fits in a criminal justice system forum. The Claimant did not lead any evidence to the effect that out of the non-issuance he suffered some sort of damages. This court cannot allow to be thrown into the realm of speculation. Consequently, I make no award here.

82. Pursuant to section 51 of the Employment Act, the claimant is entitled to a certificate of service.

83. Consequently, judgment is entered in favour of the claimant for:

- (a) Kshs. 420,000/=, being 2 months' gross salary, a compensation under section [49[1][c], of the Employment Act,2007.
- (b) A certificate of service to issue to the Claimant within 14 days of this judgment
- (c) Interest on (a) at court rates with effect from the date of filing of this suit till full payment.
- (d) Costs of the suit be in favour of the claimant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF OCTOBER, 2021**

**OCHARO KEBIRA**

**JUDGE**

**Delivered in presence of**

Ngania for the Claimant.

Wanjiku for the Respondent.