

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

**CAUSE NO. 1077 OF 2018**

*(Before Hon. Lady Justice Agnes Kitiku Nzei)*

**KEVIN NDUNGU KIRIGA .....CLAIMANT**

*VERSUS*

**FAMILY BANK LIMITED .....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent vide a Statement of Claim dated 5<sup>th</sup> June, 2018 and sought the following reliefs:-

(a) *Loss of employment ..... (Kshs.25 yrs x 145,000/= x 12) = Kshs.43,500,000/=.*

(b) *Severance pay ..... (145,000 x 4.25 yrs x 15) = Kshs.355,539/=.*

(c) *General damages for wrongful termination.*

(d) *Costs of the suit.*

(e) *Interest on (a) and (b) above.*

2. The Claimant pleaded:-

- (a) that he was first employed by the Respondent on **28<sup>th</sup> June, 2013** as an Assistant Manager, earning a monthly salary of **Kshs.110,000/=**, and was on or about **4<sup>th</sup> February, 2014** elevated to the position of Manager-Management Information and Analyst with effect from **1<sup>st</sup> February, 2014**, earning a monthly salary of **Kshs.145,000/=**.
- (b) that due to his exemplary performance, the Claimant was awarded a commendation letter by the Respondent's Chief Executive Officer (**one Mr. Peter Munyiri**), and was on **24<sup>th</sup> March, 2015** given a change of role from Corporate Banking to Relationship Manager Corporate, while retaining his remuneration.
- (c) that the Claimant was on **31<sup>st</sup> January, 2017** moved from the position of Relationship Manager to Corporate Information Banking with effect from **6<sup>th</sup> February, 2017**.
- (d) that on **10<sup>th</sup> March, 2017**, the Claimant was summoned to review his performance, and it was agreed at the meeting that he was to ensure that

his performance improved; and that another meeting was scheduled for **24<sup>th</sup> March, 2018** where the Claimant proved that he was able to perform by attaining a deposit of **Kshs.19.9 million** out of his set target of **Kshs.30 million**.

(e) that the Claimant was commended for his exemplary performance as he was among the top Relationship Managers in excellence.

(f) that on **28<sup>th</sup> April, 2017**, the Claimant was issued with a letter of termination **on account of poor performance**.

(g) that **the Claimant was not given an opportunity to explain anything regarding the issue, was not given any reason for termination, was not given an opportunity to be heard, and had not been given any warning**.

(h) that **after** termination, the Claimant was given tokens, being a Tusky's Shopping Voucher for Kshs.5,000/= and Dinner for two at Serena Hotel valued at Kshs.10,000/= **for exemplary performance over the month of April, during**

***which the Respondent claimed that the Claimant had underperformed.***

*(i) that the Respondent's act of terminating the Claimant's employment contravened provisions of the Employment Act, provisions of the Claimant's employment, good labour practice and principles of natural justice.*

3. Documents filed alongside the Claimant's statement of claim included an affidavit in verification of the claim, the Claimant's written witness statement and a list of documents, listing 12 documents. The listed documents included a letter of appointment dated 26<sup>th</sup> June, 2013, a letter of confirmation of employment dated 13<sup>th</sup> January, 2014, a commendation letter dated 8<sup>th</sup> January, 2015, minutes of a Review of Performance Meeting dated 24<sup>th</sup> March, 2017, the termination letter dated 27<sup>th</sup> April, 2017, a gift voucher from Tuskys for Kshs.5,000/=, a gift voucher from Nairobi Serena Hotel dated 8<sup>th</sup> May, 2017, a demand letter dated 2<sup>nd</sup> August, 2017 and copies of the Claimant's payslips, among other documents.

4. The Respondent filed a Response to the Claimant's claim dated 30<sup>th</sup> November, 2018 and **denied** the claim. The Respondent further pleaded:-

(a) *that the Claimant's employment was subject to the Bankers Code of Conduct and Staff Rules and Regulations (Human Resource Manual).*

(b) *that the Claimant's change of role from Corporate to Relationship Manager was not due to outstanding performance.*

(c) *that during the meetings held **on 10<sup>th</sup> March, 2017 and 24<sup>th</sup> March, 2017**, the Claimant was **urged to work hard in order to match the performance levels of other relationship managers**; and admitted that he was not happy with his own performance; and agreed to:-*

(i) *Send daily lead tracker reports to the Senior Manager.*

(ii) *Set up review meetings every fortnight to assess his performance.*

(iii) *Constantly update the Head of Human Resource on his performance.*

(iv) *Increase his deposit collection to a minimum of at least 50% of his monthly target.*

(d) *that the Claimant refused and/or failed to respond to communication from the Senior Manager-Corporate and Institutional Banking with regard to his performance; and neglected to perform the said duties in breach of his contract of employment.*

(e) *that as a result of the Claimant's neglect of duty, the Respondent received complaints from its branches, which relied entirely on the operations and performance of the Claimant's office.*

(f) *that the Claimant's termination was proper, lawful and in accordance with the terms of his employment and in conformity with the law.*

5. The Respondent also filed witness statements of **Elijah Kamau Kariuki** and **Emmaculate Damaris Mutinda** (dated 27<sup>th</sup> November, 2023); and a list of documents dated 30<sup>th</sup> November, 2018, listing 9 documents. The listed documents included copies of the Claimant's employment

contract dated 26<sup>th</sup> June, 2013, an appointment letter dated 4<sup>th</sup> February, 2014, a transfer letter dated 23<sup>rd</sup> February, 2015, a transfer letter dated 24<sup>th</sup> March, 2014, a letter of change of role dated 31<sup>st</sup> January, 2017, minutes of meetings held on 10<sup>th</sup> and 24<sup>th</sup> March, 2017 respectively, and a bundle of emails.

6. The Claimant filed Reply to the Respondent's Response, dated 9<sup>th</sup> April, 2019, and joined issues with the Respondent.
7. According to the Court's record, trial opened before **Dr. Jacob Gakeri, J** on **11<sup>th</sup> April, 2024** when the Claimant testified. The Claimant adopted his filed witness statement as his testimony and produced in evidence the documents referred to at paragraph 3 of this Judgment. The Claimant further testified that he was unfairly terminated; that the Respondent fabricated reasons to dismiss him and disregarded the law. That the employer had **no** reason to dismiss him, and that the termination was **hasty and unprocedurally done**.
8. Cross-examined, the Claimant testified:-

- (a) that the Respondent conducted regular performance appraisals, and **that deposits were a moving target and varied (was adjusted) from month to month.**
- (b) that the Claimant's February/March 2017 target was Kshs.30 million, and that he did not meet the same, but there was growth in his deposits. That the Claimant had met 66% of his set target.
- (c) that the Claimant was terminated before he could set the meeting.
- (d) that the letter **dated 28<sup>th</sup> April, 2017** stated the reason for dismissal as **"continued underperformance"**.
- (e) that the contract did not state that his term of employment would be 25 years, or payment of gratuity.
- (f) that no warning was issued.

9. The defence case opened before me on 29<sup>th</sup> July, 2025. The Respondent's witness, **Emmaculate Damaris Mutinda (RW-1)** adopted her filed witness statement as her testimony, and produced in evidence the Respondent's

documents referred to in paragraph 5 of this Judgment. The witness told the Court that she had been the Respondent's HR since 2016.

10. Cross-examined by the Claimant, **RW-1** testified:-

- (a) *that she had participated in termination of employees for poor performance; and that before termination, an employee sits with his line manager, is addressed on his poor performance and is given an opportunity to improve.*
- (b) *that if the employee is given a show cause letter, a hearing follows and then separation.*
- (c) *that the Claimant was **not given a show cause letter, and there was no disciplinary hearing.***
- (d) *that there had been a discussion with the line manager and Head of HR.*
- (e) *that **a disciplinary hearing is mandatory for non-performance.***
- (f) *that save for an email dated **7<sup>th</sup> February, 2017** by the Claimant's line manager (**Otieno Owino**), there was **no specific documentation to show***

**that there was couching as alleged in the termination letter.**

(g) *that the minutes of the meetings held on **10<sup>th</sup> and 24<sup>th</sup> March, 2017 did not document that the Claimant was to set up review meetings every fortnight; but that the issue was discussed.***

(h) *that the witness was **not** sure whether a warning letter was issued to the Claimant, either before or after the meeting of 10<sup>th</sup> March, 2017.*

(i) *that it was observed in the minutes of the meeting held on **24<sup>th</sup> March, 2017 that the Claimant's performance had improved**, but not as per the bank's expectations. That the witness **(RW-1)** was **not aware of how much deposits the Claimant had achieved during March and April 2017 before his termination.***

(j) *that there was communication between the Claimant and his line manager by an email dated 18<sup>th</sup> April, 2017. That the said email (by the Claimant's line manager) **addressed the Claimant on the setting up of the next***

**meeting, but did not give the time lines within which the performance meeting was to be set up.**

(k) *that although the Respondent Bank's Policy is that an employee appeals within **14 days, the issue of a right of appeal was not captured in the (Claimant's) separation letter.***

11. Re-examined, **RW-1** testified that the Claimant was terminated for **underperformance**, and that this issue is well captured in the termination letter. That the Claimant did **not** meet the Bank's expectations.

12. Having considered the pleadings filed and the evidence presented by both parties, issues that fall for determination, in my view, are:-

**(a) Whether termination of the Claimant's employment by the Respondent was unfair.**

**(b) Whether the reliefs sought are merited.**

13. On the first issue, for a termination of employment to pass the fairness test; there must be both substantive justification

and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination, while procedural fairness addresses the procedure adopted by the employer in effecting the termination (**Walter Ogal Anuro - vs - Teachers Service Commission [2013] eKLR**).

14. On substantive fairness, **Section 43(1) of the Employment Act** provides as follows:-

***“(1) In any claim arising out of a 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.”***

15. **Section 45(1) and (2)(a) of the Employment Act** provide as follows:-

***“(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".***

16. In the present case, the Claimant is shown to have been employed by the Respondent Bank on **15<sup>th</sup> July, 2013** as an **Assistant Manager-Management Information & Analyst, Credit Department-Head Office**, vide a letter of Appointment dated **26<sup>th</sup> June, 2013**. His job description on the aforesaid position was set out in the said letter of appointment.

17. According to the Claimant's pleadings and the evidence presented by both parties, the Claimant was **subsequently transferred** by the Respondent from the aforesaid initial position and initial duties/roles as follows:-

**(a) By a letter dated 4<sup>th</sup> February, 2014, the Claimant was transferred/appointed to the position of Manager-Management Information and Analyst.**

**(b) By a letter dated 23<sup>rd</sup> February, 2015 and titled "Transfer and Change of Role", the Claimant was transferred from the Credit**

**Department-Head Office to Corporate Banking Department as a Corporate Analyst with effect from 2<sup>nd</sup> March, 2015; and his title was changed to Relationship Manager-Corporate Banking.**

**(c) By a letter dated 31<sup>st</sup> January, 2017, the Claimant's role was changed from that of Relationship Manager-Corporate Banking to Relationship Manager Corporate-Corporate and Institutional Banking with effect from 6<sup>th</sup> February, 2017.**

18. I have noted from the evidence on record that the Claimant's **new/subsequent job descriptions for the aforestated three new/subsequent positions/roles were not stated in the aforementioned transfer/change of role letters; or even shown to have been attached (annexed) to the letters.**

19. I have also noted from the evidence presented herein that on **10<sup>th</sup> March, 2017**, barely a month after the Claimant was moved to his last role with effect from **6<sup>th</sup> February**,

**2017 (vide a letter dated 31<sup>st</sup> January, 2017)**, a meeting was held by the Respondent to review the Claimant's performance. **RW-1's** witness statement, which she adopted on oath as her testimony in Court, states as follows at **paragraph 8** thereof:-

**“8. On the 10<sup>th</sup> March, 2017, the Respondent held a meeting to review the Claimant's performance. It was established that the Claimant had not met his targets on deposit collection.”**

20. The Respondent did not tell the Court **which** of the Claimant's roles involved collection of deposits, and was therefore the basis of the review; the role/position held by him as at **10<sup>th</sup> March, 2017** or the one held/performed **prior to 6<sup>th</sup> February, 2017**. The **period of the review was also not stated**. The Court was not told the **basis** of the review as **no** job description on the role/duties being measured was produced in evidence. No **key performance indicators** and the Claimant's **actual performance score card** were produced in evidence.

21. The Claimant's termination letter dated **28<sup>th</sup> April, 2017** states that the Claimant's employment contract was terminated "**due to continued underperformance . . .**" The **validity** of this allegation/reason for termination of employment was **not proved** by the Respondent.

22. **Section 10(1)(c) of the Employment Act** states that an employee's job description of the employment **must** be stated in his contract of employment.

23. **Sub-section (5) of the aforesaid Section** states as follows; and in mandatory terms:-

**"(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee in writing."**

24. As already stated in this Judgment, the Claimant's duties/roles as stated in the contract of employment dated **26<sup>th</sup> June, 2013** changed severally over the years; but the Claimant is **not** shown to have been notified (in writing)

of his new job description/duties and key performance indicators thereof. The Claimant is **not** even shown to have been **consulted** before the changing of his position/role.

25. In my view, an employee **cannot** be accused and/or terminated for **“underperforming”** duties whose description he has **not** been given, and key performance indicators of which have **not** been given in writing by the employer before the job performance commences.
26. In view of the foregoing, I return a finding that the Respondent did not establish the **validity** of the alleged **reason** for terminating the Claimant’s employment. There was, therefore, **no substantive fairness** in terminating the Claimant’s employment.
27. On procedural fairness, an employer who alleges **poor performance** against an employee **must** always comply with the mandatory procedure set out in **Section 41 of the Employment Act** before terminating the employment of such an employee. The said Section states as follows:-

***“41(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 provisions 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.”***

28. The Respondent did **not** comply with the aforesaid mandatory procedure, and did **not** give the Claimant an opportunity to be heard before terminating his employment. The Respondent did **not**, in all circumstances of the case herein, act in accordance with justice and equity in terminating the Claimant's employment.

29. **Section 45(4)(b) of the Employment Act** provides that a termination of employment shall be unfair for all purposes of the Act if it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

30. I find and hold that termination of the Claimant's employment by the Respondent was substantively and procedurally unfair.

31. On the second issue, and having made a finding that termination of the Claimant's employment was unfair, I award the Claimant **the equivalent of nine (9) months' salary as compensation (damages) for unfair termination of employment.** I have taken into account

the **manner** in which the Claimant's employment was terminated; in an abrupt manner and without following the laid down procedure. The Claimant was not given any notice, and was not given an opportunity to be heard. This was extremely unfair.

32. It was a common ground that the Claimant was earning a monthly salary of **Kshs.145,000/=** at the time of termination. Copies of payslips produced in evidence by the Claimant indicate as much. The equivalent of nine (9) months' salary is **Kshs.145,000 x 9 =Kshs.1,305,000/=**, **which I award the Claimant for unfair termination of employment.**

33. The claim for severance pay is **declined**, as termination was not on account of redundancy under **Section 40 of the Employment Act.**

34. The claim for Kshs.43,500,000/= for loss of employment is **declined**, as such a remedy is not one of those provided for in **Section 49(1) of the Employment Act**; and in view of

the award of compensation for unfair termination of employment already made herein.

35. In sum, and having considered written submissions filed herein by both parties, Judgment is hereby entered for the Claimant against the Respondent for **Kshs.1,305,000/=** being compensation for unfair termination of employment.
36. The awarded sum shall be subject to **Pay As You Earn (PAYE)** pursuant to **Section 49(2) of the Employment Act.**
37. The awarded sum shall attract interest at Court rates from the date of this Judgment until payment in full.
38. The Claimant is awarded costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS  
17<sup>TH</sup> DAY OF APRIL 2026**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Mr. Kevin Kiriga (the Claimant) present in person

Miss Mogina for the Respondent