



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 760 OF 2015

PETER KAMAU MWAURA.....1ST CLAIMANT

PETER NJANJA NJUGUNA2ND CLAIMANT

-VERSUS-

NATIONAL BANK OF KENYA.....RESPONDENT

JUDGMENT

1. The Claimants filed a Statement of Claim on 7.5.2015 alleging that the Respondent unfairly terminated their contracts of service on 13.4.2015 on grounds of poor performance. They seek the following reliefs:

- a) A declaration that the Respondent's actions of terminating the Claimants from employment vide the Respondent's letter dated 13.4.2015 was unprocedural, unfair and unlawful.**
- b) A declaration that the Respondent violated the Claimants' rights to fair administrative action under Article 47, right to fair labour practices under Article 41, freedom from discrimination under Article 27 of the Constitution of Kenya, 2010 as well as rules of natural justice.**
- c) A declaration that the Claimants were entitled on termination to terms similar to those accorded by the Respondent to employees who left employment under the voluntary early retirement plan.**
- d) An order that the Respondent does implement for the Claimants exit terms similar to those enjoyed by the Respondents' employees who left employment under the voluntary early retirement plan.**
- e) 12 months' compensation for wrongful and unfair termination.**
- f) General damages for violation of fundamental rights and freedoms.**
- g) Three months' salary in lieu of notice.**
- h) Payment in lieu of accrued leave days.**
- i) An order directing the Respondent to issue the Claimants with favourable recommendation letter.**
- j) Any such other appropriate relief as the Court may deem fit.**
- k) Costs of this claim plus interest thereon.**

2. The Respondent filed a defence on 12.4.2016 alleging that the claimants were lawfully dismissed for poor performance and after failing to improve upon being placed on performance improvement plan (PIP) in 2014. She averred that the Claimants did not exit employment through Voluntary Early Retirement (VER) and as such they cannot be accorded similar terms to those accorded to their colleagues who took up the VER. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 15.10.2019 and 21.1.2020 when the Claimants testified as Cw1 and Cw2 respectively while the Respondent called her Head of Employee Relations, Stephine Opiyo Obonyo who testified as Rw1. Thereafter, the parties filed their written submissions.

Claimants' case

4. Peter Kamau Mwaura, (Cw1), testified that he was employed by the Respondent on 31.8.1987 as a clerk and rose through the ranks to the managerial position of Officer in Charge of Business Continuity Centre (BCC) along Mombasa Road. He further testified that throughout his employment, he never received any caution letter or warning letter from the respondent.

5. He told the court that on 13.4.2015 he was called to the Head Office by the Head of his department and on arrival he was taken to the Board room where he was issued with the letter dated 13.4.2015 terminating his services on ground of poor performance. The letter alleged that he had scored 1 out of 5 during the 2014 performance appraisal but according to him, the allegation was not true because the appraisal forms he produced as exhibits indicated that he scored 3 out of 5. He testified that he was appraised in June 2014 and January 2015 and he maintained that he was never rated 1 out of 5. He also denied that he was placed under any PIP after the appraisal.

6. In addition, he contended that he was not given any hearing before the termination or received any warning letter nor did he ever hold any discussions with anyone about his performance before the termination.

7. He further testified that in April 2014, there was VER and he offered to leave but Director of IT Mr. Mohammed verbally pleaded with him to stay because he headed a critical department.

8. He testified that he had four loans at the time of termination but he cleared three using his terminal benefits leaving only one outstanding. He contended that he was not paid salary in lieu of notice and the 14 days he worked in April 2015. He further contended that the abrupt termination shocked him hence he developed hypertension. He prayed for a rebate on his loans and same benefits as his colleagues who exited through the VER in 2014.

9. On cross-examination, he admitted that his appointment letter set out the terms and conditions of services; that the bank procedures and performance policies applied to him; and that paragraph 10 of his appointment letter provided for 30 days' notice before termination.

10. He contended that his aggregate score was 2.8 as stated in his appraisal form annexed as Appendix 7 of his documents but admitted that the appraisal form had a comment that, "requires improvement". He admitted that for the period from July – December 2014, he was appraised by Mohammed Abdalla, his Head of Department, who wrote an email to him dated 17.11.2014 suggesting that he be put on PIP. However, the claimant contended that he was never placed on PIP by any letter from Mr. Mohammed and in the January 2015 appraisal he scored 2.8.

11. He contended that he was threatened to sign the termination letter or else he would not be paid his dues. He further contended that that the accrued leave and salary due offered in the termination letter were never paid or applied to settle his loans. He admitted that he never applied for the VER but that he was dismissed on account of poor performance.

12. On re-examination, he testified that management staff were entitled to 3 months' notice before termination and maintained that his performance rating was 3 out of 5. He contended that the proposed PIP by Mr. Mohammed's email was improper because he ought to have been placed on the PIP immediately after June 2014 appraisal or January 2015 appraisal.

13. Peter Njanja Njuguna, (Cw2) testified that he was employed by the Respondent on 16.9.1992 as an accounts clerk and thereafter rose through the ranks to the management position of BRO (Business Relationship Officer) at Rongai earning a salary of Kshs. 172,472 per month.

14. He further testified that on 13.4.2015, he received an email from the Director of Business Mr. Boniface Biko summoning him to the head office for an urgent matter; that on arrival he was served with a letter terminating his employment on ground of poor performance; that the termination was a shocker to him because he had just been promoted in September 2014 on account good performance and transferred to Rongai Branch.

15. He also contended that he was neither given any hearing before the termination nor did he hold any discussion about his performance. He further contended that he was not given any warning or placed on PIP before the termination. Finally, he testified that he was paid one month's salary in lieu of notice contrary to the HR Policy Manual which provides for 3 months' notice period for the management staff.

16. He contended that he had 3 loans totalling to Kshs. 5,000,000 as at the time of termination but he has since reduced it to Kshs. 3.3 million. He prayed for compensation for unfair termination, exit package in terms of 2014 VER plus a rebate on the outstanding loan.

17. On cross-examination, Cw2 stated that the compensation he seeks will alleviate the loan burden. He admitted that he never applied for the VER because he had a huge loan burden. He admitted that he was served with a termination letter dated 13.4.2015 which stated that his performance for 2014 was rated 1 (unacceptable). He admitted that he was appraised in June 2014 and December 2014 but contended that the Performance Policy was a sham. He denied the alleged poor performance on his part.

18. He admitted that clause 10 of his appointment letter provided for 30 days' termination notice but he was later promoted to management. He further admitted that he was not given any other letter of employment.

19. Upon re-examination, he testified that managerial staff are entitled to 3 months termination notice. He further testified that he signed the performance appraisal which had no date and observed that the rating indicated below his signature was fake because it did not tally with the marks indicated in the form.

Respondent's case

20. Stephine Opiyo Obonyo, Rw1, confirmed that the Claimants were employees of the Respondent and clause 10 of their appointment

letters provided that separation was to be by either party's notice of 30 days. However, he admitted that the appointment letters referenced to other terms and conditions of service. He further contended that the letter dated 27.1.2009 was issued to the 1st Claimant appointing him to junior management and that Clause 6 of the letter also provided for one month notice. He also confirmed that the terms of separation were similar for the 2nd Claimant but he was never elevated to management position.

21. He contended that in a performance management system, the management sets the overall strategy; thereafter the line manager sits with the employee to set individual targets which they agree upon and sign the performance plan. He stated that the plans are reviewed continuously but the formal review is for half the year and full year; that during the formal review, they agree on the rating for formal review; that this is first done by the employee then followed by a discussion with the line manager and thereafter the two sign the rating; and finally, the ratings go through moderation by a team of line managers in line with the performance of the bank.

22. He further testified that after the ratings are moderated, the results are communicated to the employee; that rating of 1 and 2 mean poor performance and the employee is taken through PIP; that if the employee improves the PIP is closed but if he does not improve the employee is terminated.

23. He testified that during the period between July and December 2014 both claimants' rating was 1 and they signed the review forms acknowledging the rating. He testified that Cw1's performance review for the year 2013 was a score of 2 but his performance dwindled in 2014. However, he admitted that the 2nd claimant score for the period between January to July 2014 was a 3.

24. He further testified that there was a discussion in which Cw1 was notified of his poor performance and thereafter he was placed on PIP but again he scored 1 out of 5 leading to termination of his employment on account of poor performance just like the Cw2. He also testified that the termination letters offered payment of terminal dues which included payment of salary in lieu of notice and any accrued leave. He contended that Cw1 was paid Kshs. 288,433.1 but after statutory deductions he got a net of Kshs. 203, 241.11 as indicated in the terminal payslip. On the other hand, the Cw2 paid a gross of Kshs. 268,867.30 but a net of Kshs. 163,564. According to him, the Claimants were paid all their dues.

25. He testified that the respondent published a VER vide Circular No. 1 of 2014 dated 19.2.2014 but the Claimants never applied. Consequently, he contended that the claimants are not entitled to the benefits offered under the said VER.

26. On cross-examination, he testified that there is no document to show that the 2nd Claimant was put on PIP. He confirmed that Cw1 responded by an email dated 11.11.2014 stating that he was not satisfied with the rating and explained that the areas of poor rating required ICT background while he has operations background. He contended that the Cw1 was heard on his poor performance by Shadrack Kiamuko as evidenced by the said email by Cw1 which made reference to a meeting between Shadrack Kiamuko and Cw1.

27. He testified that the Cw1 was dismissed only 5 months after being put on PIP. However, confirmed that the promotion of the 1st Claimant to management position vide the letter dated 27.1.2009 was due to good performance. He admitted that training is one of the ways to have an employee improve while under PIP. He further admitted that he did not have any document to show that the Claimants were given any support to help them improve. Finally, he admitted that there was no documentary proof that there was a disciplinary hearing before the separation. However, that the Cw1 admitted that he had poor performance and that he signed the appraisal.

Claimants' submissions

28. The Claimants submitted that they were not subjected to a hearing contrary to section 41 of the Employment Act and their evidence to that effect was not rebutted by the Respondent. They further submitted that even though incapacity to perform is one of grounds for termination set out under section 45 of the employment Act, the same must be proved at the shop floor. They contended that they had impressive employment records which included merit awards, bonuses and salary increments awarded to them on account of their performance.

29. For emphasis, they relied on **Mary Mutanu Mwendwa v Ayuda [2013] eKLR** where the Court held that the Employment Act has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present. They further relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR** where it was held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

30. They submitted that having failed to accord them all the rights provided under section 41 of the Employment Act before terminating their services, the termination became unfair, unlawful and unprocedural. Consequently, they prayed for compensation for the unfair and unlawful termination. To fortify the claim, they relied on the Labour Appeal Court of South Africa in **Le Monde Luggage cc t/a Pakwells Petze v Commissioners G. Dun and Others, Appeals Case No. JA 65/205** where it was held that compensation which must be made to a wronged party is payment to offset financial loss due to wrongful act.

31. They submitted that they are entitled to 3 months' salary in lieu of notice as provided in the letter dated 10.11.2009. They argued that pursuant to section 49 (1) (c) of the Employment Act they are entitled to 12 months' compensation as they have been unable to secure meaningful employment; they have been unable to repay their loan facilities as a result of the termination; and, finally because they diligently served the Respondent for over 20 years.

32. They cited the case of **Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR** where the Court held that in granting 12 months of salary compensation for unfair termination, it considered the Claimants long service. They further relied on **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR** where the Court held that in determining whether to make an award of compensation the court is to consider the 13 factors set out under section 49 (4) of the Employment Act and awarded the Claimant who had served for 2 years, 12 months' compensation.

33. They further argued that the termination of their services was a continuation of the staff reduction under the VER of April 2014 and as such they ought to be accorded similar exit terms as those who exited under the VER plan including severance pay, rebate of the outstanding loans, consolidation of securities to secure consolidated loans, and medical cover.

34. They submitted that they and their families have greatly suffered including economic hardships as a result of the Respondent's unlawful actions which amounted to violation of their fundamental rights and freedoms and prayed for an award of general damages for the said violations. They relied on **Industrial Court Cause 953 of 2011, Patrick Njuguna Kariuki v Del Monte Kenya Limited** where Ongaya J awarded Kshs. 5,000,000 as exemplary damages to purge the malicious and outrageous conduct by the employer that caused suffering to the employee.

35. Finally, they submitted that the Respondent has defaulted in the payment of their terminal benefits in violation of Article 41 of the Constitution and urged the Court to find in their favour.

Respondent's submissions

36. The Respondent submitted that before an employer terminates the services of an employee, the threshold that must be met is procedural fairness as stipulated under sections 41 and 45 of the Employment Act and substantive justification as stipulated under sections 43 and 45 of the Employment Act. She relied on **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** where the Court held that the requirements of section 41 of the Employment Act have a long pedigree in administrative/public law and are referred to as the rules of natural justice.

37. She further submitted that a fair or unfair termination is based on the circumstances of each case as held by the Court of Appeal in **Kenfreight (EA) Limited v Benson K Nguti [2016] eKLR**. She contended that, in this case, the termination of Claimants' employment met the requirements set out under section 41 of the Employment Act because she had a fair and valid reason to terminate the Claimants' employment on account of poor performance and that the proper procedure was followed in placing them under PIP. She contended that the Claimants were accorded an opportunity to improve, to be heard and to air their grievances through communication and meetings with supervisors and department heads but their performance dwindled.

38. She relied on **Judicial Service Commission v Gilbert Mwangi Njuguna & another [2019] eKLR** where the Court of Appeal held that an opportunity to produce full and complete written documentation was sufficient and an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues.

39. She submitted that under section 47 (5) of the Employment Act, the burden of proving that the termination was unfair is on the claimant while employer's duty under section 45 of the Act is to show that valid reason or reasons for termination of employment. For emphasis, she relied on **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR** where it was held that the Court looks into the validity and justifiability of the reasons for termination.

40. She submitted that the test on whether a reasonable employer could have decided to dismiss on any facts, has been restated in several cases and cited the case of **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** where the Court of Appeal held that it was an eminently reasonable action by any employer to dismiss the 1st respondent an employee, if faced with the conduct displayed by the 1st Respondent. The Court further relied on the case of **British Leyland UK Ltd vs Swift [1981] IRLR 91** where it was held that if a reasonable employer might have reasonably dismissed the employee then the dismissal was fair.

41. She therefore submitted that the Claimants failed in their roles due to poor performance which was to the detriment of the Bank as against its Performance Management Policy whose primary aim is to promote and facilitate the attainment of the bank's objectives.

42. As regards the reliefs sought, she argued that the Claimants are not entitled to a declaration that their termination was procedural and unfair and that their rights under Article 41, 46 and 27 of the Constitution were violated because the correct procedure was followed before and after their termination.

43. She further contended that Claimants are not entitled to enjoy the same exit terms as employees who applied for the VER because they admitted in their pleadings and evidence that they never applied for the VER.

44. With respect to 12 months' compensation, she argued that compensation is not aimed at facilitating unjust enrichment of the party claiming unfair termination. She relied on the case of **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR** where the Court cited the case of **D.K. Marete v Teachers Service Commission Cause No. 379 of 2009** where it was held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees they are meant to redress economic injuries in a proportionate way.

45. She submitted that Courts have held that where a Claimant prays for an award of remedies under section 49 (1) of the Employment Act, the Court will award the salary due in lieu of notice. For emphasis, she relied on **CMC Aviation Limited v Mohammed Noor Civil Appeal No. 199 of 2013** where it was held that the respondent was not entitled to 12 months' compensation as the contract was terminable by one month's notice.

46. She further relied on the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** where the Court held that a grant of 10 months' salaries for a period of which the claimant did not work would amount to unjust enrichment. She also relied on the finding in **Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR** that the measures of compensation should be guided by the statutory capping at the time of termination. Therefore, she urged the court to disallow the prayer for 12 months' compensation as she had demonstrated that the termination was fair and in accordance with the law.

47. On general damages, she submitted that the violation of a constitutional right must specifically be pleaded and proved. She argued that it is

not enough to set out the Article of the Constitution that was breached but one must show that the right was violated. She submitted that there was no evidence led to prove the alleged speculative violations.

48. She submitted that the change of notice period was done lawfully with the Respondent reviewing the notice period for its entire management in order to align itself with the industry practice. She argued that it is too late and unfair to the Respondent to seek to unjustly benefit from the notice period.

49. She submitted that she paid for the accrued leave as provided by her policy less any debts owed to her and referred to her Supplementary documents dated 4.11.2019 and 16.1.2020 as evidence of payment of the said terminal dues. In conclusion, she urged the Court to dismiss the claim with costs and to take into account that the Claimants have outstanding loans which she wishes to recover at the earliest.

Issues for determination and analysis

50. I have carefully considered the pleadings, evidence and the rival submissions presented by both sides and found no dispute in the fact that the Claimants were employed on 6.8.1987 and 19.8.1998 respectively until 13.4.2015 when their contracts of service were terminated on grounds of poor performance.

51. The issues for determination are

- a) Whether the Claimants were unfairly and unlawfully terminated.
- b) Whether the Claimants are entitled to the reliefs sought

Was the Claimants' employment unfairly terminated?

52. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

- (1) No employer shall terminate the employment of an employee unfairly.**
- (2) A termination of employment by an employer is unfair if the employer fails to prove—**
 - (a) that the reason for the termination is valid;**
 - (b) that the reason for the termination is a fair reason—**
 - (i) related to the employee's conduct, capacity or compatibility; or**
 - (ii) based on the operational requirements of the employer; and**
 - (c) that the employment was terminated in accordance with fair procedure.**

53. Flowing from the above mandatory provision of the law, termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reasons(s) and upon following a fair procedure.

Reason for the termination.

54. The reason cited for terminating claimants' employment herein was poor performance. The termination letter dated 13.4.2015 stated that in the appraisal conducted for the year ended 2014 the claimants scored a rating of 1 out of 5 which was an **unacceptable performance** leaving the bank with no alternative but to terminate their contract in accordance with Clause 4.7.2 of the Bank's Performance Management Policy. The said Clause provides that: -

- "i. Staff whose performance is rated 'Below performance Standards' or 'Unacceptable Performance' will be subjected to corrective measures and shall not be entitled to performance rewards;***
- ii. Staff whose performance rating is 'Below performance Standards' will be subjected to a Performance Improvement Plan (PIP)"***
- iii. ...***
- v. Staff whose performance is rated 'Unacceptable Performance' will be subjected to immediate corrective action that may include exiting the bank."***

55. Cw1 denied that his performance was rated 1 during his appraisal in June 2014 and January 2015 and contended that he was rated 3 and he was never placed on any PIP. Likewise, Cw2 denied the alleged poor performance on his part and contended that the respondent's performance policy was a sham observing that the alleged rating of 1 was indicated on the appraisal form after signatures by him and his

Supervisor.

56. Section 4.5 of the Respondent's Human Resource Policy provides:

“Performance Review

The reviews of all employees' performances have been outlined in the PMS process.

Each employee must have his/her targets set at the beginning of every year. The targets will be detailed on a form HR-PMS1. The guidelines for assessing performance are as follows:

i. Outstanding Performance- Where an individual has achieved an overall rating of over 114%

ii. Exceed Performance-Where an individual has achieved between 101-113%.

iii. Achieved Performance-Where an individual has achieved between 85-100%

iv. Achieved Moderate Performance-Where an individual has achieved between 50-85%

v. Achieved Low Performance- Where an individual has achieved less than 50%.”

57. Clause 4.6 of the Performance Management Policy provides that the ratings are as follows:

Outstanding Performance- 5

Exceeding Performance – 4

Met Performance Standard- 3

Below Performance Standard – 2

Unacceptable Performance -1

58. I have carefully considered the material placed before the court by the parties and I am satisfied that the claimants were excellent performers before 2014 and 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. The claimants' supervisors who appraised their performance did not give evidence herein and as such the respondent was left to rely on the documentary evidence to rebut the claimants' evidence.

59. The respondent produced copy of appraisal form for the Cw1 signed by the claimant and his supervisor on 12.1.2015 and 16.1.2015 respectively. In his self-assessment, Cw1 rated himself 3 but the supervisor scored him 58% and rated him 2 which equals to a Moderate Performance but later the score was cancelled and reduced to 49% and a rating of 1. It is unknown when the score was reduced and whether the claimant was involved. As regards Cw2, the respondent produced appraisal for Performance trend in which Cw1 scored 83% but rated 1 below the signature. Considering Clause 4.5 of the Policy, a score of between 50-85% is rated Moderate Performance equalling to 2 out of 5.

60. Having found that the claimants' supervisors scored them between 58 -83% equalling to a rating of 2 out of 5, before the appraisal forms were tampered with, it is my view that there was no valid reason justifying termination of the claimant's employment under Clause 4.7.2 of the bank's Performance Management Policy on account of poor performance. The respondent did not prove that the claimants scored a rating of 1 out of 5 in 2014 performance appraisal equalling to “Unacceptable Performance Standard.” The respondent also did not prove that she placed the claimants on PIP under Clause 4.7.2 (i) and (ii) of the said Policy for a specified period and determined that indeed they were incapable of performing their roles in the bank.

61. Without any evidence to rebut that the claimants never score a rate of 1 out of 5 equalling to an “Unacceptable performance Standard” and further without evidence that the claimants were placed under PIP after scoring Moderate Performance Standard and failed to improve, I must hold that the respondent has failed to prove on a balance of probability that the reason for terminating the claimant's contracts of service, namely, poor performance, was valid as required by section 45 of the Employment Act. It beats logic how an employee promoted due to good performance, as admitted by Rw1, can within 5 months, be dismissed for poor performance. That plus the unexplained amendment to the score/ratings on the appraisal forms, corroborates the contention by Cw2 that the respondent's Performance Management Policy was a sham.

62. In *Jane Samba Mukala vs. Oltukai Lodge Limited* [2010] LLR 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.”

63. The Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR held:

“The reason advanced by the Bank for terminating the respondent’s employment was poor performance. In Jane Samba Mukala v OI Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;

“a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

64. The upshot of the above, is that the Respondent has not proved that there was a valid and fair reason to terminate both Claimants as required under section 45 of the Employment Act.

The procedure followed.

65. Section 41 of the Employment Act which provides:

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
[Emphasis Added]

66. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR held:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

67. In this case the Claimants contended that they were not accorded any hearing prior to their termination and Rw1 confirmed that indeed no hearing took place before the termination. Consequently, I find that the respondent has failed to prove that a fair procedure was followed before termination the claimant’s employment on account of poor performance contrary to the mandatory provisions of section 41 of the Employment Act.

68. Having found that the respondent has failed to prove a valid reason for terminating the claimants’ contracts, and further failed to prove that a fair procedure was followed, it is my holding that the termination was unfair and unlawful within the meaning of section 45 of the Employment Act.

Are the Claimants are entitled to the reliefs sought

69. In view of the foregoing holding, I make a declaration that the Respondent’s action of terminating the claimants’ employment contract vide the letter dated 13.4.2015 was unfair and unlawful. I further make a declaration that the termination violated the claimants’ right to fair labour practices and right to fair administrative action as envisaged under Article 41, and 47 of the constitution and lifted by section 41 of the Employment Act.

70. However, I decline to make declaration that the respondent violated the claimants’ freedom from discrimination as envisaged under Article 27 of the Constitution because the claimants admitted that they never applied for VER.

JUDGE