

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAKURU

ELRC PETITION NO. E011 OF 2023

(Before Hon. Lady Justice Helen Wasilwa, J)

JOSEPH OTUOMA JUMA.....
PETITIONER

VS

ABSA BANK KENYA PLC
(FORMERLY BARCLAYS BANK OF KENYA)
.....RESPONDENT

JUDGMENT

1. By a Petition dated 8th June 2023, the Petitioner sought for the following reliefs; -
 - a. *A declaration that the termination of his employer vide a letter dated 9th June, 2020 was unfair the same having been based on invalid, illogical and unfair reasons.*
 - b. *A declaration that the Petitioner's rights under Article 27, 28, 35, 41 and 50 of the Constitution of Kenya were grossly violated by the Respondent.*
 - c. *Compensation for the gross constitutional violations.*
 - d. *The denied and/or unpaid travel allowances in the total sum of Kshs. 30,689.52 calculated at the rate of Kshs. 54.22 per kilometre.*
 - e. *Compensation or payment of the denied salary increment in the sum of the Kshs. 30,000.00 for the 17 months the Petitioner remained or continued in*

employment after he was denied salary increment and bonus on the basis of unfair and erroneous rating in the 2018 unpaid salary at the Petitioner last payslip until statutory retirement ago.

f. Statutory compensation for wrongful and unfair termination of employment for a period of 12 months the Petitioner's last pay slip.

g. Costs of the petition with interest at court rates.

h. Any other relief as the Honourable Court would deem fit to grant.

Petitioner's Case

2. The Petitioner avers that he was employed by the Respondent on 2nd March 2005 and upon completing his training, he was posted at the Moi Avenue Branch which was the busiest branch in Kenya.
3. The Petitioner avers that he excelled in his posting as an entry level clerk and within 18 months of his employment, he was promoted to middle management level as a Business Customer Advisor. According to the Respondent's then organizational structure; the promotion was from Band 1 (B1) to Band 3 (B3) thereby passing Band 2(B2).
4. The Petitioner avers that after 3 years, he was promoted to the position of a Branch Manager at the then newly opened Taveta Branch. Between 2011 to 2012, the Petitioner steered the branch to match or surpass older branches and

the branch posted outstanding results to be ranked 3rd and 2nd in the countrywide branches performance ratings.

5. The Petitioner avers that in 2013, he was transferred to the Respondent's Nyahururu Branch as Branch Manager where he served for six years. While serving at Nyahururu, all members of his team were rated '*good*' confirming they all scored 80% points in the performance rating matrix for the year 2018. As team leader, he scored 85% which going by the same performance rating matrix ought to have been marked '*good*', however, he was awarded a lower rating dubbed '*needs improvement*'.
6. Consequently, he was denied a salary increment and bonus for his good performance whereas his team members all received and benefitted for both in tandem with the Respondent's tradition to reward good performance.
7. The Petitioner avers that his request to appeal the erroneous low rating was denied by the then Employee Relations Manager. However, his peers similarly affected by the wrong rating either by design or system error were granted the opportunity to successfully appeal resulting to restoration of their correct rating and they benefitted from both the salary increment and bonuses. This violated his right to access to justice and fair hearing under Articles 22 and 50 of the Constitution.
8. The Petitioner avers that he never received any explanation why his rating was interfered with or on what basis his 85%

rating was erroneously marked as *'needs improvement'* which is a low rating.

9. The Petitioner avers that in September 2019, at the onset of the corona virus, he was transferred to Narok Branch. The branch heavily relies on the tourism sector, agricultural activities and other related activities that were adversely affected by drought and the corona virus pandemic. Despite the challenges, he steered the branch to greater levels of profitability.
10. However, on September 2019, the Petitioner was summoned for a discussion about his performance and thereafter he was served with a Notice to Show Cause to which he adequately responded.
11. It is the Petitioner's case that the period under review at the time ought to have been end of 2018 when he served as the Branch Manager, Nyahururu where his performance was rated 'good' and his team surpassed their individual targets with equally 'good' ratings, thus, he did not understand the reason of the summons.
12. The Petitioner avers that he was summoned again in January and May 2020 for the same capability hearings without clarity on which period or duration was under review at the time of the summons.
13. The Petitioner avers that his peers whose rating was lower than his rating on 2019 performance rating matrix i.e Naivasha and Nakuru West Branch Managers were not

invited for the capability hearing. Additionally, his line manager who failed to meet the requisite targets, was left to continue serving in the same capacity as he was given an opportunity to improve his performance. The Respondent's action violated the provisions of Article 27 of the Constitution as it shows that he was discriminated against and targeted for termination.

14. It is the Petitioner's case that he was deliberately discriminated against and his constitutional rights were violated and he was targeted for removal.
15. The Petitioner avers that while serving as the Narok Branch Manager, his performance was rated as '*needs improvement*' whereas his team was rated highly and none was summoned to the Capability hearings and as a result, they received bonuses and salary increments.
16. The Petitioner contends that a team's performance is always reflective of its team leader's performance, therefore, it is illogical that his performance was poor while his team excelled. Thus, he believes that he was targeted and discriminated against in a scheme meant to get rid of him after 16 years of committed and exemplary service without blemish on his record.
17. The Petitioner avers that during his final capability hearing of May 2020, the Respondent itself had posted diminishing profits and his plea to be granted a chance to perform

landed on deaf ears as the Respondent was determined to get rid of him from the system.

18. It is the Petitioner's case that during the capability hearings, he was denied his rightful travel allowance, an entitlement under the law and his plea for the same through his Line Manager was denied. However, other employees who attended the hearings received their travel allowances further confirming that he was a victim of discrimination and unfair labour practices by the Respondent in violation of Articles 27,28 and 41 of the Constitution.
19. The Petitioner avers that he believes that the capability hearing panel may not have recommended his termination but his Line Manager bulldozed the proceedings and caused his unfair termination on invalid reasons.
20. The Petitioner avers that other than the related minutes, the capability hearing panel's recommendations has never been shared with him despite demand for the same. The Respondent has failed, declined, refused and/or neglected to supply the same to the Petitioner.
21. It is the Petitioner's case that he was discriminated against perhaps on the basis of longevity of service and treated unfairly in contravention of his constitutional rights.

Respondent's Case

22. In opposition to the Petition, the Respondent filed a Replying Affidavit dated 7th September 2023 sworn by Vaslas Odhiambo, the Respondent's Head of Employment Relations.
23. The Respondent avers that it employed the Petitioner on 2nd March 2005 as Customer Adviser within Retail Banking and rose through the ranks to the position of Branch Manager, Narok Branch, a position he held until his lawful termination from the Respondent's employment on 9th June 2020.
24. The Respondent avers that on or about 5th May, 2014, while working at its Nyahururu branch, the Petitioner was issued with a first warning letter for underperformance.
25. The Respondent avers that the Petitioner was moved to the Narok Branch in 2019 and at the time its rating was good, however, the Petitioner's performance was poor.
26. The Respondent avers that at HI 2019, the Petitioner was rated underperforming (UP) and was issued with a show cause letter dated 30th August 2019 which he responded to vide his letter dated 5th September 2019. Upon considering the Petitioner's explanation and finding it unsatisfactory, the Respondent invited the Petitioner for a capability hearing on 12th September 2019 vide a Notification of Capability Hearing dated 6th September 2019. The Petitioner attended the Capability hearing and after the said hearing, the Respondent's Panel recommended that the Petitioner be issued with a written caution letter, which was subsequently issued on 20th September 2019.

27. The Petitioner was once again rated Improvement Needed on October 2019 as per the Respondent's monthly scorecards. The Petitioner was taken through a capability hearing process that resulted in a final written warning letter dated 13th January 2020. At Q1 2020, the Petitioner was again rated underperforming and the Respondent invited him for a capability hearing which culminated in his termination.

28. The Respondent avers that on 24th April 2020, it issued the Petitioner with a notice to show cause letter on poor performance, outlining the particulars of his past performance. The Petitioner was required to respond by 29th April 2020, which he did, however late, vide a letter dated 2nd May 2020. Upon considering the Petitioner's explanation and finding it unsatisfactory, the Respondent invited him to a Capability hearing vide a notification letter dated 13th May 2020.

29. The Respondent avers that on 15th May 2020, the Petitioner via e-mail, requested for the rescheduling of the capability hearing date. In an effort to ensure that the Petitioner was accorded a fair hearing, it conceded to the Petitioner's request and the meeting was rescheduled to 3rd June 2020 wherein the Petitioner put his defence.

30. The Respondent avers that upon deliberations on the Petitioner's representations, it was resolved that it was proper and just to terminate the Petitioner from employment which was done vide a termination letter dated 9th June 2020. The

Respondent further informed the Petitioner of his right to appeal against the said decision.

31. The Respondent avers that the Petitioner's employment was terminated following his recurring issue of poor performance. Therefore, his allegations of discrimination are unfounded and lack any basis.

32. It is the Respondent's case that mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause under article 27 of the Constitution as was held in Federation of **Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR**. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any basis. The Petitioner has not demonstrated in any way that the alleged differentiation was unreasonable or arbitrary.

33. The Respondent avers that at the time of the capability hearing held on or about September 2019, the Petitioner had worked at the Respondent's Narok branch for a period of over 6 months. The averment that the period under review ought to have been when the Petitioner served at the Respondent's Nyahururu Branch is misguided.

34. It is the Respondent's case that the capability hearing held on or about September 2019 formed the basis of issuing the Petitioner with & written caution letter dated 20th September 2019. Despite, being on a caution letter, the Petitioner failed to exhibit any positive growth and was subsequently issued with a final warning letter dated 13th January 2020.

35. The Respondent avers that in the absence of any improvement in the Petitioner's performance, it lawfully subjected the Petitioner to a disciplinary process that culminated in his termination from employment. The allegations that the capability hearings were targeted hearings engineered to remove the Petitioner from employment lack basis.

36. The Respondent avers that the disciplinary actions taken against the Petitioner while at Narok Branch, were for specific periods that the Petitioner's performance was below business expectations and which were in the years 2019 and 2020, The Capability hearings were not the same as alleged and the Petitioner was at all material times offered an explanation of his underperformance in the notice to show cause letters dated 30th August 2019 and 24th April 2020, Further, the capability hearings that followed the show cause letters were not quick and successive as alleged but were rather necessitated by his underperformance.

37. The Respondent avers that Clause 7.2.4 of its Disciplinary, Capability (Performance) and Grievance Policy and Procedure

on Performance/ My Contribution Grievances Process provides that:

“A Colleague dissatisfied with their ratings should raise a grievance within the timeframe as provided for/ communicated after the conclusion of the Performance/My Contribution Process. All grievances lodged after opportunity window/period will not be considered.”

38. It is the Respondent's case that the Petitioner submitted his appeal request for the performance rating for the year 2018, at a time it was no longer accepting appeals. Pursuant to Clause 7.24 of its Disciplinary, Capability (Performance) and Grievance Policy and Procedure, the Respondent did not consider the Petitioner's request, consequently, the allegation that he was denied a chance to appeal against the alleged erroneous rating, is false and unfounded.

39. The Respondent avers that the Petitioner's allegations that he was denied his travel allowance during the capability hearings is untenable and lacks basis in law as travel allowance is payable to an employee pursuant to the terms of the employee's employment contract.

40. The Respondent avers that the termination was for valid and genuine reasons related to his poor performance, thus, it argued that the Petitioner's allegations that his line manager orchestrated his dismissal are mere falsehoods and misrepresentations.

41. It is the Respondent's case that the Petitioner's employment contract provided for a termination clause, therefore, he had no legitimate expectation of working for the Respondent until the statutory retirement age. The assertion that the Petitioner's termination was done more than 20 years before his statutory retirement age, is untenable and lacks basis.

Petitioner's Submissions

42. The Petitioner submitted while serving at the Nyahururu Branch as the Branch Manager, the Respondent, in its performance rating matrix for the year 2018, rated his performance as "needs improvement" despite a score of 85% which, according to the Branch Managers' Performance Matrix at the time ought to have been a rating of 'good'. At the same time his team members at the Branch scored a rating above 80% and were all rated 'good'.

43. The Petitioner submitted that his concerns and questions regarding the deliberately erroneous rating of his individual performance were ignored without any attempt by the Respondents to confer any explanation at all. With that erroneous rating, he missed out on his salary increment and bonus which were traditionally payable on such a good performance ratings.

44. The Petitioner submitted that being an employee at the management level, he was not unionizable hence his benefits accrued based on performance being the only avenue through which he earned any benefits including bonuses and salary

increment ever since he was promoted to the position of the Branch Manager.

45. The Petitioner submitted that his performance rating could not have been marked “needs improvement” at a score of 85% and, further, that his rating was deliberately manipulated to mark the beginning of the process to edge him out for reasons known to the Respondent but which reasons are definitely invalid and illogical falling outside the ambit of the provisions of section, 43 and 45 of the Employment Act.
46. The Petitioner submitted that it was illogical to purport that, whereas his individual performance was poor as a team leader, his team members each had a good performance rating. Logically, the team members individual performances mirror the performance of the team leader, thus, it would be an absurd hypothesis to suggest that the team leader’s performance was poor but his team performed better in their individual or collective capacities.
47. It is the Petitioner’s submission that all the other Branch Managers who were similarly affected by wrong performance ratings, either by design or through a system errors, were all allowed to successfully appeal. Therefore, he was subjected to unfair, unreasonable and discriminatory treatment despite presenting reasonable grounds to be granted an appeal to the erroneous rating. Further, it being a first time allegation on performance, the Respondent, if at all acting in good faith and fairness, would have listened to him.

48. The Petitioner submitted that after 16 years of service, the Respondent issued him a notice to show cause on 30th August, 2019, for the very first time, barely two months after the first quarter of the year when his performance was good. In fact, at the time of receipt of the NTSC, the period under review was in doubt.

49. The Petitioner submitted that even though he promptly and adequately responded to the notice as required, the notice was a violation of the Respondent's own procedures as contained in its Policy Guidelines which lays down a 5-step approach in the capability procedure. The Policy provides that under performance or off-track ought to be immediately addressed first by an intensive Management (performance accelerator) but not through an immediate Show Cause Notice as the first cause of action. He was not put on any performance accelerator (performance improvement plan) within the period preceding the NTSC i.e. June, July and August 2019 if it is indeed true that his performance was suddenly found wanting.

50. The Petitioner submitted that the Performance Accelerator document the Respondent seeks to rely on was actually prepared by him after receipt of the NTSC. The Respondent realized its fault in following its own procedures and in an ill-fated attempt to sanitize its mistakes purported to issue the Petitioner with such a document which he diligently worked on without the participation of his Line Manager as per the

requirement of the guiding policy and procedures. The Petitioner's Line Manager who ought to have been his close ally in his efforts to improve in the identified areas of performance was totally disinterested and only wanted to have him out as quickly as possible in fulfilment of the Respondent's desire.

51. It is the Petitioner's submission that as per the Respondent's Performance and Grievance Policy and Procedure, the Performance Accelerator should be done within 3 months. The policy and procedure guidelines do not envisage a situation where an employee served with a notice to show cause and also, at the same time, put on performance accelerator. The two cannot proceed at the same time and the Respondent was at pains during the hearing to explain or to tell the Court which one came first because evidence was led to suggest that the two were pursued at the same time.

52. The Petitioner submitted that the Respondent was bound by its own Policy and Procedures in relation to all its employees at any level including the Petitioner and no evidence has been provided to the Court to show or justify why the Petitioner was subjected to a different process at the beginning of the alleged under performance. Thus, he was discriminated against and targeted for removal on allegations of underperformance.

53. The Petitioner submitted that a sudden and a completely unforeseen incident occurred in the year 2019 affecting Narok Branch which extended to the year 2020; the infamous Mara

Heist in which the Maasai Mara University withdrew a staggering Kshs. 88 Million from its account at the Branch profoundly impacted the Branch's liabilities balance sheet growth and made it near impossible for it to make a come back within the performance measurement matrix.

54. It is the Petitioner's submission that the effect of such a huge withdrawal continued to be felt at the Branch and it became a subject of discussion at his first capability hearing on 6th September 2019. All the panellists acknowledged and confirmed that the events which affected the Branch's performances in the period under review were entirely beyond the Petitioner's control.

55. The Petitioner submitted that the same issue came up as a performance concern in all the successive show cause letters wherein it was cited as liability growth and discussed in all the three capability hearings no wonder one of the panellists named S.B recommended that Maasai Mara account be removed in the Petitioners performance review.

56. The Petitioner submitted that being subjected to quick and successive capability hearings even before review of the remedial actions following the findings of the first capability hearing left him with no viable chance for improvement and confirms that the Respondent was determined to get rid. Additionally, the Respondent, through the Petitioner's Line Manager or any other concerned officer did not bother to take any action to assist the Petitioner in actualizing the identified

remedial steps towards achieving improved performance if indeed his performance dipped as alleged.

57. The Petitioner submitted that the period covering the capability hearings especially in the year 2020, the entire Banking sector's performance dipped following the devastating consequences of the global Corona virus pandemic hence it was the worst time to condemn an employee, especially one based in Narok Branch and who has performed over the years, for underperformance when all the revenue streams and people were grossly affected by the pandemic.

58. The Petitioner submitted that to further lend credence to the fact that the Respondent acted out of malice and improper motive, his personal performance was rated 'underperforming' as a consequence of which he, again, missed out on well-deserved salary increment and bonus both of which members of his team received following a good rating.

59. The Petitioner submitted that in further demonstration of the Respondent's malice, through a policy decision, it restricted areas of business within the Branch which decision affected the Petitioner's efforts as it caused loss of business both factors being beyond the Petitioner's control. Additionally, the Respondent failed to honor and effect the Petitioner's request for rectification on the March 2020 performance dashboard which was riddled with errors and became the subject matter in the consequent capability hearings as confirmed from the minutes produced.

60. The Petitioner submitted that the Respondents did not table any evidence to confirm that the panellists recommended the termination of his employment. The Respondent tabled unsigned and unverified minutes from which no particular conclusion could be noted that any of the panellists or all of them unanimously recommended termination.

61. It is the Petitioner's submission that the termination of his employment was decided and executed by his Line Manager acting in the interest of the Respondent albeit on illogical, unfair, unconstitutional and invalid reasons outside the provision of the law.

62. The Petitioner submitted that if at all his performance dipped for any reasons in the last one year leading to his termination; an employer, acting in utmost good faith, would have been so concerned as to delve in to the matter with a view to finding out the reasons behind the sudden shift in performance, to understand and assist him bounce back to his performing ways other than to take such a drastic decision to force his exit to unceremoniously mark the end his banking career.

63. The Petitioner submitted that the reasons he cited during his capability hearings must played a significant role in what the Respondent may have flagged out as underperformance which reasons the panellists confirmed were beyond his control but the Respondent deliberately refused to acknowledge that fact in its obvious determination to kick him out.

64. The Petitioner submitted that the Respondent deliberately failed to take those logical and reasonable steps in line with its own policy guidelines which failure lends credence to the fact that the Petitioner's termination was irregular and malicious and that he was deliberately targeted for termination possibly in a bid to off load some of its top level management

65. On procedural fairness, the Petitioner submitted that he was served with quick and successive NTSC on the allegation of underperformance to which he suffered unforgettable embarrassment in his neighbourhood and among his peers. Additionally, he was deliberately prevented from filing an appeal against his termination noting that his request for the related minutes of the final capability hearing was ignored. He further attended the capability hearings physically without any facilitation from the Respondent whereas other employees were facilitated to attend the same hearing, thus, he deserves compensation as prayed.

66. The Petitioner submitted that the Respondent attempted to sanitize the procedural aspect of the termination, the procedure adopted, failed the test of procedure fairness.

Respondent's Submissions

67. The Respondent submitted on six issues: whether the Petitioner has met the threshold for pleading constitutional violations; whether there were valid reasons to warrant the termination of the Petitioner; whether the procedural requirements set out in

section 41 of the Employment Act were observed; whether the Petitioner is entitled to the reliefs sought; and who bears the costs of the suit.

68. On the Respondent submitted that it is settled law that a party approaching the court alleging violation of his/her constitutional rights has to do so with utmost precision as to the alleged constitutional violations and the nature of the infringements; the principle was set out in the case of **Anarita Karimi Njeru -Vs- Republic (1976-1980) KLR 1272** and Rule 10 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, also known as the Mutunga Rules. Additionally, the principle of pleading constitutional violations with precision was reiterated by the Court of Appeal in **Mumo Matemu V Trusted Society of Human Rights Alliance and 5 Others [2013] eKLR**.

69. The Respondent submitted that the petition does not set out with reasonable degree of precision that which the Petitioner complains of. Aside from generally stating constitutional provisions, the Petitioner has provided little or no particulars of the alleged constitutional violations.

70. It is the Respondent's submission that the reliefs sought by the Petitioner are not constitutional reliefs contemplated under Article 23 (3) of the constitution. The Petitioner has wrongfully approached the Court vide a petition when no constitutional issues arise in the petition. Having chosen to approach the

court vide a constitutional petition, the Petitioner bore the obligation to present his petition in a manner the infringements and reliefs sought are ascertainable.

71. The Respondent submitted that without conceding that the petition raises constitutional issues, the Petitioner has failed to prove that the alleged violations occurred. It is settled law that a person who alleges infringement and/or violation of a right, bears the burden of proving such violation as held by the Court of Appeal in [*Haki Na Sheria Initiative v Inspector General of Police & 3 others \[2020\] \[2020\] KECA 566 \(KLR\)*](#).

72. The Respondent submitted that violation of Article 27 is alleged, there has to exist a difference in treatment between persons who are in comparable situations and to amount to discrimination, such distinction of treatment should be on the basis of grounds prohibited by the constitution. Reliance was placed in [*FEDERATION OF WOMEN LAWYERS KENYA \(FIDA-K\) & 5 others v ATTORNEY GENERAL & another \[2011\] KEHC 2099 \(KLR\)*](#) wherein the court expanded the requirement for violation of article 27 of the constitution and held as follows,

“in our view mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any basis”

73. It is the Respondent's submission that the Petitioner has not met the threshold for discrimination as he has not provided any grounds and/or basis of the alleged discrimination; neither has he proven that the alleged differential treatment was arbitrary and unreasonable.

74. The Respondent submitted that the Petitioner has not provided any evidence of his alleged rating as "needs improvement". Additionally, without conceding that the Petitioner's rating was different from that of his team members, it is the Respondent's submission that the alleged team members were not persons in a comparable position as the Petitioner. The performance matrix provides for different performance rating for employees in different positions to the effect that a performance rating of Improvement Needed (70% to 79%) for a Branch Manager is different from the performance rating of a BOO which is Improvement Needed (60%- 69.9%). Notably, the Petitioner was a Branch Manager yet the evidence adduced by the Petitioner in attempt to prove the alleged discrimination, shows that his team members were a Branch Operations Manager, a custodian and tellers, therefore, their performance ratings were different from the Petitioner's in terms of the Respondent's performance matrix.

75. The Respondent submitted that it has put in place mechanisms to measure the performance of its employees and the ranking of each employee varies depending on his/her position.

Consequently, employee performance ratings cannot be the same as purported by the Petitioner. The allegation that the Petitioner's performance rating was manipulated to edge him out of employment is therefore unfounded.

76. The Respondent submitted that the Petitioner merely alleges that he was the only one among his peers invited to the capability hearing and that other Branch Managers affected by wrong performance ratings were allowed to appeal. The Petitioner further alleges discrimination on the basis that he was denied his travel allowances during and after the capability hearings whereas other employees invited for the hearings were paid their travel allowances. The Petitioner has merely made bald assertions to his claim with no evidence of the allegations presented before this Court. Consequently, the Respondent did not discriminate against the Petitioner.

77. The Respondent submitted that the Petitioner does not provide any communication to illustrate that he requested for the said information and that he was never supplied with the same by the Respondent. As set out in the case of [*Haki Na Sheria Initiative*](#) (Supra), whoever alleges violation of a constitutional violation bears the burden of proof. The Respondent thus contends that it did not violate the Petitioner's right to access to information.

78. The Respondent submitted that the right to fair labour practices underpins the procedure set out under Sections 41, 43, 45 and 47 (5) of the Employment Act entails an employee both substantive and procedural fairness before terminating employment contracts. The Petitioner was terminated for a valid reason which related to his performance and he was accorded a fair hearing in accordance with the Employment Act and the Respondent's policies and procedures. Consequently, the Respondent did not violate the Petitioner's rights to fair labour practices and fair hearing under articles 41 and 50 of the Constitution.

79. The Respondent submitted that the Petitioner ought to have been specific as to which clauses of Article 50 was violated. Article 50 of the constitution referred to by the Petitioner is an omnibus article of the constitution and some of its clauses are not applicable to the Petitioner as was held in the case of Judicial Service Commission v Shollei & another (Civil Appeal 50 of 2014) [2014] KECA 334 (KLR)

80. On the second issue, the Respondent submitted that the law with regard to termination of contracts is that the same should only be terminated where there are reasons, which reasons, the employer at the time of terminating such a contract genuinely believed to exist hence the termination. Section 43 of the Employment Act provides that:

“In any claim arising out of termination of a contract, the employer shall be required to prove

the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

81. The Respondent further submitted that Clause 6.3.3 of the Respondent’s Disciplinary, Capability (Performance) and Grievance Policy and Procedure provides inter alia that;

“Where a final written warning has been issued and is in force and there is no improvement in performance to the required level, the decision to terminate employment may be made without any further hearing.”

At the time of the Petitioner’s termination, he had a final written warning dated 13th January, 2020 that was issued to him following a capability hearing process.

82. It is the Respondent’s submission that the Petitioner’s termination as can be discerned on the termination letter dated 9th June, 2020 was on account of poor performance. The termination letter concluded that the Petitioner had failed to meet the agreed performance targets and objectives contrary to the business expectations and terms of his employment contract.

83. The Respondent submitted that the Petitioner’s employment was subject to good performance, in terms of Clause 6 of the

contract of employment dated 12th August, 2011. Clause 6 of the said contract provides inter alia that:

“should your performance be found wanting, the bank reserves the right to terminate your employment on grounds of poor performance”

84. It is the Respondent's submission that the Petitioner admitted in his response to the NTSC dated 2nd May 2020 that the apparent low performance level is purely attributed to the branch operating environment which is predominantly agriculture driven. Further, he confirmed during the capability hearing dated 3rd June, 2020 that he had given some promises which he unfortunately never fulfilled. The Petitioner further proceeded to acknowledge his poor performance and stated that he was focused to change.

85. The Respondent submitted that its witness confirmed during trial that the alleged factors cited by the Petitioner in an attempt to justify his underperformance were not enough. In any event, assuming without conceding that indeed there were factors affected the Petitioner's performance as alleged, the Petitioner, was granted ample time to improve which he failed to do, despite undertaking to improve his performance.

86. The Respondent submitted that the Petitioner was aware of the Respondent's expectations in terms of his performance as acknowledged by himself as discussed hereinabove. The capability hearing the Petitioner was subjected to was in

accordance with Clause 6.3.2 of the Disciplinary, Capability and Grievance Policy and Procedure and the allegation that the capability hearings were engineered towards his termination is baseless.

87. The Respondent submitted that it gave the Petitioner the necessary assistance, he was put on a Performance Accelerator Plan and the Petitioner's Performance was reviewed on 17th April, 2020 as was agreed between himself and the Respondent in terms of the Performance Accelerator Plan. In the absence, of improvement in the Petitioner's performance, the Respondent rightfully initiated a disciplinary process against the Petitioner.

88. On the third issue, the Respondent submitted that procedural fairness is what entails a fair hearing. It cited [Benedict Mtoto Mwabili v County Public Service Board Taita Taveta County \[2018\] KEELRC 1690 \(KLR\)](#) the court held that:

“It is now a settled law under section 10(5), and 41 of the Employment Act, Article 47 of the Constitution and a plethora of decisions of this court that, before taking any action to the detriment of an employee, the employer must accord the employee a prior fair hearing. In this case, the contract of service of the claimant was varied to his detriment by the respondent before according any fair hearing.”

89. Additionally, Article 41 (1) of the Constitution provides that every person has the right to fair labour practice.

90. The Respondent submitted that its Disciplinary, Capability and Grievance Policy and Procedure under Clause 6.2 outlines the procedure to be followed in cases of underperformance: Managing Underperformance; Capability (Performance) Hearing; Decision & Sanction; Communication- Informing the employee of the decision; Review Process.

91. The Respondent submitted that the Petitioner was rated underperforming in H1 2019. Following the performance rating for the said period, he was put on a Performance Accelerator Plan in terms of the Respondent's Capability Policy and Procedure. Thereafter, his performance was reviewed and in Q1 he was still rated underperforming. Thereafter, the Respondent accorded him a fair hearing before proceeding to embark on terminating his employment.

92. The Respondent denied the Petitioner's allegation that he prepared the Performance Accelerator Plan and submitted that its policy does not allow an employee to prepare such a document whose preparation is a reserve of the employee's manager as confirmed by the Respondent's witness during trial. The Petitioner was put on a Performance Accelerator (PA) Plan whose objective was to align his performance with the Respondent's business objectives.

93. The Respondent submitted that the Petitioner was put on a PIP before issuance of a show cause letter. The disciplinary process leading up to his termination saw the Petitioner put on a Performance Accelerator Plan following his performance in H1 2019 and after the period of the PIP, a review was done by the Respondent, evidenced by the Scorecards of 2020 where the Petitioner was still rated Underperformance. Thereafter, the Petitioner was issued with a show cause letter dated 24th April, 2020 in terms of Clause 6.3.1 of the Respondent's Disciplinary, Capability (Performance) and Grievance Policy and Procedure.

94. The Respondent submitted that the capability hearings related to specific periods of review and the same were conducted to conclusion in terms of its Disciplinary, Capability (Performance) and Grievance Policy and Procedure. The Petitioner was issued with a written caution, and a final written warning prior to his termination which are sanctions that are recognized in the Respondent's Disciplinary, Capability (Performance) and Grievance Policy and Procedure.

95. The Respondent submitted that its policies do not require that recommendations be made following a capability hearing. Clause 6.3.3 Respondent's Capability Procedure allows it to proceed and terminate without any further hearing, the employment contract of an employee who fails to improve despite being issued with final written warning which is in force. It therefore acted within its mandate as an employer by

terminating the employment contract of the Petitioner who had previously been issued with a final written warning.

96. The Respondent submitted that the Petitioner has not presented any evidence that his Line Manager caused his unfair termination as alleged. The Respondent reiterated that the Petitioner was terminated on account of poor performance and was subjected to due process prior to his termination.

97. It is the Respondent's submission that it complied with Section 41 of the Employment Act and it did accord the Petitioner a fair hearing as contemplated by the court in [Mary Chemweno Kiptui v Kenya Pipeline Company Limited \[2014\] KEELRC 905 \(KLR\)](#) in that *the employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.*

98. On reliefs, the Respondent submitted that the Petitioner's employment was lawfully terminated as a consequence he is not entitled to any award of compensation and damages. A party is entitled to damages and/or compensation upon providing and/or establishing that their termination was procedurally and substantially unfair. It cited the Court of Appeal in ***Kenfreight (E.A) Limited v Benson K. Nguti [2016] KECA 409 (KLR)*** wherein it was guided by the

decision in ***C.P.C. Industrial Products v Angima, Civil Appeal No. 197 of 1922*** and held that;

“the principle that damages will only be limited to the period of notice agreed between the parties could only apply if, in exercising its right to terminate the appointment, the employer was not actuated by ulterior motives or did not act in bad faith; and that if the employer acted maliciously, oppressively, or even callously the court was bound to consider the fact in assessing the damages the employee would be entitled to for wrongful termination or dismissal.”

99. The Respondent submitted that the Petitioner is not entitled to the declaratory order sought in prayers no. (a) and (b), for the reasons that the Petitioner was fairly and lawfully terminated and his petition does not raise any constitutional issues.

100. The Respondent submitted that the remedies available to the Petitioner are as outlined under article 23 (3) of the constitution, Section 12 (3) of the Employment and Labour Relations Court Act 2011 and Section 49 of the Employment Act 2007. Additionally, payment of travel allowance was not a term of the employment contract and the capability hearing leading to the termination was held virtually as confirmed by the Petitioner during trial hence the prayer for travel allowance has no basis.

101. The Respondent submitted that salary increment and payment of bonus is based on an employee achieving his targets and

objectives and the Petitioner is aware of this fact having entered into a contract that expressly provided that salary increments will be based on his achievements of targets and objectives in terms of clause 6 of his employment contract. The Petitioner having been terminated on account of poor performance is not entitled to payment of bonus and salary increment.

102. It is the Respondent's submission that the prayer for unpaid salary until retirement age is without basis, untenable and amounts to unjust enrichment. The Petitioner's employment contract had a termination clause and employment till retirement was therefore not a guarantee as he could be terminated for breach of the conditions set out in his employment contract or unsatisfactory conduct.

103. The Respondent submitted that the Petitioner did not plead the issue of the alleged mortgage in his pleadings and cannot seek sympathy from the court by introducing matters that were not specifically pleaded.

104. On costs, the Respondent submitted that having demonstrated that the Petitioner's contract of employment was fairly and lawfully terminated and that the Petition does not disclose any constitutional issues, the Court should award it costs of this suit.

105. I have considered all averments and submissions of the parties herein. The issues for his court's determination are as follows:

- 1. Whether the petitioner's termination was based on valid reason and after following due process.**
- 2. Whether the petitioner's rights under the constitution were breached.**
- 3. Whether the petitioner is entitled to the remedies sought.**

ISSUE NO 1

106. The petitioner was terminated vide a letter of 9/6/2020 which indicated that he was underperforming contrary to business expectation. Prior to this termination the petitioner was issued with a show cause letter dated 24/4/2020 and to which he responded to on 2/5/2020. In the show cause letter the petitioner was informed that he had been issued with a final warning occasioned by his past performance. He was still underperforming as explained in the said letter and was asked to show cause why disciplinary action should not be taken against him accordingly.

107. In his response, the petitioner gave an explanation surrounding the current levels of performance. He explained that liabilities growth was the key contribution to the observed low performance levels as at end of quarter 1. He also indicated that the apparent low performance level is purely attributed to the branch operating environment which is predominantly agriculture driven. He said that the first quarter is characterized by utilization of available bank balance on farm inputs and machinery. Therefore for large scale farmers

these expenses include purchase of tractors and transport trucks which stretch to tens of millions. He averred that this drops in balance are usually compensated by huge deposits after sale of harvest which is responsible for overall annual balance sheet growth of the branch. He attached historical emails requesting for an increase in branch cash holding limit during the peak season.

108. As to the branch weighted score of 0% against target of 20% he explained that they had operated short of one frontline staff since August 2019 and this impacted their services speed due to a single cashier operating resulting in some respondents falling within the indifferent category.

109. Previously in 2019, the petitioner had also been issued with a written caution letter dated 20/9/2019 for failing to consistently meet the agreed performance standards and objectives. He was also issued a show cause letter dated 10/12/2019. On 3/6/2020, the petitioner was taken through a capability hearing where he explained that challenges in the branch performance were due to Masai Mara heist where large sums of cash were withdrawn and the short time of the reviews.

110. From the proceedings herein, the petitioner was explained to the issue of concern and he responded accordingly and admitted short falls in his performance and he was served with a termination letter dated 9/6/2020. The reasons for termination were still due to poor performance which reasons were established during the capability hearing.

111. Section 43 of the Employment Act 2007 states as follows:

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

112. In view of the reason given out in the capability hearing and responses given, it is evident that the respondents believed that the petitioner's performance was below expectation and he admitted to some of this and not being able to keep up with the promises. It is therefore my finding that there were valid reason to warrant his termination.

113. As concerns due process the petitioner has acknowledged being taken through a disciplinary process and the minutes therefore have been exhibited before court. It is therefore my finding that the petitioner was subjected to a fair disciplinary process and as per section 45(2) of the Employment Act 2007 the termination was therefore fair and justified.

ISSUE NO 2

114. The petitioner submitted that his rights under the constitution were infringed upon. He indicated that article 27, 28, 35, 41

and 50 of the constitution were breached. He submitted that he was rated low erroneously and his request to appeal was denied. He further submitted that he was discriminated against as his peers whose ratings were lower than his i.e Naivasha and Nakuru West branch managers were not invited for the capability hearing and therefore he was target for removal.

115. The petitioner also averred that he was also rated as needs improvement whereas his team was rated highly and none was summoned to the capability hearings and as a result, they received bonuses and salary increments. He averred that his team could not be rated differently from him as he was their team leader.

116. From these submissions, the respondent submitted that the petitioner did not raise a grievance to the ratings within the timeframe as provided for under clause 7.2.4 of the Disciplinary Capability (Performance) and Grievance Policy and Procedure in Performance/My Contribution Grievances process. The petitioner did not demonstrate that he raised his grievance within the stipulated period. The respondents averred that he raised his appeal in 20/8 beyond time allowed.

117. On issue of being discriminated against the petitioner also failed to demonstrate how others were treated differently as compared to him and that the same was unreasonable and arbitrary and does not rest on any basis.

118. As to the teammates being treated differently, the respondent submitted that the ratings of a branch manager was higher 70-79% as compared to others who were at 60 to 69.9% for needs improvement. In essence, the petitioner failed to demonstrate these differential treatment was biased and outside the parameters for each staff.

119. It is therefore my finding that the claimant has not demonstrated that his rights under the constitution were breached.

ISSUE NO 3

120. In the circumstances, I find that the petitioner is not entitled to the remedies sought. The petition fails accordingly and is dismissed. There will be no order of costs.

Dated, Signed and Delivered Virtually at Nairobi this 4th Day of November 2025.

**HELLEN WASILWA
JUDGE**