



REPUBLIC OF KENYA



**Barclays Bank of Kenya Limited v Ayago (Civil Appeal E098 of 2023)
[2025] KECA 532 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 532 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E098 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
MARCH 21, 2025**

BETWEEN

BARCLAYS BANK OF KENYA LIMITED APPELLANT

AND

BENSON OTIENO AYAGO RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Kisumu (M. N. Nderi, J.) dated 17th September 2020 in Cause No. 21 of 2016)

JUDGMENT

1. This being a first appeal with respect to the present appeal, and as has been reiterated in several decisions of this Court, it is this court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31 (1) (a) of the Court of Appeal Rules. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR. The background to this appeal, is that Benson Otieno Ayago, the respondent filed suit against the appellant Barclays Bank of Kenya Limited, seeking for the following reliefs:
 - (i) Kshs.3,509,895/-
 - ii. Costs of the suit
 - iii. Interest.
2. The respondent's case was that he was employed by the appellant bank as a clerk in 1994, which position he served as cashier and customer advisor for 13 years. In the year 2012, the respondent was appointed Branch manager in Bomet, with a consolidated salary of Kshs.233,991/-. The respondent's case was that on 30th September 2015, his employment was unfairly terminated on account of alleged poor work performance. Prior to his termination, he was called to a performance review before a panel



where inter alia, financial performance, customer recruitment and controls would be appraised. It emerged that the branch's performance for the entire year 2014 and half of 2015, had declined and despite many discussions with his employer, the respondent's performance improvement plan did not yield positive outcomes. He cited shortage of essential staff, including a personal banker and shortage of sales staff. He explained that as a result of this shortage, he was forced to juggle responsibilities to fill the gaps and this led to underperformance of the branch.

3. The appellant in its response stated that the respondent was dismissed for failing to meet targets as a branch manager and that the respondent had agreed to monthly, half yearly and yearly performance targets. The appellant acknowledged the issue of staff shortage and promised to send additional staff. Strategies of improvement were then agreed on for September 2015 to December 2015, though according to the respondent, the appellant did not honor the commitment and timelines agreed on to make amends in the branch performance and terminated the respondent's employment in September 2015. The appellant stated that respondent was paid terminal benefits including notice pay and all the said sum was applied to offset the respondent's personnel loan with the appellant bank.
4. The appellant explained that the respondent was reviewed on 4th September 2015 before the year ended and was terminated on 30th September 2015 and that as of June 2015 the branch performance was 51% and by August the performance had improved to 66% but said performance was nonetheless below the 100% target hence the termination.
5. The appellant bank's witness, Vaslas Odhiambo Agola, RW1 admitted to the issue concerning staff shortage, but insisted that the branch had capacity to meet the target. The witness also admitted that the panelists at the interview recommended a personal banker to be employed immediately to support the staff at the branch; that staff had left and was not sure that they had been replaced in 2015; and that the respondent had cited lack of enough personnel to do key functions, as the reason for the underperformance of the branch. The appellant also admitted that one teller had been sacked and another resigned on medical grounds, and neither had yet been replaced.
6. The appellant bank maintained that the respondent was fairly terminated for underperformance, although it admitted that the termination was done before the expiry of the agreed improvement period of September 2015 to December 2015; that although the branch had improved to 76% in September 2015, but said performance was still below expectations and that the claimant had received one warning in 2014, arguing that there was no legal nor policy requirement for three warnings to be given before termination.
7. In its judgment, the trial court condensed the issue for determination as being whether the termination was unfair and the remedies available to the respondent.
8. On the issue of termination the learned judge found that the appellant had failed to prove on a balance of probabilities that it had a valid reason to terminate the respondent's employment as per section 43(1) and (2) read with 47(5) of the *Employment Act* 2007 as the respondent had sufficiently demonstrated that the termination was wrongful and that the appellant had failed to meet its end of the bargain to enable him meet the expected branch performance target and that the missing staff made it impossible for the desired target to be achieved. Consequently, the trial court found that the respondent's termination was unfair and violated the *Employment Act*.
9. The court noted that the respondent had risen through the ranks and was required to repay the loan to the appellant bank, yet he was unable to discharge said obligation due to the unlawful termination; that the respondent although was paid terminal benefits, he could not enjoy the same as it was prematurely applied to offset his staff loan; and that the respondent was not compensated for sudden job loss. The



court thus held that the respondent was entitled to compensation in terms of section 49(1) (c) of the Act.

10. The court then went on to award the equivalent of 10 months salary in compensation for unlawful and unfair termination in the sum of Kshs.2,339,910 plus interest and costs.
11. Appellant aggrieved by the decision of the trial court, the appellant filed its memorandum of appeal challenging the judgment of the Superior Court on 4 grounds that:
 - a. whether the appellant was entitled to terminate the respondent based on performance,
 - b. whether the claimant was given an opportunity to show cause;
 - c. whether the respondent contributed to poor performance;
 - d. whether the appellant is entitled to its counterclaim for the outstanding loan of Kshs.3,946,972.50 owed by the respondent.
12. These grounds can be combined as follows 1 and 3 – whether the appellant was entitled to terminate the respondent based on performance, and whether the respondent contributed to poor performance. In this regard, the appellant contends that during the respondent’s employment in 2014 to 2015 performance dwindled causing the appellant bank to intervene; and on 8th April 2015 the appellant held an interview with the respondent to address said dwindling performance; that the respondent admitted to falling short of his expectations and committed to 3 months for improvement.
13. The appellant also contends that despite the respondent’s claim that he had a shortage of staff, he did not request for more staff if such shortage was a serious one, and that there was no evidence of such request, and that at said meeting the respondent undertook to re-strategize to take advantage of the staff available, but nonetheless the appellant issued the respondent with a warning.
14. In addition, the appellant argues that the respondent was subjected to further assessment and in June 2015 he scored 62.25% still below target; given another chance to regularize and placed on an improvement plan with continued reviews; that in August 2015 the respondent was assessed at 51.52% being a drop from the first scoring, and further that the respondent failed to meet his targets as agreed. Another interview was held on 11th September 2015 where the respondent admitted to his shortfalls blaming the same on staff shortage, consequently the appellant had no choice but to terminate the respondent on the basis of poor performance since 2014 to 2015.
15. The appellant contends that in the position of branch manager the respondent was expected to mitigate challenges as well as liaise with headquarters for support, which the respondent failed to do failing to stem the high turnover staff rate and as such the appellant submits it followed proper steps under section 41 of the Act and was entitled to terminate as the respondent had contributed to his termination.
16. On whether the claimant was given an opportunity to show cause, it is the appellants contention that the respondent was given an opportunity to be heard in the two interviews, and the resultant 3-month improvement period to resolve the poor performance which still remained below target with no reason for said poor performance.
17. With regard to whether the appellant is entitled to its counterclaim for the outstanding loan of Kshs.3,946,972.50 owed by the respondent. The appellant submits that the respondent did not deny owing the outstanding nor did he file any defence to it, and the trial court ought to have made a decision of the said counterclaim in favor of the appellant as an admitted debt.



18. The respondent's position is that the appellant's have only one issue for determination, being whether the respondent's termination was unlawful. The respondent points out that it is admitted that two staff members had left for different reasons and neither had been replaced; further that upon the review of his work on 14th September 2015, an action plan was implemented and improvement timelines given by end of the year 2015; that despite this, the appellant however within the same month of September 2015 terminated the respondent in disregard to law and procedure.
19. The respondent also argues that the branch performance had improved from August 2015 from 51% to 76% in September 2015, a fact not denied by the appellant. The respondent also contends that the appellant's witness testified that the appellant's expectation was 100% and on the other hand admitting that the branch did not have sufficient staff; further, that under the circumstance it was impossible to meet the appellant's required work standard, and the appellant could not now turn around and blame the respondent for poor performance, and as such the appellant did not justify the grounds for termination.
20. The main issue in this appeal is whether the respondent's termination was lawful and procedural and in compliance with the *Employment Act*.
21. From the record, that the basis of the respondent's termination was the respondent had performed poorly and failed to meet targets as agreed upon by both parties during the two reviews on record. The appellant argues that the respondent was indeed given notice to show cause vide the interview held on 14th September 2015 and given an improvement timeline by year end. We take note that at the said interview the respondent raised the issue of insufficient staff, a fact that was admitted by the appellant. The appellant, on the other hand, turns around to claim that there is no evidence of the respondent requesting more staff. The question then would be, how was the respondent subjected to due process without being given the tools, in this case, sufficient staff to properly perform his duties and meet the required targets? Indeed, a panelist at the interview proposed that a personal banker be employed immediately to improve performance – this was not done.
22. The importance of employers ensuring that employees have the necessary resources to perform their duties effectively cannot be overstated. It is significant that despite knowledge of the fact that the branch had insufficient staff, and the observation by the panelist that a personal banker should be brought in with immediate effect to boost the branch's performance, the appellant did not do so and thus, did not provide a conducive environment for the respondent to work in and therefore meet his targets. The respondent cannot be said to have contributed to his termination by virtue of poor performance. It is also not lost to us that despite the 3month period to improve by end of year 2015 agreed on 14th September 2015, the respondent's employment was terminated at the end of September, just two weeks after the interview; all this despite recorded improvement, despite being understaffed, a fact not denied by the appellant. We are therefore in agreement with the trial court that due process was not followed.
23. Now that it has been established that due process was not followed, what next? The question of whether or not termination is unfair is dependent on the adherence or lack thereof by an employer of the twin requirements of procedure and substantive justification. Adhering to one and contravening the other renders the dismissal wrongful. Section 41 of the *Employment Act* is instructive and states:

‘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 and the employee shall be entitled to have another employer or union representative of his choice present during this explanation.’

Sections 43, 45 and 47(5) of the *Employment Act* also requires that an employer must prove the reasons for dismissal are valid and fair and prove that the grounds are justified.

24. From the record it is apparent that the respondent’s employment was terminated on the basis of poor performance a fact not contributed to by the respondent as is clear from the record. This court in *Co-operative Bank of Kenya Limited vs. Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment) stated:

“that notwithstanding, even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate.”

25. The burden was on the appellant to show that the employment was terminated in accordance with fair process, granted the appellant a meeting and identified what was going wrong and promised to send additional staff and even gave timelines, and even gave reasons for the termination. However, we find that the appellant did not discharge the burden of proving that the termination was fair and did not embrace procedural fairness. We are satisfied that indeed the termination was unfair, un-procedural, and there is no basis for the court to interfere with the learned judge’s finding to that effect.

26. Turning to the issue of damages awarded, one of the guiding principles for the remedies under section 49 is that damages are awarded to compensate a claimant, and not as a punishment to the employer, but to make good the employee’s loss. In the case of *Hema Hospital vs. Wilson Makongo Marwa* [2015] eKLR this Court adopted with approval the holding of the Labour Court of South Africa in *Le Monde Luggage cc t/a Pakwells Petze vs. Commissioner G Dun & Others*, Appeal Case No. JA 65/205 held:

“the compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee’s loss and not to punish the employer.”

27. The remedies for wrongful dismissal and unfair termination are provided for in section 49 as read with section 50 of the Act to constitute salary, allowances, notice and compensation capped at a year’s gross pay, at the time of dismissal. Section 49(4) however goes further and sets out 14 considerations which should be taken into account in deciding the appropriate remedies under 49(1).

28. With respect to section 49, this court in *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union* [*CA No. 188 of 2014*](#) stated:

“our understanding of the act is that the prescribed remedies are discretionary rather than mandatory to be granted on case by case basis...the 13 considerations the court must take into account before determining what remedy is appropriate include the wishes of the employee, circumstances of termination and the extent to which the employee caused/ contributed to it, the practicality of reinstatement , employees length of service...etc the



court before exercising discretion to determine what remedy to award, the court must be guided by the above comprehensive list of considerations.”

Such discretion must be however exercised judiciously as per this court’s holding in Kenya Revenue Authority & 2 Others vs. Darasa Investments Limited [2018] eKLR, Civil Appeal No. 24 of 2018.

29. In the instant appeal the learned judge awarded the respondent 10 months’ salary of Kshs.2,339,910 together with costs and interest. The trial court considered the counterclaim, and noted that the respondent had worked for over 21 years for the appellant, and despite terminal dues paid to him, the respondent never received the same as it was used to offset the personal loan owed to the appellant, meaning that the respondent went home with nothing despite all his years of service. We take judicial notice that it is common practice that once one stops being an employee, then the interest changes from employee interest to normal interest and the appellant bank would then be at liberty to recover the same through laid down procedure. The appellant having used the respondent’s terminal benefits to offset the loan, there is then nothing owing to the appellant and /or no proof as it were, and if so, the appellant has legal redress on the same. In our considered view, this approach and reasoning was fair; the learned trial judge took note of the offsetting that addressed and resolved of the counterclaim.
30. For the above reason, this court agrees with the trial judge’s finds that said damages awarded were not excessive and the trial judge gave sufficient reasoning for his award under section 49 of the act. Consequently, from the foregoing, we hold that the appeal has no merit and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

