

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT  
MOMBASA**

**CAUSE NO. E128 OF 2024**

**DANIEL NYAEGA XTO ..... CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK GROUP ..... RESPONDENT**

**JUDGMENT**

The claimant is an adult. The respondent is a banking institution registered under the Banking Act.

The respondent employed the claimant as the bank manager at the Mtwapa branch until 3 December 2024. His employment was terminated on the grounds that he had failed to meet performance targets for the year 2023; he had been placed in the bank's performance improvement plan (PIP), and despite being provided with the necessary support, he continued to perform below expected standards. He therefore failed to meet the targets set for March to June and September 2024, raising doubts about his capability as an employee.

The claim is that the claimant had worked with the respondent in other positions for 17 years without any disciplinary case. He rose to the position of sales manager before being appointed the Mtwapa branch manager in August 2023. Before, the branch was not meeting its profitability target of 84%, so he changed it to 112%. A credit audit revealed malpractices by the former leadership of the branch.

The claimant's case is that in January 2024, a performance review indicated that he had partially met his targets despite his request to the human resources manager to upgrade every employee. The claimant found this discriminatory because he was new to his role and required job training, which was not provided. For the 5 months as the branch manager in 2023, he was not fairly reviewed.

The claimant appealed against the ratings on 4 September 2024, which was accepted, but the human resource business manager, Joe Miranga, called him and indicated that the respondent

was not happy with his appeal. Later, it was found that his appeal had no merit. He raised a grievance through his manager, but the matter was not addressed.

The claimant was placed under the PIP and issued a letter of reprimand, which required him to have monthly meetings with his line manager to agree on his improvements. They held only one meeting and provided no follow-up until his termination notice.

The claim is that the respondent engaged in unfair labour practices against the claimant. He had been the branch manager for a month when it was audited, and malpractices were discovered under the previous leadership. Despite turning the branch's profitability around, the respondent failed to factor this in. In February 2024, the human resource partner visited his branch and engaged with the employees, creating the impression that the claimant was not performing his duties properly. No allegations were raised against him to allow him a response. He suffered the consequences of the regional compliance manager, which led him to file a grievance in a letter dated 17 April 2024. At the time, the claimant's mother was ailing, so he applied for 14 days' annual leave on 21 March 2024, which was declined. His benefits, by virtue of the assignment, were rejected without justification, as evidenced by his letter dated 2 February 2024.

The claim is that the notice terminating his employment dated 3 December 2024 was based on unfair and unlawful grounds. The reasons given were baseless and a sham. Where the respondent conducted any investigations, they failed to involve the claimant, resulting in an unfair summary dismissal. This violated the law and the claimant's constitutional rights.

The claimant is seeking an order that the termination of employment due to alleged poor performance is invalid and unfair, and an order of reinstatement with back payments be issued. In the alternative, compensation for unjust termination of employment: 12 months' gross salary, certificate of service, and payment of costs.

The claimant testified that he worked for the respondent in various positions for 17 years without any disciplinary record. He was highly rated, leading to his appointment as branch manager of the Mtwapa branch, which was not doing very well at the time due to leadership challenges. However, in December 2023, he was reviewed after 5 months and rated partially, but the respondent failed to account for the branch's previous management challenges.

The claimant testified that, despite making every effort to improve the branch, he was placed on a PIP with the condition that he discuss with his line manager, but was only invited to one

meeting. There was no follow-up. As a young branch manager, he asked for mentorship and was allocated the Malindi branch manager, who was his competitor, and hence requested another mentor, which was not addressed.

The claimant testified that at the time of his performance reviews, he was going through a very hard personal time as his mother was ailing. He applied for annual leave to attend, but this was declined. He was later issued a notice dated 3 December 2024, without due process, investigation, or discussion, resulting in his summary dismissal. The respondent failed to comply with the law or with due process and was unable to support the claimant in his new role.

In response, the respondent admitted that the claimant was employed on 5 July 2011 as a graduate trainee and posted to the Town Centre Branch. He then held the position of sales manager. On 1 August 2023, he was appointed branch manager, Mtwapa, earning Ksh. 206,933 per month.

The claimant was promoted to sales manager based on his scores in 2021, 2022, and 2023. In 2023, his final performance rating partially met the target with a score of 2.51. He was placed on a PIP to clarify performance expectations and allow him to demonstrate his ability to meet set goals.

During the PIP, the claimant was expected to work with his line manager to identify areas of improvement and development. He was expected to hold monthly meetings using the PIP template, with discussions focused on his performance and the support needed for improvement.

The claimant's progress was periodically reviewed and monitored during the PIP to ensure improvement. He was expected to inform his line manager of any challenges that prevented optimal performance.

The claimant's expected key performance areas of focus for improvement were financials, commission and fees, forex income, internet banking revenue, international money transfer revenue, retail deposits, loans, and customer growth, among others, which would streamline operations and increase revenue for the bank. The claimant was provided support to enable him to focus on areas for improvement at the beginning of the PIP. However, he continued to fall short of expectations and failed to meet the performance targets. He was issued a severe

reprimand letter following unsatisfactory performance and poor ratings. He filed an appeal against the reprimand, but it was found to be without merit and dismissed.

The claimant was invited to attend a capability hearing on 15 November 2024 to show cause why disciplinary action should not be taken against him for continued poor performance below the stated targets. He was allowed to attend with a representative but opted to participate alone.

The claimant's failure to meet the required performance targets casts doubt on his capability and professionalism, rendering his continued employability with the respondent impractical. His employment was terminated on 3 December 2024 for continued poor performance, and he was paid his terminal dues of Ksh. 230,689.

In evidence, the respondent called Gloria Wesa, the employee relations manager, who testified that, upon his employment, the claimant worked from 5 July 2011 to 3 December 2024, when his employment was terminated for poor performance as the branch manager of the Mtwapa branch.

Wesa testified that the claimant's final performance rating was assessed as partially meeting the target with a score of 2.51. He made an appeal, which was dismissed on 19 March 2024 for lack of merit. He was then placed on PIP through a letter dated 9 April 2024. The purpose was to clarify performance expectations and allow the claimant to demonstrate his abilities to meet set goals.

During the PIP, the claimant was expected to work with his line manager to identify areas of improvement and development. He was expected to hold monthly meetings using the PIP template and receive the necessary support for improvement. His progress was reviewed periodically, but he failed to meet the set targets. He did not indicate any challenges.

Wesa testified that the key targets for the claimant included financials, where he was expected to generate revenue through commissions and fees charged for over-the-counter payments and withdrawals, as well as ATM and other fees. Regarding forex income, he was to ensure that foreign exchange transactions were not so high as to incur losses. Regarding IBank revenue, he was supposed to encourage customers to use internet banking to avoid over-the-counter transactions, thereby generating income for the respondent. For international money transfers, he is required to enhance transfers from diaspora customers through Western Union and other money transfer systems. On performance at risk, being loans that have gone bad,

the claimant was expected to ensure a rate of below 5%. Ensure retail meets the set standards by offering incentives to retain customers and by working with the sales team to increase loan uptake.

Other targets included customer growth through recommending the bank to 65% of people, improving low customer satisfaction, onboarding accounts with deposits, and using prepaid cards. The claim was to ensure that more institutions adopted quick, easy pay for bulk salary payments and to activate IBank internet banking for customers. The claimant failed to meet the set target standards.

Wesa testified that the other targets for the claimant were internal business procedures, including audits, which he failed to address per the set targets.

The claimant was placed on PIP but failed to address the set targets. He failed to improve his scores, resulting in a capability hearing that found him incapable of undertaking his role to the required standard, and his employment was terminated on 3 December 2024.

The claimant has since been paid his terminal dues of Ksh. 230,689 credited to his personal account. This included salary for days worked, notice pay, and 44 days of leave.

Wesa testified that the claimant had a disciplinary record. On 6 February 2013, he was issued a warning letter for MIB Fraud for the loss of Ksh. 247,805.

On 12 September 2018, the claimant was issued a letter of reprimand for unsatisfactory performance in 2017.

On 9 April 2024, the claimant was issued a letter of reprimand for unsatisfactory performance in 2023.

On 2 September 2024, the claimant was issued with a letter of reprimand for unsatisfactory performance in 2024.

Termination of employment was due to failure to meet performance targets, which cast doubt on the claimant's capability and professionalism, thus rendering his employability with the respondent impracticable.

#### Determination

By a notice dated 3 December 2024, the respondent terminated the claimant's employment for alleged continued unsatisfactory performance. The respondent noted that the claimant had

failed to meet his performance targets for 2023; he was placed on the PIP but failed to meet his targets for March, June, and September 2024. These performance failures cast doubt on the claimant's capability and professionalism as an employee of the respondent, rendering his continued employability impracticable.

The claimant's case was that the respondent unfairly treated him, failed to provide the necessary support as a newly appointed branch manager, and, despite finding audit issues with his branch, its profitability has improved significantly since his appointment in August 2023. Despite various challenges, he performed well, but his performance was not assessed. During his PIP, his line manager only met him once; he was not offered any mentorship, and ultimately, the termination of employment was not justified.

Under section 41(1) of the Employment Act (the Act), an employer is allowed to terminate employment on the grounds of poor performance and incapacity.

***(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.***

However, before applying such measures against the employee, the employer must demonstrate the process undertaken to determine that the employee is performing poorly.

The parameters to be addressed by the employer in such a case are addressed by the Court of Appeal in the case of **Kwale International Sugar Company Ltd v Mbaya [2024] KECA 795 (KLR)**. The court held that:

- 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.*

Invariably, the employer must have a policy and practice for measuring good or poor performance. Such a policy must be applied to the employee objectively. Beyond having the policy, the employee should be invited to demonstrate their capability, and the employee should be taken through a disciplinary hearing.

Further to these measures, the court in **National Bank of Kenya v Samuel Nguru Mutonya [2019] KECA 404 (KLR)** held that placing an employee on PIP is not sufficient:

*... the employer has the duty to demonstrate that upon the appraisal of the employee and there was a finding of poor performance, measures were taken to give the alleged poor performing employee training and timelines within which to show improvement.*

A PIP would have no meaning if the employee's training is not included. In **Five Forty Aviation Limited v Erwan Lanoe [2019] KECA 763 (KLR)**, the court held that, in the aviation industry, the training of a pilot is a continuous requirement. Equally, in this case, the claimant, a newly appointed branch manager, the element of his training to fit the job was imperative. As a sales manager before becoming the branch manager, his performance was excellent. The respondent had a duty to establish why his performance suddenly declined. Simply placing him on the PIP and assigning him to various targets without the element of training would not achieve the desired results; it would fail.

The claimant appealed to his performance ratings in March 2024. These were dismissed as having no merit. He requested mentorship and noted that the allocated branch manager was his competitor and would not be of assistance. This was not addressed.

Ultimately, having taken over a branch that was performing poorly, without training, mentorship, or any follow-up from the line manager, the claimant was pitched for failure.

A highly performing employee does not suddenly drop in performance with an underlying issue. A mere technical application of a PIP without taking measures to support the employee would constitute unfair labour practices, as held in **Joyce Mukolwe v Mustek East Africa Limited, Cause No. 2283 of 2016**. An employer must demonstrate the measures they have taken to addressing poor performance by an employee, including seeking an explanation from the employee.

In the case of **Jane Wairimu Muchira v Mugo Waweru & Associates [2012] eKLR**, where the court observed that proper procedure, once poor performance of an employee is noted, is to point out the shortcomings to the employee and allow the employee to improve over a reasonable time. The court also observed that appraisal of performance must necessarily involve active participation of the employee and that a credible performance appraisal process must be evidently participatory.

In this case, under the PIP from 12 April 2024, the claimant had only a single meeting with his line manager. Without proper identification of the claimant's supportive needs, training, coaching, and the requested mentorship, the placement on the PIP was counterproductive. It was not to achieve improvement but to lead to a given conclusion, termination of employment. In the **Palace Engineering (Pty) Ltd v Ngcobo and Others (JA20/2012) [2014] ZALAC 55 (5 February 2014)**, the court held that although the assessment of the employee's work performance was undertaken, it was procedurally and substantively unfair for failing to comply with the law. This position was reiterated in the case of **Jindal Mining South Africa (Pty) Ltd v Association of Mineworkers and Construction Workers Union (AMCU) obo Zwane and Others (JR2422/23) [2025] ZALCJHB 34 (19 June 2025)**.

In this case, the capability hearing on 15 November 2024 is not akin to the procedures under section 41 of the Act. Upon the claimant being invited to demonstrate his ability on the job and the outcome of that demonstration, a show-cause proceeding leading to a disciplinary hearing was imperative. To conclude that he was of poor performance and the capability hearing casts doubt on his capability and professionalism, rendering his continued employability with the respondent impractical, was premature.

Where there is no substantive fairness in the termination of employment, under sections 41, 43 and 45 of the Act, this results in unfair termination of employment.

The primary remedy sought by the claimant is an order of reinstatement. However, the relationship between the parties has broken down following various PIP failures and the failure to provide the claimant with any support. The respondent is a banking entity operating in highly sensitive relations, and returning the claimant to such an environment would not be conducive.

The claimant had worked for the respondent for over 17 years. He had performed very well as the sales manager, only to be promoted to branch manager and lose his job within a year. The claimant had a poor work record, as evidenced by the various warnings.

Taking the above in context and the provisions of section 45(5) of the Act, an award of 4 months' gross salary is hereby found appropriate. The claimant enjoyed interim orders allowing him to pay the mortgage facility at the staff rate. Had he been allowed to continue in his employment, he would have enjoyed such a facility until payment in full. He will enjoy the current staff rates until the scheduled payment date unless he opts to repay early and be released by the respondent.

On the salary of Ksh. 206,933 x 4 = Ksh. 827,732 in compensation.

Regarding costs, the claim is successful, and costs are due.

**Accordingly, judgment is entered for the claimant against the respondent in the following terms:**

- a) Employment terminated unfairly.**
- b) Compensation Ksh. 827,732.**
- c) The claim shall repay the staff loan and mortgage loans at staff rates as agreed between the parties unless he opts to pay up before the due dates.**
- d) The claimant is awarded costs.**

Delivered in open court at Mombasa, this 4<sup>th</sup> day of December 2025.

M. MBARŪ  
JUDGE

In the presence of:

.....  
.....

and .....

