

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

*(Before Hon. Lady Justice Monica Mbaru)*

**CAUSE NO. E117 OF 2025**

**ISAACK MZAE MWABILI.....CLAIMANT**

*VERSUS*

**CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

The Respondent employed the Claimant through a letter dated 20<sup>th</sup> May 2015 as a branch manager, grade 5 within the management grades, with effect from 1<sup>st</sup> July 2015, earning a consolidated salary of Ksh. 270,000 per month. The salary was increased over time to Ksh. 315,536.

The claim is that on 7 August 2024, the Respondent was unlawfully terminated from his employment on the alleged grounds of poor performance. The termination of employment was substantively flawed and contrary to clause 7 of the Human Resources Policy and Procedures Manual (HR Manual). The HR Policy provided that management was responsible for providing sufficient resources and support to ensure the successful implementation of performance expectations for each employee of the Respondent. To ensure satisfactory

management of performance, the Respondent was required to ensure natural justice to the affected employee by undertaking review discussions under clause 7 of the HR policy, which the Respondent failed to do with regard to the Claimant.

The Claimant is that the Respondent failed to give the Claimant a fair chance to address any challenges regarding his performance. The alleged poor performance was without due process. Under Section 41 of the Employment Act (the Act), the Claimant was supposed to be accorded a hearing.

The terms guiding the performance improvement plan (PIP) processes defined under clause 7.7 of the HR policy were flawed. The PIP could not have lasted for more than 5 years, as alleged in the letter dated 7<sup>th</sup> August 2024. There was nothing done by the Respondent to address the alleged poor performance with regard to the Claimant.

The claim is that he was diligent in his duties, and his 2022 score indicated improving performance while at the Umoja branch, where he transitioned it from loss-making to profit-making. The issues of underperformance, alleged for 4 to 5 years, were not addressed with him.

The claim was issued with a show-cause notice on 14 July 2023 based on an alleged poor performance review conducted in May 2023. Before the PIP could be agreed on, this notice was irregular. Thereafter, the Claimant was unilaterally

scored by his supervisor, deviating from the agreed score, with changes that had not been discussed. The supervisor used the Claimant's performance at the Embakasi branch to rate him, without providing documentary evidence or the necessary staff and capacity development. The PIP included matters such as bank liquidity and the single-borrower limit, despite the branch's capacity to provide loans to its customers. The Respondent failed to address the glaring staffing gaps. The Respondent ignored the government freeze on recruitment, resulting in understaffing at the branch.

The claim is that the procedures leading to the termination of employment were substantially flawed because the Claimant was denied access to the minutes of the capacity hearing held on 12<sup>th</sup> July 2024, and his appeal was not heard on the merits. The resulting termination of employment was thus unfair and without justification.

The claim is that the Respondent denied the Claimant the right to retire after 16 years of service. He was denied the chance to earn a pension. He was denied a fair chance in career growth, having previously worked for KCB Bank Kenya Limited before joining the Respondent and the Respondent's Rock City Branch in South Sudan as branch manager. He has since lost all the experience from his professional years and is unable to secure similar employment.

The Claimant is seeking judgment against the Respondent, with a declaration that his employment was terminated unfairly, that his constitutional rights to dignity, fair labour practices, fair administrative action, and the right to a hearing were violated, and that he should be paid 12 months' compensation at Ksh. 3,786,432 with pensions for 16 years of service.

In the alternative, the Claimant is seeking payment of damages for diminished employability, an order of reinstatement of the staff mortgage rate to 6%, and a detailed tabulation reflecting the correct computation, plus costs of the suit.

The Claimant testified in support of his claim. His case was that his salary was adjusted following a performance review on 23<sup>rd</sup> September 2021. The branch had performed well, including his personal performance. He was not on PIP at the time of the salary review.

On 21<sup>st</sup> July 2020, a review took place. He signed for his personal reviews, and the supervisor was supposed to invite him to a discussion before reaching an agreement on the PIP. He was required to increase loan advances and advances in his branch during the June 2021 performance review. He was subsequently placed on PIP until 30<sup>th</sup> September 2021. The PIP proceeded for a year.

The Claimant testified that his performance was reviewed by the Respondent and his supervisor without a hearing. The matters addressed in the PIP resulted from several ongoing issues, including understaffing and liquidity constraints.

However, he was issued a notice to show cause on 20<sup>th</sup> December 2023. He replied on 22<sup>nd</sup> December 2023 and was issued a first warning, followed by a second and a third warning on 8<sup>th</sup> January 2024. In a month, his performance was rated poor.

On 26<sup>th</sup> March 2024, the Claimant received notice for a capability hearing on 5<sup>th</sup> July 2024. It was over alleged poor performance. He was allowed to call a colleague, but opted not to. The Respondent recommended his dismissal with effect from 9 August 2024. He wrote an appeal, but there was no reply.

The Claimant testified that he had hoped to work and retire in the banking sector, working for the Respondent. He had perfected his career in this regard. He obtained a loan payable at a staff rate of 6%, but with termination of employment, the repayment rates changed to commercial rates. He was thus denied the right to work until retirement and to earn a pension, and the claims made should be awarded.

### **Response and set off**

In reply, the Respondent denied the claims and that the Claimant's employment was terminable on any of the grounds provided under the Employment Act (the Act). On 2<sup>nd</sup> March 2016, he claimed that a letter was issued extending his probation by 3 months following unsatisfactory performance of his duties.

Through a letter dated 23<sup>rd</sup> September 2021, the Claimant's salary was increased owing to an adjustment in costs of living against the Respondent's overall performance and not his personal performance at the branch.

On 22<sup>nd</sup> July 2020, the Claimant was apprised of his key duties – finance, customer perspective, internal business process, and people. The major problem identified in January to June 2020 was deposits, account numbers and loans. The aggregate score and rating were 50%, which was rated as unsatisfactory performance. It was agreed that the Claimant's branch would meet its targets by marketing cheap deposits through the landlord product. The Claimant agreed to the targets, indicating he would improve to 70% and thus put on PIP effective 1<sup>st</sup> July 2020.

The Claimant was reviewed again for the period of January to March 2021 and attained 42%, which was poor. He was required to put more effort into his targets.

The claim was subjected to another review for January to June 2021. He was assessed and scored at 40%, and the PIP was extended to 3 months, until 2023.

In July 2023, the Claimant was reviewed, and overall performance was assessed at 41%, ranked as poor. He was then notified that his employment would not be terminated due to underperformance. On 14<sup>th</sup> July 2023, the Respondent issued him a notice to show cause why disciplinary action should not be taken for poor performance.

In a letter dated 18<sup>th</sup> July 2023, he claimed and confirmed that while his branch had stagnated, he was optimistic that he would improve when a pipeline of ksh. 100 million was disbursed. There was an addition of 2 sales recruits to increase performance.

On 28<sup>th</sup> August 2023, the Respondent issued the claim, including a first warning regarding poor performance. On 30<sup>th</sup> September 2023, the Claimant replied that he had not been given a hearing prior to the warning being issued.

On 20<sup>th</sup> December 2023, the claim was issued with another show cause notice due to underperformance. He replied to a second warning issued on 27<sup>th</sup> December 2023.

On 8<sup>th</sup> January 2024, a third warning was issued because the HR policy does not provide a timeframe between warnings. He was subjected to a performance review for January to December 2023, but he scored 42.6%, which was rated poor. The Claimant indicated the challenges he was facing that led to poor performance. A show-cause notice was issued with a last warning.

On 5<sup>th</sup> July 2024, the Claimant was invited to a performance capability hearing, but he failed to give satisfactory responses. It was recommended that employment be terminated and notice dated 8<sup>th</sup> August 2024 issued, indicating one month's notice. Termination of employment was justified.

The Claimant made an appeal, and, in a letter dated 27<sup>th</sup> August 2024, the appeal was rejected.

The response is that there was due process and justifiable grounds leading to the termination of employment. The claims made are without merit and should be dismissed with costs.

The response is that the Respondent continually gave the Claimant time and resources over a period of 4 years to improve his performance. This was never realized. The PIP was implemented to help the Claimant set targets, but there was no improvement.

Through a letter dated 7 September 2015, the Claimant received a house loan for the sum of Ksh. 5,431,312.45 to be repaid within 240 months with Ksh. 38,912 instalments. The applicable interest rate of 6% was for employees. The interest rate would apply only if the Claimant remained an employee, as provided in clause 5.12 of the HR policy.

Upon the summary dismissal, the Claimant, by notice dated 14 August 2024, requested payment of 6 months' loan interest at the staff rate on a gratuitous basis; this was allowed. Thereafter, the Claimant is not entitled to a staff interest rate.

The employment relationship was transactional upon good cause. There was no definite provision that the Claimant would work until retirement, and there was

good cause to terminate his employment; thus, he cannot claim a pension for the 16 years towards retirement.

### **Set-off**

In set-off, the response is that upon the summary dismissal of the Claimant, he was paid the following dues:

- a) Salary up to 8 August 2024.
- b) 12 pending leave days not taken by 8 August 2024.
- c) Notice pay for one month.

Payment in lieu of notice was erroneously effected, as this was not applicable under summary dismissal. The sum of Ksh. 315,536 paid in error should be offset against any dues, if any are due.

In evidence, the Respondent called Josephine Munyiva Mutunga Kioko, the head of corporate banking, who testified that the Claimant was assessed and reviewed on his performance from 2020 and found to be underperforming continuously. From 2020, his aggregate score on the overall performance was below 60%, which was poor. With the exception of 2022, the Claimant never turned its branch into a profit-making one. He had no justifiable reason for failing in his duties since 2023.

The Respondent approved a business development officer, but this was not implemented due to a recruitment freeze and a branch portfolio of less than Ksh.

350 million. He was thus placed on a PIP to assist him in improving his performance on 2 June 2023, and the PIP was reviewed every 3 months without improvement.

Under the HR policy, the Respondent was allowed to issue the Claimant a PIP and warnings, and despite every effort to support him, he underperformed. A notice to show cause was issued, leading to warnings and a capability hearing.

Ms Kioko testified that while the claim was at the Umoja branch, he had adequate staff and several other employees, including a business development officer and a clerk, who were approved as additional staff. However, there is no proof that these additional staff were ever deployed at the HS branch.

The Respondent also called Rose Mukoba, the acting head of human resources, who testified that the HR policy permits the use of a PIP when an employee is underperforming. The Respondent, as a parastatal, has employees regulated by the HR policy and written contracts. Each PIP that was issued was signed by the Claimant. He was continuously rated as a poor performer.

Mukoba testified that in 2022, the Claimant was routed to his branch, and no PIP was issued.

However, in 2020, the Claimant remained on PIP.

In 2023, upon appraisal, a PIP was issued. Each was reviewed after 3 months. There was no improvement, and a notice to show cause was issued, leading to a

capability hearing and a recommendation for summary dismissal, as set out in the notice dated 8 August 2024.

The Claimant filed an appeal, which was dismissed on 27 August 2024.

Mukoba testified that the Claimant was given support while on PIP. This included the provision of a direct sales representative at his branch. He had an acting business development officer. These records, however, are not filed.

At the close of the hearing, both parties filed written submissions.

The Claimant submitted that he was employed by the Respondent as a Branch Manager from July 2015 on permanent and pensionable terms, with confirmed employment in August 2016, and that his salary gradually increased to Kshs. 315,536.00 at the time of termination on 7 August 2024, on alleged grounds of poor performance. He claims that the termination was both substantively and procedurally unfair, as the Respondent failed to follow its HR Policy Manual, particularly Clause 7 on performance management, and did not implement a genuine or properly documented Performance Improvement Plan (PIP).

The Claimant contends that there is no evidence supporting the allegation that he has been on a PIP since 2020, as admitted by the Respondent's witnesses, who conceded that no PIP documentation existed before September 2023. He asserts that the Respondent failed to produce crucial employment records it possessed, contrary to section 74(1) of the Employment Act, and instead relied

on selective and inconsistent documentation that failed to demonstrate poor performance. The Claimant further argues that the PIP process started in September/October 2023 was fundamentally flawed, having been applied retrospectively, lacking prior discussion, documentation, and mutual agreement, and failing to comply with the Respondent's own policy requirements on performance management, including prompt intervention, documented discussions, agreed improvement plans, and monthly reviews.

It is further submitted that the Respondent unfairly altered performance targets from an agreed 70% to an unilaterally imposed 100%, without evidence of such an agreement in the Balance Scorecard, and subsequently relied on those inflated targets to justify the PIP and subsequent termination. The Claimant contends that the Respondent failed to consider important mitigating factors affecting the Umoja Branch, including staffing shortages, lack of institutional support, and systemic liquidity challenges, which were beyond his control and fell under the responsibility of the Respondent's Board and Asset Liability Committee in accordance with the Central Bank of Kenya Prudential Guidelines. He argues that, despite raising these concerns and requesting support, the Respondent failed to provide adequate assistance and instead hastily initiated disciplinary proceedings against him.

The Claimant further asserts that the Respondent did not justify poor performance as a valid ground for termination. The Court in **Kwale**

**International Sugar Company Ltd v Mbaya (Civil Appeal E059 of 2022) [2024] KECA 795 (KLR)**, relying on **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR**, averred that when termination is based on poor performance, the employer must demonstrate the existence of a performance evaluation framework, the measures taken to address the poor performance, and that the employee was given an opportunity to respond before termination. The Claimant asserts that the Respondent did not meet this threshold because there was no proper evaluation system in place, no meaningful support or corrective measures, and no fair hearing prior to termination.

On procedural fairness, the Claimant argues that he was denied a fair hearing contrary to sections 41 and 45 of the Employment Act and Articles 10 and 41 of the Constitution. He asserts that no proper disciplinary hearing was held, that he received multiple show cause and warning letters within unreasonably short periods, and that he was not given sufficient time or materials to prepare his defence. He also claims that he was not provided with the minutes of the disciplinary hearing, was locked out of the Respondent's systems immediately after termination, and that his appeal against the termination was neither considered nor responded to, indicating a rushed and predetermined process.

The Claimant, therefore, argues that he has fulfilled the burden under section 47(5) of the Employment Act by proving a prima facie case of unfair dismissal, while the Respondent has failed to justify the termination under sections 43 and

45 of the Act. He contends that the dismissal was not based on valid or fair reasons and was carried out in breach of principles of natural justice and fair labour practices. Consequently, he requests the Court to determine that the termination was unfair and to grant him remedies under section 49 of the Employment Act, including maximum compensation, considering his nearly ten years of service, a clean disciplinary record prior to the contested PIP process, and the detrimental effects of the termination on his career and financial commitments. He further asks that the Respondent's pleaded set-off be dismissed for lack of evidentiary support and that the claim be allowed with costs.

### **Respondent's Submissions**

The Respondent maintains that the Claimant's dismissal was lawful, procedural, and fair, based on poor performance and carried out fully in accordance with the Employment Act, the HR Policy, and established due process. It is contended that the Claimant consistently received low performance ratings, never exceeding 60% from 2020, and was subsequently placed on a Performance Improvement Plan (PIP) in September 2023 after signing his performance management contract in June 2023.

The Respondent asserts that the Claimant was informed of underperformance, given an opportunity to improve, subject to monthly monitoring, and supported through measures including staff assistance and a conducive work environment,

but failed to show improvement. It is further argued that the Claimant received a show cause letter dated 20<sup>th</sup> December 2023, responded to it, and was subsequently invited to, and attended, a performance capability hearing on 12<sup>th</sup> July 2024, with termination taking place on 8<sup>th</sup> August 2024, following an appeal that was later dismissed.

The Respondent relies on sections 41, 43, and 45 of the Employment Act to argue that both substantive justifications and procedural fairness were satisfied. It claims that poor performance can be a valid reason for dismissal when the employer demonstrates a structured evaluation system, measurable targets, and reasonable efforts to support the employee's improvement.

In support, reliance is placed on **Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause No. 823 of 2010 (2013)** where the Court held that where termination is based on poor performance, the employer must demonstrate the existence of a performance evaluation system, the measures taken to address the poor performance, and that the employee was afforded an opportunity to respond before termination.

Regarding pensionable service, the Respondent argues that the Claimant is not entitled to a pension for 16 years of service as claimed. In **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] KECA 765 (KLR) (5 February 2014)**, the Court of Appeal held that claims for pension and retirement-related benefits are

not automatic upon termination and must be determined in accordance with the applicable pension scheme and contractual framework.

Additionally, in **D K Njagi Marete v Teachers Service Commission [2020] KECA 840 (KLR)**, the Court of Appeal held that claims for anticipatory earnings and retirement-related benefits are not anchored in law and are therefore not recoverable as damages for unfair termination.

Regarding damages for reduced employability, the Respondent claims that these benefits depend on an employment relationship and end upon dismissal, citing **Eric V.J. Makokha & 4 others v Lawrence Sagini & 2 others [1994] KECA 75 (KLR)** where the Court held that once the contract of employment is terminated, all benefits incidental to that contract cease, and the employee cannot continue to enjoy employment-related privileges thereafter and **Joseph Njagi Mwita & 4 Others v Barclays Bank Limited [2019] KEELRC 1597 (KLR)** where the Court held that employment-related benefits, including preferential staff loan terms, are contingent upon the subsistence of the employment relationship and cease upon termination unless otherwise expressly agreed.

The Respondent further contends that the Claimant is not entitled to preferential mortgage interest rates, as such rates would constitute a modification of the employment contract. They cite **Lilian Rhoda Adhiambo v Barclays Bank of**

**Kenya [2021] KEELRC 3031 (KLR)**, which references **National Bank of Kenya Limited v Hamida Bana & 10 Others [2017] eKLR** and **Savings & Loan (K) Limited v Mayfair Holdings Limited [2012] KECA 40 (KLR)**, affirming that courts cannot freely alter contractual terms agreed upon by the parties.

Regarding remedies, the Respondent argues that the Claimant is not entitled to compensation for wrongful dismissal. Alternatively, any award should be minimal and based on section 49 of the Employment Act, proposing a maximum of three months' salary minus one month already paid as set-off. Therefore, the Respondent urges the Court to declare the dismissal fair, dismiss the Claimant's claim in its entirety, and award costs to the Respondent.

### **Determination**

Through a notice dated 7 August 2024, the Respondent terminated the Claimant's employment with immediate effect. The reasons given were that he had continuously underperformed, and despite notices to show cause why his employment should not be terminated and being placed on PIP, he failed to improve. He was invited to discuss his performance as branch manager on 12<sup>th</sup> July 2024, and, over the past 5 years, he had been found to underperform.

The Claimant asserted that he was not afforded due process and was denied his rights to natural justice by the Respondent, as he was seen as underperforming.

Under section 41 of the Act, an employer is allowed to terminate employment following poor performance. Poor performance presupposes that the employee has failed to meet performance targets agreed by the parties.

In **Okumu v Simba Pharmaceutical Ltd [2026] KEELRC 757 (KLR)**, the court held that parties to the employment relationship must agree on the targets to be measured in addressing work performance. It is not sufficient to accuse the employee of poor performance, as held in **Kimeu v Teachers Service Commission [2026] KEELRC 417 (KLR)**. The employer has a duty to put in place mechanisms to review the employee's performance.

For performance evaluation measures or guidelines to be effective, they should be well-known to the employee. The employee must accept the given targets, and the assessment should follow on this basis.

In light of these parameters, the employer must then follow due process as outlined in **Ouma v County Government of Kisumu & another [2025] KEELRC 2603 (KLR)**. The provisions of Section 41 of the Act are expressed in mandatory terms and, as such, must be complied with by an employer who is considering terminating an employee's services or effecting a summary dismissal. Where this procedure, as set out under Section 41 of the Act, is not followed, then a termination that arises from it will be procedurally flawed. It is procedurally irregular.

On 12<sup>th</sup> October 2023, the Claimant agreed with his supervisor on his performance targets. These included the following areas:

1. I will watch the top 10 accounts
2. Monitoring on a daily basis
3. Restructuring accounts before downgrading
4. Regular customer visits
5. Proper appraisals for all loan facilities.

The Claimant made an undertaking to improve by 3% by 30 September 2023.

The supervisor was to do a weekly review.

On 14<sup>th</sup> July 2023, a show-cause notice was issued identifying the areas of concern.

In his response on 18<sup>th</sup> July 2023, the Claimant noted that, with regard to profitability, his branch had improved since 2019. On deposits, there was improvement, and on PAR, he had maintained a 19% improvement.

Fundamentally, in his response, the Claimant noted the challenges he faced, including stagnation in advances and accounts. The branch experienced inconsistent business cycles, especially in lending, due to overall liquidity issues, leading to lost business and slow growth. This was compounded by staffing challenges, especially in user development over the years, which he had shared with HR, further hampering growth.

Despite this response, a first warning was issued on 28 August 2023. The Respondent noted that the challenge of liquidity was within the Claimant's control, as he was required to mobilise and lend resources. Other branches within his locality, including Embakasi, were doing well and posting profits. Regarding the staffing challenge, the Respondent advised the Claimant that, as the branch manager, he was the chief business developer and that, with his team, he should have achieved better performance results.

Thus, a new PIP was issued.

The areas of improvement were outlined.

Both parties remained engaged regarding the Claimant's performance, and the evaluation tool was consistently applied under the PIP. There was no improvement.

On 29<sup>th</sup> September 2023, the Claimant admitted that he signed the scorecard as the basis for his performance management reviews. He acknowledged receipt of the show-cause notice regarding his performance.

Ultimately, there was no improvement in the performance. From 2023 to 7<sup>th</sup> August 2024, when employment was terminated, the Claimant failed to show good cause why his performance had not improved.

The motions of a capability hearing were addressed at length in **Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd &**

**another [2016] KEELRC 461 (KLR)**. In this case, the claim was processed through these procedures, leading to the capability hearing, and he still failed to demonstrate improvement on the given parameters.

The court finds that the termination of employment was justified and that due process was adhered to. The Claimant was the team leader in his branch and failed to improve the overall performance for over 4 years.

Termination of employment was based on section 41(1) of the Act. Although noted to take effect immediately, the application of ‘termination of employment’ instead of ‘summary dismissal’ bears different results.

The Respondent cannot seek a set off under such notice dated 7 August 2024. The notice pay offered at the end of employment is justified.

Upon the finding that termination of employment was justified, the Claimant, having the loan agreement, the terms of the post-employment came into effect. Indeed, the Claimant asked for a preferential staff rate for only 6 months. This was granted. The non-staff rate is applicable after the lapse of such period.

**Accordingly, the claim herein is without merit and is dismissed. The offset does not apply in this case. Each party shall bear its costs.**

Delivered in open court at Nairobi, this 23<sup>rd</sup> day of April 2026

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Catherine and Omar

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