



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

**CAUSE NO. 259 OF 2017**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**ANN NJERI NJAGI.....CLAIMANT**

*VERSUS*

**COMITATO INTERNAZIONALE PER LO SVILUPPO**

**DEI POPOLI (CISP East Africa).....RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit by a statement of claim dated 10<sup>th</sup> February 2017 and filed in Court on 13<sup>th</sup> February 2017 alleging that she had been wrongfully and unfairly terminated by the Respondent that she was terminated after the Respondent realised that she was pregnant.

2. The Claimant prays for:

- (i) Severance pay Kshs.49,999.95
- (ii) One month in lieu of notice Kshs.100,000.00
- (iii) Salary arrears for October, November and December 2016, January and February 2017 Kshs.500,000.00
- (iv) Less of income for the unexpired period Kshs.300,000.00
- (v) Compensation for unfair termination Kshs.1,200,000.00
- (vi) Special damages Kshs.631,417.22

**Total Kshs.2,781,417.17**

- (vii) Costs of this suit
- (viii) Interest on (i) and (ii) above at Court rates

3. The Respondent filed a memorandum of reply on 17<sup>th</sup> March 2017 denying the claim and prayed for its dismissal with costs.

**Claimant's Case**

4. The Claimant avers that the Respondent engaged her on a fixed term contract dated 4<sup>th</sup> April 2016 effective 11<sup>th</sup> April 2016 as an Assistant Communication Officer at a gross salary of Kshs.100,000 inclusive of allowances. That under the contract the Claimant was to serve on probation for three (3) months during which time her performance, conduct and suitability for continued employment would be reviewed by the management of the Respondent.

5. The employer had absolute discretion to extend the probation period for a further three (3) months. After probation, the Claimant became an employee for the remainder of the contract which was to last for 8 months and 20 days.
6. That the Claimant's performance conduct and suitability for continued employment was reviewed during the period and the Respondent found her suitable for the job and became employed for the remainder of the contract.
7. The Claimant further avers that at all material times she devoted her time, attention and skill to the duties of her position and served the Respondent with loyalty and diligence.
8. It is averred that on 5<sup>th</sup> September 2016, the Respondent purported to terminate the Claimant's employment after it realised that she was pregnant.
9. That during her employment she was entitled to hourly overtime pay of Ksh.1,000 which the Respondent did not pay.
10. That because of the sudden loss of employment, the Claimant experienced immense stress, suffered mental anguish and trauma which occasioned premature labour, something she had not experienced before termination.
11. That she was rushed to Aga Khan Hospital and incurred a lot of expenses for what would have been a normal delivery but for the abrupt termination of employment. That the Doctor's report dated 3<sup>rd</sup> November 2016 evidences the pre-term birth. That the failure by the Respondent to pay her dues occasioned her mental anguish, financial embarrassment and emotional trauma.
12. That she was appraised on 5<sup>th</sup> September 2016 after termination. That the appraisal was an afterthought since she had already been terminated.
13. Finally, the Claimant avers that she sought legal advice on 30<sup>th</sup> November 2016.

#### **Respondent's Case**

9. The Respondent admitted that it engaged the Claimant on a 8 months, 20 days' contract from 11<sup>th</sup> April 2016 due to expire on 31<sup>st</sup> December 2016 on the terms and conditions set out in the contract dated 4<sup>th</sup> April 2016.
10. That the Claimant was to serve a three (3) months' probationary period for purpose of reviewing the Claimant's performance, conduct and suitability for employment and the Respondent had discretion to extend the probationary period for a further period of three (3) months if the Claimant did not meet expectations.
11. The Respondent denies that the Claimant completed the probationary period and became employed. It avers that after the initial three (3) months, it was not satisfied with the Claimant's performance and invited her for a meeting where she was informed of her unsatisfactory performance and failure to meet expectations but gave the Claimant an opportunity to improve by extending the probationary period by a further two (2) months vide a letter dated 29<sup>th</sup> June 2016.
12. It is further averred that on 5<sup>th</sup> September 2016, upon completion of the extended probationary period, the Respondent conducted a performance appraisal which showed that the Claimant's performance was still unsatisfactory.
13. That on the same day, the Claimant was given the performance appraisal form for her feedback on the results but she declined to do so. That she returned the form on 31<sup>st</sup> October 2016, which explains the different dates of signatures of the form on record.
14. The Respondent contends that the Claimant's performance negatively affected the Respondent's operations and donors had noted the decline in the performance of the communications department and the Respondent had no option but to terminate her employment on 5<sup>th</sup> September 2016.
15. The Respondent denies the contents of paragraph 9 and 10 of the statement of claim. In the case of the latter, it avers that the reason for termination alleged by the Claimant was untrue and intended to misguide the Court.
16. That the sole reason for termination of the Claimant was due to her non-performance and that the Respondent believed in women empowerment and equal opportunities for all.
17. That during the period 2015 and 2016 more than five women employees were pregnant and none was dismissed. That all employees including women had medical insurance cover.
18. It denies that the Claimant was passionate and diligent in performing her duties. That the Claimant never worked extra hours and the Respondent had no arrangement with employees to work after hours of business.
19. The Respondent further avers that it was not responsible for the medical challenges the Claimant had in November 2016 and insists that even after termination in September 2016, the Claimant continued to enjoy medical cover yet she was not an employee.
20. It is also contended that the Claimant was lawfully terminated and paid her dues. That the date of execution of the appraisal form by the

Supervisor is deemed to be the date of the performance appraisal. That the initial review of the Claimant's performance on 27<sup>th</sup> June 2016 found it unsatisfactory and the same was communicated to the Claimant vide a letter dated 29<sup>th</sup> June 2016.

21. Finally, the Respondent avers that since the Claimant's termination was lawful, she is not entitled to the reliefs sought for the following reasons: -

(i) She was never confirmed as an employee of the Respondent

(ii) She was accorded a one month's notice

(iii) Having been terminated in September, she did not qualify for the October, November, December 2016 and the January and February 2017 salaries

(iv) No income was lost for the unexpired term of the contract.

(v) Claimant had the benefit of the Respondent's insurance cover.

### **Evidence**

22. The Claimant adopted her witness statement and was cross examined. She confirmed the duration of the contract of employment to be 8 months and 20 days and probation for 3 months but could be extended by the employer.

23. She further confirmed that she was not appraised during the first three (3) months. She admitted that she had a meeting with her two colleagues around that time on matters relating to an upcoming event but denied having been appraised by the Respondent on 27<sup>th</sup> June 2016 and was not given a copy of the minutes of the alleged meeting.

24. She denied that the meeting was a performance appraisal or the issue of extension of the probationary period was discussed. She denied having attended any meeting on performance appraisal but admitted that she was still on probation in late June 2016.

25. The Claimant denied having received a copy of the letter dated 29<sup>th</sup> June 2016 purportedly extending her probationary period for a further two months. That she first saw it in the Respondent's bundle of documents on record.

26. On the appraisal allegedly conducted on 5<sup>th</sup> September 2016, the Claimant stated that she signed the form on 31<sup>st</sup> October 2016, the date she left, that it was pending because she had not cleared after dismissal on 5<sup>th</sup> September 2016. She also confirmed that the letter dated 5<sup>th</sup> September 2016 was the dismissal letter but the appraisal was conducted on 31<sup>st</sup> October 2016 long after she had been terminated.

27. That she was called back for clearance and was given the appraisal form to complete and saw the date on the form.

28. She further confirmed that she received the letter of termination on 5<sup>th</sup> September 2016 and the reason for termination had not been explained to her previously and that she was given other 20 days' notice of termination.

29. She admitted having applied for annual leave from 21<sup>st</sup> – 31<sup>st</sup> September 2016 to exhaust the leave days as instructed by the Respondent alleging that she signed the same under duress.

30. That by 11<sup>th</sup> April 2016 she was pregnant and gave birth on 3<sup>rd</sup> November 2016. That she discovered she was pregnant in early June 2016, that on termination, the pregnancy it was visible. She confirmed that she had orally informed the immediate Supervisor one Jessy Njau. That termination came four months later.

31. That she enjoyed the Respondent's medical cover until December 2016 when the contract was supposed to end.

32. That she did not provide a copy of the Doctor's report.

33. She denied that the contract was terminated procedurally with a proper notice on 5<sup>th</sup> September 2016.

34. On re-examination, the witness testified that the contract with the Respondent was renewable as per Article 1 of the contract. That the appraisal purportedly conducted on 27<sup>th</sup> June 2016 was not an appraisal at all and had neither been given to her nor had she agreed to any action points.

35. That the pre-term delivery was attributable to the stress and trauma occasioned by the dismissal.

### **Respondent's Evidence**

36. **RW1, Susan Mwangi** testified that the Claimant was appraised on 27<sup>th</sup> June 201 as per the minutes dated 29<sup>th</sup> June 2016. She testified that it was a review meeting. She further testified that the review meeting of 27<sup>th</sup> June 2016 covered the entire job description of the Claimant. However RW1 did not attend the meeting.

37. That she was instructed to prepare a letter extending the Claimant's probationary period by a further two months from 29<sup>th</sup> June 2016. The email from Valeria Costa instructing RW1 to prepare the letter was is dated 29<sup>th</sup> June 2016.

38. She also testified that the Respondent had a specially designed appraisal form for staff, a copy of which the Respondent had provided. That the Claimant's appraisal was conducted on 5<sup>th</sup> September 2016 by Valeria Costa, the Overall Co-ordinator. She denied knowledge that Ann as pregnant.

39. On cross examination, the witness confirmed that the Respondent had no communication officer. The Claimant was not deputising anyone and was the officer in charge of communication.

40. She further confirmed that according to the job description, the Claimant augmented the main office holder and the back stopped elsewhere. That the Claimant was responsible to the delegated holder, the Regional Coordinator.

41. She emphasised that the Respondent had a designated appraisal form used and the appraisal form for the first three (3) months of the probationary period was not on record. That only one person appears to have attended the meeting held on 27<sup>th</sup> June 2016.

42. RW1 confirmed that she could not vouch on the contents of the document dated 27<sup>th</sup> June 2016. As regards the appraisal form dated 5<sup>th</sup> September 2016, RW1 stated that since Valeria Costa's name was not on the document, it is unclear who had signed it and inserted the date. In addition, the date of issue and return of the form was unclear.

43. RW1 testified that she learnt that the Claimant was pregnant when the Hospital called to inquire about insurance cover after she had left employment in September 2016. That she did not appear pregnant. The pregnancy was not visible. That she prepared the probationary period extension letter dated 29<sup>th</sup> June 2017 and handed a copy to the Claimant but had no evidence to prove that it was served upon the Claimant. RW1's statement indicated that the Claimant had orally agreed that the probationary period be extended by two (2) months.

44. That she had no evidence of when the appraisal form dated 5<sup>th</sup> October 2016 was given to the Claimant. That the last appraisal of the Claimant on record was dated 31<sup>st</sup> October 2016 and end of probation was 11<sup>th</sup> September 2016.

45. She told the Court that it was normal for employees to enjoy medical cover after cessation of employment with the Respondent and finally that the Claimant was accorded the opportunity to explain how to perform effectively.

46. On re-examination, RW1 told the Court that the Claimant reported to Rosaia Ruberto and Valeria Costa.

## **Submissions**

47. The Claimant did not file submissions.

48. The Respondent submits that contrary to the Claimant's allegation that she was found suitable for the position during the initial three (3) months, she had been found to be unsatisfactory.

49. It is further submitted that the allegation that the Claimant was dismissed after the Respondent realised that she was pregnant was untrue since she did not inform the employer that she was expecting a child and had no documentary evidence to support the claim. That RW1 denied having been informed of the pregnancy.

50. The Respondent contends that the Claimant was primarily responsible for assisting in the development and revision of key project documents and publications and was under the supervision of the project managers and broad guidance of the Regional Co-ordinator. It is further submitted that the Claimant's performance was reviewed on 27<sup>th</sup> June 2016 and found to be unsatisfactory and was informed that the probation would be extended.

51. The Respondent isolates two issues for determination –

(a) Whether the Claimant's employment was terminated during the probationary period;

(b) Whether termination of the Claimant's employment during the probationary period was lawful.

52. On whether the termination was during the probationary period, the Respondent submitted that since the initial probationary period of three months commenced on 11<sup>th</sup> April 2016 and ended on 11<sup>th</sup> July 2016 and the Claimant's performance was reviewed by Valeria Costa and Jessy Njau on 27<sup>th</sup> June 2016, was found unsatisfactory and was extended for two months, to terminate on 11<sup>th</sup> September 2016. It is submitted that the Claimant was terminated during the probationary period. That the Claimant did not object, in writing or orally to the extension from 3 to 5 months.

53. The Respondent relies on Section 42(2) of the Employment Act, 2007 on the duration of probation. Further reliance is made on the decision in **John Wanjala Wanyama v Wanandeghe Co-operative Savings Sacco and Credit Society [2016] eKLR** where Mbaru J. cited the decision in **Peris Nyambura Kimani v Dalbit Petroleum Limited [2015] eKLR** on the freedom of parties to an employment contract to set their parameters on the period of probation provided they observe the provisions of Section 42 of the Employment Act. The Respondent submits that the extension of the Claimant's probationary period after the performance appraisal of 27<sup>th</sup> June 2016 meant that the probation

lapsed on 11<sup>th</sup> September 2016.

54. That the Respondent served the extension notice on the Claimant on 29<sup>th</sup> June 2016 which the Claimant received without any protest. In sum, the Respondent's submits the Claimant was on a probationary contract.

55. On whether the termination was lawful, the Respondent relies on Section 42 of the Employment Act, 2007 which provides inter alia that the provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract. It is submitted that Section 42(1) of the Act exempts probationary contracts from Section 41 of the Act and relies on the decision in **John Muthomi Mathu v Mastermind Tobacco (K) Ltd [2018] eKLR** where Nzioki Wa Makau J. cited the judgment of Rika J in **Danish Jalang'o & Another v Amicabre Travel Services Ltd [2014] eKLR** on the application of Sections 41, 43 and 45 of the Act to probationary contracts. The Respondent associates itself with the holding of the Court and submits that it had demonstrated that the Claimant's contract was probationary, and termination took place during the same period and the Claimant was accorded the requisite notice of 7 days.

56. In a nutshell the Respondent submits that it had established that the Claimant's contract provided for a three months' probation before effluxion of the probation on 11<sup>th</sup> September 2016. That the Claimant was accorded a 25 days' notice as opposed to the 7 days prescribed by the Employment Act and the termination was lawful.

57. Finally, the Respondent submits that even assuming that the provisions of Section 41 of the Act were applicable, the Respondent was compliant in that the performance appraisal form gave the reasons for termination and the Claimant made comments on it and thus had the opportunity to defend herself.

### **Analysis and Determination**

58. Having carefully considered the pleadings, evidence on record and submissions, the issues for determination are: -

- (i) Whether the Claimant was on probation at the date of termination;
- (ii) Whether the Claimant's termination was wrongful, unfair and unlawful;
- (iii) Whether the Claimant is entitled to the reliefs prayed for.

59. On probation, Section 2 of the Employment Act 2007 provides that –

**“probationary contract” means a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period;**

60. Termination of probationary contracts is governed by Section 42 of the Employment Act which provides that –

### **42. Termination of probationary contracts**

- (1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.**
- (2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.**
- (3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).**
- (4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.**

61. Article 1.3 of the Claimant's contract with the Respondent provided that “the first three (3) months of the employee's employment will be probationary and his/her performance, conduct and suitability for continued employment will be reviewed during the period by the management of CISP (Respondent). The employer may at its absolute discretion extend the probationary period by up to a further three months ...”

62. It is common ground that the Respondent employed the Claimant under a contract dated 10<sup>th</sup> April 2016 to commence on 11<sup>th</sup> April 2016 and end on 31<sup>st</sup> December 2016, a duration of 8 months and 20 days. The contract was renewable as per Article 1.

63. The issue of poor performance as ground for termination has been addressed in several decisions. In **Jane Samba Mukela v OI Tukai Lodge Ltd, Industrial Cause No. 823 of 2010** the Court observed as follows

*“ ... where poor performance is shown to be a reasons 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 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 what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been 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 for abuse.*

*Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons of poor performance, the 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.*

*Where this procedure as set out under section 41 of the Employment Act is not followed, then a termination that arises from it will be procedurally flawed. It is procedurally irregular. This holding was as similarly held in the case of Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration & others (2006) 27 ILJ 1644 (LC) that when an employee is charged with poor performance, it must be clearly set out and differentiated between what is a misconduct and incapacity both conceptually and practically.”*

64. The Court is in agreement with these sentiments.

65. It is also not in dispute that the Claimant served the Respondent well until 27<sup>th</sup> June 2016 when the Respondent claimed that it reviewed the Claimant's performance and found it wanting and as a consequence resolved to extend the probationary period by another two (2) months as the email from Valeria Costa to Susan Mwangi (RW1) dated 29<sup>th</sup> June 2016 attests. RW1 confirmed on cross examination that she prepared the letter of extension dated 29<sup>th</sup> June 2016 and delivered it to the Claimant who denied having received the letter. RW1 led no evidence to establish that the Claimant received the letter.

66. The review of the Claimant's performance on 27<sup>th</sup> June 2016 allegedly evidenced by a report dated on the same day and signed by Valeria Costa. The notes were prepared by one Jessy Njau. The report identifies the activity/thematic area on the one hand and notes/status and action point on the other. The latter are comments by the reviewer about the reviewee. The report concludes by stating that “*the meeting ended with an indication that Ann's probation period was extended and a similar meeting will be held to assess her progress.*”

67. Although the Claimant admitted having met Valeria Costa and Jessy Njau around the same time, she denied that it was for purposes of evaluation or review. She was emphatic that the issue of extension of the probationary period of the contract did not arise. She admitted that it was in relation to her work on an upcoming event. In addition, the report or notes of the meeting are signed by one person only.

68. Finally, contrary to the Respondent's submissions, the Claimant denied having been informed, during the review that the probationary period would be extended. The Claimant denied having received any notice of extension.

69. In a similar vein, RW1 confirmed on re-examination that she did not draft the final copy to letter dated 29<sup>th</sup> June 2016 nor was she the signatory.

70. It is important to note that –

(i) The notes are silent on the views, responses, or reactions or contestations or agreements made by the Claimant. The notes appear to have been recorded in a briefing session where the communication was a monologue.

(ii) If the Claimant was privy to the proceedings, she ought to have appended her signature if in agreement with the contents.

(iii) The Respondent had a properly designed performance appraisal form that was used to appraise individual employee. RW1 confirmed on cross examination that the form on page 19 of the Respondent's bundle of documents was the appraisal form and the Respondent used it for the appraisal dated 31<sup>st</sup> October 2016.

(iv) The report of the meeting captures neither the targets agreed upon by the parties nor the timeframe. Relatedly, it does not indicate the duration by which the probationary period was to be extended and whether the Claimant was in agreement with it. RW1 did not attend the meeting to guide the Court on this issue.

71. By refusing, failing or neglecting to employ its ordinary performance appraisal form, the Respondent denied the Claimant an opportunity to effectively participate in the evaluation of her performance. The purported appraisal or review meeting on 27<sup>th</sup> June 2016 was, from the report on record more of a briefing session on matters not previously agreed upon by the parties. The Respondent neither alleged nor testified that it had an appraisal form for those serving on probation. RW1 confirmed on cross examination that the performance appraisal form on page 19 of the Respondent's bundle of documents was the appraisal form and there was no other. The Respondent has not on a balance of probabilities established the threshold in **Jane Samba Mukela v Ol Tukai Lodge Ltd (supra)**

72. For the foregoing reasons, the Court finds that the report of the meeting held on 27<sup>th</sup> June 2016 does not reflect the outcome of any performance appraisal on the Claimant's performance.

73. By deliberately sidestepping its own appraisal documents and using a review meeting where the Claimant's contribution was unrecorded, the Respondent purported to appraise the Claimant in a manner other than the prescribed manner which amounted to an unfair appraisal.

74. Having found that there was no performance appraisal on 27<sup>th</sup> June 2016, the purported decision or indication to extend the Claimant's probationary for an undefined duration has no legs to stand on.

75. The purported extension of the Claimant's probationary period was ineffectual. The right to fair labour practice enshrined in Article 41 of the Constitution of Kenya, 2010 applies to all aspects of employment and was envisioned to ensure that labour practices are underpinned on the principles of fairness and justice.

76. I now turn to the evaluation dated 31<sup>st</sup> October 2016 but before delving into it, it is noteworthy to underline that fact that the Claimant received the letter of termination on 5<sup>th</sup> September 2016 intimating that her probationary period had been extended to 30<sup>th</sup> September, 2016 and the same had been terminated on the same date. In effect, the Claimant was accorded a 25 days' notice of termination.

77. Back to the performance appraisal, the document provided by the Respondent has the signatures of two persons and the name of one person only. The Supervisor's name is signed as follows "for Rosaia Ruberto" but the signature belongs to a different person and is dated 5<sup>th</sup> September 2016. The same signature appears at the bottom of the page and was appended on 31<sup>st</sup> October 2016. The Claimant testified that she appended her signature on 31<sup>st</sup> October 2016. The Claimant completed Part 5.1 and 5.2 of the form explaining her performance record while contesting other comments by the appraiser. It is unclear on what basis the Claimant was terminated since there was no performance appraisal on record by that date.

78. The Respondent's claim that the performance appraisal form was handed over to the Claimant on 5<sup>th</sup> September 2016 was not supported by any evidence. Similarly, the termination notice of even date made no reference to the appraisal form nor did she sign on the form to acknowledge receipt. On cross examination RW1 confirmed that it was unclear who had signed the document for the Supervisor and why it had two conflicting dates. RW1 also confirmed that the performance appraisal dated 31<sup>st</sup> October 2016 was the last one on record. In the premise, it is difficult not to agree with the Claimant's contention that the performance appraisal dated 31<sup>st</sup> October 2016 was an afterthought designed to sanitize a flawed process.

79. In sum, having found that the evaluation/review/appraisal of the Claimant allegedly conducted in 27<sup>th</sup> June 2016 was ineffectual as was the consequent extension of the probationary period of the Claimant's contract, the Court finds and holds that the Claimant was not on a probationary contract at the date of termination on 5<sup>th</sup> September 2016. Relatedly, even assuming that the extension had taken effect, the same would have lapsed by the end of August 2016 and the Claimant would have been in the same position.

80. On termination, Section 35(1)(c) of the Act provides that –

### 35. Termination notice

**(1) 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) ...;**

**(b) ...**

**(c) 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.**

81. Section 40, 41, 43, 44, 45 and 47 prescribe the statutory architecture on termination. These provisions set forth the grounds in which a contract of employment may be terminated and the attendant procedure.

82. These provisions guarantee that for a termination of employment to pass the lawful test, it must meet the substantive and procedural fairness test as held in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**. Irrespective of the method of termination of employment employed, the employer must prove that the circumstances justified the termination of the employee. It is for the Claimant to prove that the termination was indeed unfair on account of the absence of a valid and fair reason and/or want of a fair procedure.

83. In **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR**, the Court of Appeal held that –

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

84. In the instant case, having found that the Claimant was not on a probationary contract, the employer was bound to give a proper notice under Section 35(1) of the Employment Act. This provision is couched in mandatory terms and the employer has no discretion on the length of the notice to give. In this case, the Respondent gave the Claimant 25 days as opposed to the 28 provided by the law. The letter read in part:–

*“Our reasons for termination are due to:*

- 1. The increased donor and program expectations and the unmatched capacity to foster growth within the communication department.*
- 2. A realised need by CISP HQ to restructure the communications department with streamlined terms of references.*
- 3. Your last appraisal conducted after 5 months services at CISP.”*

85. Contrary to its averments that the sole reason for terminating the Claimant was due to her non-performance, the termination notice has three distinct reasons. Non-performance is in fact the last on the list.

86. The Respondent is reticent on the restructuring and the increased expectation of donors and program expectations coupled with the unmatched capacity within the department. It would appear to the Court that Respondent employed the Claimant as an Assistant Communications Officer in the entire department and turns round to blame her for the shortcomings of the department as constituted.

87. As RW1 confirmed, the Claimant was employed to augment/assist the main office holder where the back would stop, but was regarded by the Respondent as the main office holder with capacity to keep pace with increased donor and program expectations and foster growth of the department.

88. RW1 confirmed on cross examination that it was not regular for an organisation to employ an Assistant where there is no substantive office holder. There is no evidence on record of how the Respondent endeavoured to support the Claimant to meet the increased expectations or foster growth. In sum, it was unfair for the Respondent to blame the Claimant for shortcomings attributable to the constitution of the communications department.

89. On restructuring of the communications department, the Respondent neither pleaded nor averred or lead evidence of any proposed restructuring of the Nairobi office and how many employees would be affected.

90. Strangely, the last reason for termination was the Claimant’s last appraisal conducted after 5 months’ service at CISP (Respondent). The last and only appraisal of the Claimant was dated 31<sup>st</sup> October 2016 as RW1 confirmed on re-examination. This appraisal was conducted after the Claimant’s employment had been terminated. It could not therefore be justification for the termination.

91. In the upshot, it is the finding of the Court that the Respondent had no valid and fair reason to terminate the Claimant’s employment contrary to the requirements of Section 45 of the Employment Act. Similarly, the Claimant was not taken through the procedural steps of a fair termination. The Respondent did to give the Claimant any notice of her transgressions and there was no disciplinary hearing.

92. Another issue related to the termination is whether the Claimant was terminated because of her pregnancy.

93. The Claimant alleged that she was terminated when the Respondent learnt that she was pregnant. She repeated the allegations on cross examination. She confirmed that she was pregnant by 11<sup>th</sup> April 2016 when she took up employment with the Respondent and had a premature birth on 3<sup>rd</sup> November 2016. She testified that she had informed the immediate Supervisor, one Jessy Njau but did not disclose when and how. She alleged that Jessy Njau informed the others including the Program and Country Director.

94. RW1 testified that she was unaware of the pregnancy and only learnt about it when the hospital called her department to inquire about insurance cover after the Claimant had been terminated. Whereas the Claimant testified that the pregnancy was visible, RW1 testified that she did not appear pregnant. RW1 confirmed on cross examination that the Claimant did not report the pregnancy to her as the Head of Human Resource.

95. Based on the evidence on record, the Claimant did not establish how she disclosed the pregnancy to her Supervisor and why she did not report the same to human resource, the responsible department. Finally, if the termination was occasioned by the pregnancy, the Claimant did not establish why the Respondent had to wait from June 2016 to September 2016 to terminate her employment.

96. The Court finds that the Claimant has failed to establish that her termination on 5<sup>th</sup> September 2016 was actuated by the fact that she was pregnant.

97. On the reliefs, the Claimant prays for –

**(i) Severance pay Kshs.49,999.95/=**

98. Severance pays is only payable under Section 40(1)(g) of the Employment Act in cases of redundancy. The Claimant led no evidence to establish that she was declared redundant nor did the Respondent plead or allege redundancy. The claim is declined.

**(ii) One month’s salary in lieu of notice**

99. Although the Claimant was accorded a 25 days’ notice contrary to Section 35(1)(c) of the Employment Act, she was paid for the entire month of September 2016 having worked for only 5 days. The claim is declined.

**(iii) Salary arrears for October, November, December 2016 and January and February 2017 (100,000 x 5 months) Kshs.500,000**

100. Since the Respondent terminated the Claimant's contract of employment on 5<sup>th</sup> September 2016 effective 30<sup>th</sup> September 2016, it is unclear how the Claimant became entitled to salaries for the next five months having ceased to be an employee of the Respondent. The Claimant did not establish this claim. It is declined.

**(iv) Loss of income for the unexpired contract period (100,000 x 3) Kshs.300,000**

101. The Claimant led no evidence to establish the claim. But more importantly, compensation is a payment made to the wronged party to offset the financial loss which has resulted from a wrongful act. See **Le Mode Luggage cc t/a Pakwells Petje v Dunn and others, Appeal Case No. SA 65/205** by the Labour Court of South Africa, adopted with approval by the Court of Appeal in **Hema Hospital v Wilson Makongo Marwa [2015] eKLR**.

102. In **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR**, the Court of Appeal stated as follows:

*“On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the Appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the Appellant would have continued to be employed until the age of 60 years.”*

103. Similarly in **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** the Court of Appeal dismissed a claim for anticipatory earnings, the Appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR** where the Court expressed itself as follows:

*“There is no provision for payment of damages to the date of retirement.”*

104. Applying the above principles to the instant case it is clear that the claim for the unexpired contract period of three months is unsustainable and is consequently declined.

**(v) Compensation for unfair termination**

105. Having found that the Claimant's termination was unfair for want of substantive and procedural fairness, the Claimant is entitled to the relief provided by Section 49(1)(c) of the Employment Act which is discretionary. The Court's exercise of discretion is guided by the provisions of Section 49(4) of the Act.

106. The Court has taken into account the fact that the Claimant served the Respondent for about 5 months until the end of September 2016. Second the Respondent had no valid reason to terminate the Claimant. Third, the Claimant was accorded a notice of 25 days contrary to the provisions of Section 35(1)(c) of the Act. In view of the above, the equivalent of two (2) months' salary is fair **Kshs.200,000/=**.

**(vi) Special damages**

107. The Claimant led no evidence to establish this claim. In addition, RW1 confirmed on cross examination that the Claimant enjoyed the Respondent's medical cover until the end of 2016. The claim is declined.

**Conclusion**

108. **In conclusion, judgment is entered for the Claimant for the sum of Kshs.200,000 with costs.**

109. **Interest at Court rates from the date of judgment till payment in full.**

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

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**