



REPUBLIC OF KENYA



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Kebongo v Barclays Bank of Kenya Limited Presently Known as ABSA Bank Kenya PLC (Cause 460 of 2017) [2025] KEELRC 134 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 134 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 460 OF 2017
NJ ABUODHA, J
JANUARY 24, 2025

BETWEEN

STELLA NKATHA KEBONGO CLAIMANT

AND

BARCLAYS BANK OF KENYA LIMITED PRESENTLY KNOWN AS ABSA BANK KENYA PLC RESPONDENT

JUDGMENT

1. The Claimant through her Amended Statement of Claim dated 11th July, 2023 pleaded inter alia as follows: -
 - a. The Claimant was employed by the Respondent for an aggregate period of close to twenty years where she was employed as a Regional Manager at the level of vice President in April 2014. That before then she had served the Respondent from the year 1990-2007 as a bank clerk and rose through the ranks to the position of a branch Manager. That thereafter she joined Standard Chartered until 2014 when the Respondent reached out to her to join their business team.
 - b. The Claimant averred that as a Regional Manager she was inter alia tasked with taking care of the Respondent's business in the vast Mount Kenya Region. That in April 2015 she was moved to the Moi Avenue Branch and tasked with the role of senior Branch Manager with role being to lead the teams to deliver the branch and customer network goals as stipulated by the score card.
 - c. The Claimant averred that on 14th November, 2016 she received an email attaching the balanced score card summary detailing the overall 2016 "year to date performance" for the entire country. That the scorecard showed the entire network rankings: Moi Avenue branch (cluster) which she headed was ranked 3rd position overall at 102.2%.



- d. The Claimant averred that on the morning of 18th November,2016 while attending a meeting with her branch team her then Line Manager Mr. John Achoki, Mr. Vaslas Odhiambo the Employee Relations Manager and Ms Caroline Ngegwa, HR Representative walked in to meeting and announced that she had been suspended effective immediately for a period of thirty days allegedly pending investigations in to certain transactions relating to her clients. That the verbal communication was followed by a letter advising of the decision.
- e. The Claimant averred that as at 18th November,2016 Mr. Achoki had been her line manager for less than three weeks and Mr. Vaslas had been in the employ of the Respondent for hardly over a week. That on 19th November,2016 a breaking news appeared on the star breaking news twitter handle stating that the Respondent Moi Avenue branch Nairobi had suspended 6 top managers over funds transfer to personal accounts.
- f. The Claimant averred that it was apparent from the alert that malicious information had been released to the media originating from the Respondent intended at soiling her name as she was well known within the banking industry. That on 24th November, 2016 she was summoned by forensic investigation manager and was asked to explain what transpired. That on the same day she gave a formal explanation and indicated that she had not played any role in the transactions in issue.
- g. The Claimant averred that on the afternoon of 7th December,2016 she was called by Mr. Achoki at the office where upon arrival she was handed over a letter dated 7th December,2016 advising that the investigations had been finalized and she was required to report back to work on the 8th December,2016. That on 8th December,2016 she reported to work as advised and on getting to her office she found she had already been replaced and her position taken by another branch manager.
- h. The Claimant averred that as she was trying to figure out the whole situation she was summoned by Mr. Achoki to his office where she was handed over a show cause letter inter alia alleging that she had inflated her score card performance with over 705.5% on account of the very transactions that formed the basis of her suspension. That the Respondent was aware that it was impossible to have a score of 705.5% and that the Respondent had already released score ratings through email of 14th November,2016 that clearly showed the Claimant's branch year to date performance at 102.2%.
- i. The Claimant averred that she questioned where the score card had been sourced from and Mr. Achoki became furious and told her that he obtained the same from Mr. Vaslas. That she protested and sought a clear explanation but instead of giving a clarification on the issues she was raising Mr. Achoki proceeded to issued her with a second show cause letter also dated 8th December,2016 this time insinuating that she had inflated her branch score performance with 5.9% again on account of the transactions that formed the basis of her suspension of 18th November,2016.
- j. The Claimant averred that the allegations in the two show cause letters were blatantly false and a fabrication because the branch score card for the period in contention clearly indicated that the variance from August 2016-October 2016 was a mere 0.4%. That the Respondent was aware of that fact bearing in mind that the score cards were prepared centrally by the Respondent's management information team based on records in the custody of the Respondent and the she had no way of manipulating the same.



- k. The Claimant averred that when it became clear that Mr. Achoki was not willing to relent as she stood up to leave she was handed over yet another letter intimating that she was being suspended pending investigations. That the suspension was for a period of thirty days and this time the allegations was that she improperly approved leave requests for her two team members. That the leave to the two had been properly and regularly approved by the Claimant with due regard to the leave guidelines laid down by the Respondent. That prior to the suspension of 8th December,2016 the Claimant had not been questioned by anybody over the leave issue.
- l. The Claimant averred that despite her reservations and concerns to the Respondent's conduct and the treatment meted on her on 12th December,2016 the Claimant rendered her written explanation on the two show cause letters that alleged inflation of the score card. That despite offering a clean explanation on 6th January,2017 she was summoned by Mr. Achoki again where upon arrival at the office she was handed another letter indicating that her suspension had been extended for a further fourteen days from 7th January,2017.
- m. The Claimant averred that while on suspension on 16th January,2017 she was yet again called by Mr. Achoki who proceeded to issue her with another show cause letter dated 16th January,2017 with allegation that she had failed to execute her role of managing and monitoring leave arrangement for her direct reports. That she responded to the show cause letter stating that the all leave days approved had been so granted at the request of individuals involved. That she proceeded to avail a detailed account of number of leave days taken by each individual under her watch. That no individual under her watch had ever complained of their leave manipulation as alleged.
- n. The Claimant averred that on the same day 16th January,2017 after offering her explanation on the leave issue, Mr. Achoki handed her yet another show cause letter dated 16th January,2017. That attached to the letter was a tabulation of about seven set of account from across the branches out of which only 3 set of the said accounts related to the Claimant's branch and the other belonged to other branches of which she was not responsible. That in one of the set of the accounts she noted that the money had moved from her branch to another branch and the person behind the same was one of her senior managers. That she responded to the show cause accordingly.
- o. The Claimant averred that on 21st January,2017 a day before she resumed her duties Mr. Achoki again extended her suspension for a further 30 days without any explanation on the endless suspensions. That on 25th January,2017 she was summoned by Mr. Achoki and handed over a letter dated 24th January,2017 advising her of disciplinary hearing of 2nd February,2017. That this letter made reference to two show cause letters of 16th January,2016 and no mention was made on the other two show cause letter of 8th December,2016 which were the basis of her suspension.
- p. The Claimant through an email of 27th January,2017 raised concerns with Mr. Achoki and the Human Resource which the Employee Relations and wellness Manager Mr. Vaslas Odhiambo responded on 28th January,2017 and disregarded her concerns and declared that the panel would be impartial. That on 2nd February, 2017 she received an email from Mr. Geneva Musau-HR Director cautioning her of raising concerns over the panelist. That the email came as a shocker since the issues she was raising were legitimate and within her right to fair hearing.
- q. The Claimant averred that the disciplinary hearing proceeded as scheduled on 2nd February,2016 and in attendance were Mr. Godwin, Mr. James Agin, Ms Christine and



Ms Betty Muthee. That on 8th February,2017 she received communication from Ms.Edita Njoroge-Regional Manager Nairobi West cluster making reference to her suspension letter of 8th December, 2016 and advising her to report back to work on 9th February,2017 and see one Ms.Christine Orono for further advise. That no mention was made of the letter of 19th January,2017 that had extended her suspension for further 30 days.

- r. The Claimant averred that on the same day 8th January 2017 Ms. Edita handed her another communication referenced as caution letter communicating the findings of the disciplinary hearing held on 3rd February,2017. That she was handed over another letter dated 8th February,2017 referenced final warning Letter which was pursuant to hearing of 3rd February,2017. That she was found culpable of failing to monitor leave arrangement for her direct report hence a final warning. That she was never invited for any hearing on 3rd February, 2017.
- s. The Claimant averred that the Respondent proceeded to issue her final warning based on leave issues whereas the same accounted only 2.5% on the colleague score card. That for the over 19 years she worked with the Respondent she had never been involved with any disciplinary issue. That she was informed that her new role would be Relationship Manager with her line manager being Mr.Godwin Onungah without any explanation on the shift from the earlier representation that her line manager would be Mrs Ann Kinuthia-Otieno.
- t. The Claimant averred that the Barclays at Work Relationship Managers were stationed at West-end building 2nd Floor along Waiyaki Way but she was told there was nowhere for her to sit there and she was forced to squat at the Market Building within the collections team in CBD as she waited to sign a job description.
- u. The Claimant further averred that on 23rd February,2017 Mr.Godwin summoned her to his office and handed her another show cause letter dated 21st February,2017 alleging that she was underperforming yet her ratings were never underperformance. That she never made aware of changes if any to those ratings. That if any changes they should have been communicated to her by December 2016 being the closing date of all performance communication as per Respondent's policy. That she responded to the show cause letter on 25th February,2017.
- v. The Claimant further averred that the Respondent was aware that her branch's score card had greatly improved to 52.4/55 in the company and was leading among clusters in control at 19.4/20 among others and she had managed to deliver a total income of Kshs 1,079,587,000. That on 3rd March,2017 she received a call and a text from Mr.Godwin advising her to collect a notification for disciplinary capability hearing scheduled for 9th March,2017 where she collected the same on 6th March,2017.
- w. The Claimant averred that on account of events that had unfolded and the callous manner she was treated by the Respondent she filed the present suit with a Notice of Motion on 8th March,2016 where a ruling was delivered on 11th March,2017 and the Respondent was restrained from undertaking any further disciplinary hearings with regard to the Claimant among other orders.
- x. The Claimant averred that on 22nd August,2017 she was summoned to a meeting intended to discuss 1st half performance review in respect to the new position she had taken up in 1st April,2016 where she found Mr.Godwin who stated her performance was good but the same would be deemed under performance on account of underperforming rating of 2016. That Mr. Godwin proceeded to hand her over a letter dated 22nd August,2017 which she refused to



acknowledge as it was requiring her to show cause on account of her performance which was stated to be below business expectations for full of 2016 and HI 2017.

- y. The Claimant averred that out of frustrations and dejection she drafted a resignation letter in a huff and dated the same 21st August, 2017 expressing an intention to resign from the Respondent's employment in 30 days. That on 23rd August, 2017 she received a formal communication terminating her services. That her actions were informed by the fact that the Respondent had despite clear directions by the court as per the ruling continued to torment her with allegations of poor performance vis a vis the year 2016. That she had become a victim of unwarranted aggressions, embarrassment and humiliation by the Respondent's superiors.
 - z. The Claimant averred that she raised her concerns and frustrations she faced and the Respondent did nothing to protect her. That an elaborate scheme had been hatched to frustrate her out of employment with a colourful career in the banking sector spanning over two decades was about to be cut short by the Respondent. That her resignation was not out of her own will as she was literally pushed out of employment due to circumstances where she could not continue working.
 - aa. The Claimant further averred that due to above allegations of underperformance she was denied bonus for the year 2016 whereas her team members in respect of whom she was in charge were all awarded their bonuses. That her interest on loans she had switched to commercial interest after she resigned further straining her. That she received a lot of accolades from her team and Respondent as late as September 2016.
 - ab. The Claimant averred that the disciplinary hearing which was scheduled for 9th March, 2016 was for formality and an avenue to terminate her which was predetermined. That the Respondent disregarded its own guide on Disciplinary Capability and Grievance policy Procedures more so part 5 and 6 of the document. That she was rated Good in 2014, 2015 and 2016 which were met with salary increment and bonuses. That the Respondent violated her rights to fair process free from bias contrary to Article 47 of *the Constitution*.
 - ac. The Claimant further averred that the Respondent violated the provisions of section 4 and 5 of Fair Administrative Act which actions accessioned her immense stress, depression, intimidation and feeling of rejection
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. A declaration that the treatment meted upon the Claimant by the Respondent amounts to unfair labour practice.
 - b. A declaration that the treatment meted upon the Claimant by the Respondent amounts to a violation of the Claimant's rights under *the Constitution* and more so the provisions of Articles 27(1) & (5), 41(1) & (2) and 47.
 - c. A declaration that the treatment meted upon the Claimant by the Respondent amounts to a violation of the provisions of section 4(1), 4(3) and 4(4) of the Fair Administrative Actions Act, 2015
 - d. A order quashing the caution letter and warning letter both dated 8th December, 2017.
 - e. The declaration that the



- f. A Order directing the Respondent to expunge the caution letter and warning letter dated 8th December,2017 from the Claimant’s personal file.
 - g. A declaration that the actions of the Respondent amount to constructive dismissal of the Claimant and thus amounts to unlawful and /or unfair termination of the Claimant’s employment
 - h. A declaration that the Claimant is entitled to damages for unfair termination of employment
 - i. Damages of Kshs 614,250x12=7,371,000 being damages for wrongful termination of employment.
 - j. Unpaid bonuses for the year 2016
 - k. General damages and aggravated damages for breach of the Claimant’s rights under the constitution
 - l. Interest and costs
3. The Respondent filed its Memorandum of Response dated 8th December, 2023 and averred inter alia:
- i. The Respondent admitted the factual part of the claim on having employed the Claimant from 1990-2007 then she came back in 2014 as regional branch Manager. That the Claimant issued it with a resignation letter dated 21st August,2017 giving it 30 days’ notice and thanking the Respondent for the skills and knowledge she gained through the years.
 - ii. The Respondent averred that it accepted her resignation letter dated 21st August,2017 and informed her of its decision to release her on 23rd August,2017 despite her one month notice and opted to pay her the one-month salary in lieu of Notice. That she was also informed of her terminal benefits, her liabilities towards the Respondent, clearance/exit terms and procedures. That she duly cleared with it and participated in the exit procedures of the Bank and was issued with a certificate of service in accordance with section 51 of the Employment Act.
 - iii. The Respondent averred that its performance management system had two measures of ‘who’ and ‘what’ and it was based on the two levels of performance that the overall performance rating of the Claimant in 2016 was based together with those whom she supervised.
 - iv. The Respondent averred that the targets or objectives for each year were agreed between the employee and his/her line manager which were then locked in the performance management system. That performance appraisal was done twice a year that is half year and end year where the line manager inputs her/his comments against what the employee inputs in line with his/her objects as set out in the beginning of the year.
 - v. The Respondent averred that the Respondent’s rating had six levels of ranking and below “good” rank was subject to capability hearings. That an employee who was unhappy with the rating could appeal against the said rating in writing to enable the Respondent address all the appeal on their performance before taking any further action on performance improvement or disciplinary action.
 - vi. The Respondent admitted having sent a summary balance score card on 14th November,2016 for the score card for the Moi Avenue branch detailing the ranking for the year 2016. That the ranking was in respect to evaluations of the overall score of the Respondent’s branches before the discovery of the irregularities of improper account transactions and breaches against the Respondent’s leave policy carried out under the supervision of the Claimant. That after



discovery of the above irregularities and breach of the Respondent's policies and from the findings of the forensic investigations carried out by the Respondent the performance of the Respondent's Moi Avenue Branch was found to be exaggerated necessitating the said ratings to be reviewed so as to reflect the correct and accurate position of the Branch's performance.

- vii. The Respondent averred that after the review the Moi Avenue Branch ratings dropped thereby affecting the Claimant's individual rating. That the performance rating of the Claimant for the year 2016 was underperformance and on 9th March, 2017 the Respondent invited the Claimant for the capability hearing in respect to the overall ratings of the Claimant 2016 as the senior branch manager of Moi Avenue Branch.
- viii. The Respondent averred that the Claimant did not appeal her performance rating of underperformance but in order to avoid the said capability hearing she opted to file the suit herein seeking for orders to restrain the Respondent from subjecting her to undergo a capability hearing on grounds that she had already undergone other disciplinary processes. That the other disciplinary processes that the Claimant alluded to were not in respect to her performance rating but were in regard to two issues of irregularities that is on leave policy and cash transactions on two Zidisha Bonus Accounts.
- ix. The Respondent averred that the Claimant did not appeal the decisions of the disciplinary panels in respect of the two disciplinary processes carried out and concluded by the Respondent in which she was issued with a final warning letter and a caution letter in accordance with the Respondent's Disciplinary Procedures Policy. That the court in its ruling of 11th May, 2017 upheld the caution letter and final warning letter issued to the Claimant to the Claimant and indicated that the said letters shall take their cause.
- x. The Respondent averred that the court in its wisdom in regards to the Claimant's performance rating in 2016 restrained the Respondent from carrying out a capability hearing on grounds of underperformance rating of 2016. That according to its understanding of the ruling the court did not intend to exempt the Claimant from her performance obligations towards the Respondent neither was it intended to absolve or excuse the Claimant's previous poor performance rated as underperforming.
- xi. The Respondent averred that the Claimant's employment contract contained provision for performance reviews in accordance with the Respondent's performance development policies. That the Claimant having avoided going through the capability hearing for her 2016 performance which could have required her to undergo PIP she instead returned to work but failed to improve her performance for the 1st half of 2017 where she was rated as underperforming.
- xii. The Respondent admitted that the Claimant was issued with a show cause letter dated 22nd August, 2017 requiring her to explain in writing the reasons hindering her performance in which letter the Respondent made reference to the performance period of her underperformance. That the performance ratings for each year were measured independently to mean that performance rating of previous year did not spill over to the performance rating of subsequent year. The Respondent denied that the Claimant's 2016 performance ratings bore any bearing to the 2017 half year performance reviews.
- xiii. The Respondent averred that the show cause letter above was written in accordance with the Respondent Performance Management policies which required an employee to account for consistent underperforming ratings. That the Claimant's response to the show cause letter was



the resignation letter dated 21st August,2017 which showed that she intended to resign even before the meeting and before the show cause.

- xiv. The Respondent averred that the ruling of the court did not vary or challenge the Claimant's performance rating of underperformance for the year 2016 but challenged the disciplinary procedure undertaken by the Respondent. That it did not frustrate the Claimant leading to her resignation as a show cause letter requiring an explanation for poor performance does not amount to harassment but accountability on her reciprocal role and duty towards the bank.
- xv. The Respondent averred that when it comes to the loan facility the Claimant being a branch manager was aware of the terms for the facility she obtained from the bank as an employee and in the event she exited the bank.
- xvi. The Respondent averred that the disciplinary actions taken by the Respondent were genuine and warranted and were carried out in accordance with the disciplinary Policy Toolkit of the Respondent bank which the Claimant was supposed to use the said procedures in the event of any breach from her team members.
- xvii. The Respondent averred that the Claimant did not provide any particulars of discrimination and/or personal dislikes, racial bias and prejudice which allegations the Respondent denied. That it was unable to plead to the said allegations and that it is a reputable institution committed to Constitutionalism and the rule of law and which ensures adherence to the law.
- xviii. The Respondent prayed that the court should disallow the prayers sought by the Claimant as she willfully resigned and was paid all her terminal dues.

Evidence

4. The Claimant called one witness, the Claimant (CW1). She testified in court on the 22nd May, 2024 and 9th October,2024 where she adopted her amended witness statement together with the pleadings and documents filed in court as her evidence in chief.
5. CW1 further that she was a trained teacher but quit and joined the banking industry explaining her journey from 1990 until 2017 when she exited. That she was the regional manager for Moi Avenue Cluster Nairobi. She was suspended on 18th November, 2016 on account of her team members carrying out transactions which were questioned.
6. CW1 testified that she was removed from the banks system on 24th November,2016 and that no money was lost as everything was done as per procedure. On resuming on 8th December,2016 she was issued with two show cause letters on the same transaction. It was her evidence that she was accused of leave irregularities of her team whose leave was approved but they never went which was not true. That she responded to all the show cause letters and her suspension was extended.
7. CW1 testified that she was invited for disciplinary hearing which she attended but requested for a different panel as she wanted Godwin removed as she thought he would not be independent but. The request was declined.
8. CW1 testified that on 8th February,2017 she was called to resume work on 9th February,2017 and when she reported, she received a caution letter and a warning letter on the leave issue and the transactions. That she was accused of manipulating data which was not possible as it was not handled by her. She further stated that before she resumed work she was again accused of underperformance in that her score card showed performance at 102.2%. She responded to the show cause letter denying the underperformance over which she had no prior communication about. She was invited for a hearing



- on 9th March,2017 on the underperformance and by this time she had already been issued with final warning.
9. CW1 further stated that she challenged the capability hearing in Court and the Court issued injunctive orders against it. Concerning bonus, it was her evidence that these were paid in March to other staff except her. It was further her evidence that she resumed work after court's ruling and was assigned the role of relationship manager which was lower than her previous role even though her appointment letter stipulated she could be assigned any other role.
 10. CW1 testified that in the new show cause letter she was accused of underperformance in her role which she had served for less than 6 months. She was released when she resigned and subjected to exit interview where she stated that she was leaving due to bullying and harassment. It was her evidence that she was not privy to performance accelerator plan as it was never generated with her participation nor communicated to her. That email from Vaslas showed she was targeted and raised concerns and wrote seeking help but got no response.
 11. In cross examination CW1 confirmed that the court made a determination on the 5 show cause letters. That the court dealt with her complaints in the ruling. That the ruling did not bar the Respondent from taking disciplinary action against her. CW1 further contended that the actions by the Respondent after the court ruling were illegal and that the disciplinary hearing did not make reference to the 5 show cause letters considered by the court and further that her resignation letter of 21st August,2017 did not mention humiliation and coercion.
 12. CW1 confirmed that she was satisfied with the work and skills learnt. That she was paid one month in lieu of notice, unutilized leave days and she signed for the letter accepting her resignation.
 13. CW1 confirmed that the show cause letter of 22nd August,2017 was not signed by her or her line manager as was the practice. That the document was given to her at 7.45pm. That she scrambled the resignation letter out of frustration. That the resignation letter was dated before the show cause letter and that in the exit interview she indicated she left due to bullying and harassment but did not indicate the same in her resignation letter. The Respondent acknowledged her exit interview but never made any response and resignation was not breach of contract.
 14. In re-examination CW1 clarified that by the time she went to court she had received several show cause letters and the court ordered that she goes back to work and nature their relationship. The court never commented on the justification of the show cause letters. That she was not taken back to her position.
 15. CW1 clarified that even though the resignation letter was dated 21st August, 2017 she resigned on the meeting of 22nd August,2017 after she was handed over a show cause letter when she thought they were going to discuss her role. She further clarified that the resignation letter was received on 22nd August,2017 and she never gave reasons for resigning as she was in an hurry but gave the same in her exit interview and that the show cause letter pushed her to resign without her wish.
 16. The Respondent's case on the other hand was heard on 9th October, 2024 where Vaslas Odhiambo (RW1) the Respondent's Head of Employment Relations testified. RW1 adopted his witness statement and the Respondent's pleadings and documents as his evidence in chief.
 17. RW1 stated that he knew the Claimant who resigned and her resignation accepted by the Respondent on 23rd August,2017. That on the exit interview employees are given opportunity to say what they want to say and the manager had no opportunity to respond during the exit interview. That the questions were important to the Respondent. RW1 further stated that the Claimant answered positively that the Respondent Bank was a place she would recommend for work and given a chance she would work for



- the Respondent again which meant she had no issues with the bank. That the Claimant was paid her terminal dues upon resignation.
18. In cross-examination RW1 confirmed that he joined the Respondent in November, 2016 and the Claimant complained in November, 2016, two days after he joined. That he handed the suspension letter to the claimant but he could not remember if he was in the meeting where the Claimant resigned and was not part of the exit interview.
 19. RW1 confirmed that appeal was to be filed within three days after being made aware of the decision of the rating. That ratings for 2016 were monthly, quarterly and annually and performance communicated individually. He further confirmed that the rating was before discovery of irregularities. That the report was not before the court but the details were in the show cause letter.
 20. RW1 further stated that he was not sure of the correct inflation of score card since one show cause stated it was inflated by 705.5% and a similar other one by 5.9% and that the review of the score card was communicated via show cause letter. That the document was generated by the data team.
 21. RW1 informed the Court that he did not have the communication to everyone or individual performance but the Claimant was a team leader. That there were those who lied on transactions and leave. That the performance Accelerator plan document was not signed but he believed it was genuine.
 22. RW1 stated that not everyone qualified for bonus and he did not know the employees listed therein. That bonus was paid to those with good and above performance. That there was no prior communication on performance to the claimant before the show cause letter and the Claimant responded to the show cause letter stating the rating was not consistent with performance for the period.
 23. RW1 confirmed that the court through its ruling stated that any matter in possession as at 3rd February, 2017 was not to be delved into. That capability hearing arose from performance in 2016 and that the show cause letter of 22nd August, 2017 raised issues of underperformance but the letter was not signed and he could not vouch for its authenticity.
 24. RW1 confirmed that on the caution letter on leave management issues and opening and closing issues there was no previous warnings apart those ones. That the Claimant was on suspension until February, 2017 and she had no access to the system during suspension.
 25. In reexamination RW1 clarified that the documents were all considered by the court in its ruling which concerned the show causes, performance and score card. That the only document which came after court's ruling was resignation letter, acceptance of the resignation and exit interview. That period for appeal was 10 days. That there were no disciplinary proceedings after the ruling.

Claimants' Submissions

26. The Claimants' Advocates Ahmednasir Abdullahi Advocates filed written submissions dated 31st October 2024. Counsel submitted that the allegations of underperformance were not true. The Claimant had responded to the show cause letter dated 21st February 2017 vide a letter dated 25th February 2017. She had in her response, inter alia explained that the said allegation of underperformance was inconsistent with the score card which had been used for the year 2016 reviews.
27. Counsel submitted on the alleged underperformance for the half year (HY) 2017 and full year (FY) 2016, that it was the Claimant's uncontroverted evidence that, as per the ratings released by the Respondent in November 2016, the Moi Avenue Cluster (branch), she led and was ranked No. 2 overall with a cumulative score of 102.3 % percent against a maximum score of 120%.



28. Counsel submitted that although the Respondent was making these allegations of underperformance, nothing was presented to the Claimant giving details of the alleged underperformance and/or advising that the Claimant's performance had moved from strong as communicated in November 2016 to underperforming as alleged.
29. Counsel submitted that the Claimant severally sought for this information relating the alleged review of the score card and the same was never availed and they did not feature in the Respondent's response to the Claimant's Notice of Motion Application handled by Hon.Lady Justice Monica Mbaru.
30. Counsel submitted that purported Performance Accelerator (PA) Plan dated 4th May 2016 was not signed by the Claimant and/or the line manager as would have been expected in the case of a genuine document and that the purported review score card was engineered to show the Claimant was underperforming.
31. Counsel submitted that as the Claimant was being vilified for alleged under performance, her team members were being generously rewarded with bonuses.
32. Counsel further submitted that after the ruling of Hon. Lady Justice Mbaru, the Claimant went back to work. However, contrary to her expectations and in sheer disregard of the decision by Hon. Lady Justice Mbaru, the Claimant was assigned the role of a Relationship Manager, a demotion from her role of a Senior Branch Manager which she took up in the hope that the issues that had bogged her down for months culminating in her moving to court were now substantially resolved.
33. The Respondent however continued with the allegations of underperformance for the year 2016 and the Claimant wrote to the head office in South Africa seeking intervention on this issue but no help was forthcoming despite the acknowledgement of her complaint and further that the Respondent's witness Mr. Vaslas admitted at paragraph 26,27 & 28 of the witness statement that the Claimant was served with the Notice to show cause letter dated 22.8.2017, and in reaction she tendered the resignation letter dated 21.8.2017.
34. Counsel submitted that the treatment that the Claimant had been subjected to and considering the allegations that were raised in the notice to show cause dated 22.8.2017 which the Claimant declined to accept, it was apparent that the intention of the Respondent was to again subject the Claimant to a capability hearing/disciplinary process, and ultimately edge her out of employment. The particular notice to show cause raised the same issue (of underperformance in year 2016) that had been raised in the Notice to show cause dated 21.2.2017.
35. On the issue of whether the Claimant is entitled to the prayers sought in the Claim, Counsel urged the Honourable Court to find and hold that the Claimant was constructively dismissed from employment. Counsel relied on the case of Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR and submitted on the guiding principles in determining the issue of Constructive dismissal and submitted that the Claimant's case aligns with the principles enumerated in relation to Constructive Dismissal.
36. Counsel submitted that in her exit interview, the Claimant clearly indicated that the reason she was leaving employment was because of bullying and harassment. She further intimated that she was being forced to accept an underperformance rating yet herself and her team were rated strong in 2016.
37. Counsel further submitted that the Claimant sought a declaration that the treatment meted upon her by the Respondent amounted to unfair labour practice and a violation of her rights under *the Constitution*, more so the provisions of articles 27(1), & (5), 41(1) & (2) and 47 and relied on the case of *Kenya Ports Authority v Munyao & 4 others (Petition E008 of 2023)* [2023] KESC 112 (KLR).



38. Counsel submitted that the Claimant was subjected to a string of erratic suspensions and notices to show cause. Between November 2016 and March 2017, the Claimant had been subjected to about five notice to show cause letters, several suspensions and reprimands. In certain instances, when the Claimant voiced her reservations about persons who had been identified by the Respondent to preside over her trial, the Claimant was threatened and her concerns dismissed.
39. Counsel relied on among the case of Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others [2019] eKLR, and submitted that the Court had discretionary power to determine the amount of damages payable to the Claimant on account of these blatant violations. Counsel submitted that the Claimant be awarded Kshs. 10,000,000.00 as general damages and Kshs. 5,000,000.00 as aggravated damages.

Respondent's Submissions

40. The Respondent's Advocates Okweh Achiando & Company Advocates filed its submissions dated 28th November 2024 and on the issue of whether the Ruling dated 11th May, 2017 rendered the Claimant's Claim res judicata, the Respondent submitted that vide the ruling dated 11th May, 2017, this Honourable Court dealt with finality and resolved the issues contained in the alleged five (5) show cause letters referred to by the Claimant in her Claim and her submissions, accordingly these issues are res judicata and are could not be introduced for determination.
41. Counsel relied on among others the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR and submitted that the rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter.
42. Counsel submitted that it was not open for the Claimant to reintroduce issues that had been put to rest, in the event that the Claimant was dissatisfied with the Respondent's conduct after the ruling, the Claimant should have filed contempt of proceedings against the Respondent which was not done and thus what remained for determination by the Court were the issues from paragraph 75 (b)-95 of the Claimant's Claim.
43. On the issue of whether the Claimant was unfairly terminated or she resigned from the Respondent's employment, Counsel submitted that while the Claimant alleges at paragraph 75 (e) of her Statement of Claim that her services were terminated, the Claimant resigned vide a letter dated 21st August, 2017 which resignation was accepted by the Respondent vide a letter dated 23rd August, 2017.
44. Counsel submitted that it was trite law that an employee claiming constructive dismissal must satisfy the elements of constructive dismissal set out in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR. Counsel submitted that an employee who alleges constructive dismissal bears the burden of proof and that the Claimant did not meet the threshold for constructive dismissal as set out in the Court of Appeal decision.
45. Counsel submitted that in a Claim for constructive dismissal, it is imperative that the Court evaluates the resignation letter to ascertain that the elements of constructive dismissal have been met and to prevent manipulation or overstretching of the concept of constructive dismissal. According to Mr. Achiando, a cursory look at the resignation letter dated 21st August, 2017, showed that the Claimant's made no mention of humiliation, bullying, frustration and/or harassment by the Respondent.
46. Counsel submitted that the Claimant in the said resignation letter thanked the Respondent for the skills and knowledge she acquired at the Respondent and indicated that she was giving a 30-day notice,



evidencing her willingness to continue working at the Respondent. Had the Respondent's working environment been harsh and intolerable as alleged, the Claimant would not have demonstrated any willingness to work for the Respondent even a day longer.

47. It was Counsel's submission that the Claimant alleged that she was issued with a show cause letter dated 22nd August, 2017. The Claimant tendered her resignation on 21st August, 2017 while the alleged show cause letter is dated 22nd August, 2017 and the Claimant did not append her signature on the said show cause letter to signify acceptance, further buttressing the fact that the alleged show cause letter was never issued to the Claimant. Counsel relied on the case of *Herbert Wafula Waswa v Kenya Wildlife Services (2020) eKLR* and submitted that once an employee hands in a resignation letter, the employment relationship comes to an end.
48. Counsel submitted that upon submission of her resignation and acceptance of the same by the Respondent on 23rd August, 2017, the Claimant ceased to be an employee of the Respondent. Any other obligations such as payment of the Claimant's benefits by the Respondent and clearance by the Claimant including filing the exit interview were administrative matters which followed cessation of the employment relationship between the parties.
49. Counsel submitted that the performance issues raised by the Claimant in her Claim and submissions are not for determination before this Honourable Court since the Claimant resigned and was not terminated from the Respondent's employment.
50. On the issue of whether the Claimant is entitled to the prayers sought in the Amended Statement of Claim, Counsel submitted that a party is entitled to damages and/or compensation upon providing and/or establishing that their termination was procedurally and substantially unfair.
51. Counsel submitted that unfair termination and constructive dismissal are different concepts that attract different remedies and relied on the case of *Deya v Safaricon Limited (Cause 630 of 2019) (2022) KEELRC 13561 (KLR)*.
52. Counsel submitted that that the Claimant is not entitled to prayers no. (vii) (viii) and (ix) of her Claim seeking a declaration of constructive dismissal and damages for unfair and wrongful termination. Counsel relied on the case of *Haki Na Sheria Initiative v Inspector General of Police & 3 others [2020]* and submitted that a person who alleges infringement and/or violation of a right, bears the burden of proving such violation.
53. Counsel relied on the case of *HCCHRPET/E154/2024 Dr. Magare Gikenyi Benjamin and Others - vs- The Cabinet Secretary Lands, Public Works Housing and Urban Development and Others* and submitted that the Claimant had not met the threshold for discrimination and had not provided any grounds and/or basis of the alleged discrimination.
54. Counsel submitted that the Claimant resigned and was not terminated therefore the cited provisions of the Fair Administrative Act do not apply and the prayer must fail.
55. Counsel submitted that regarding unpaid bonuses for the year 2016, that payment of bonus by the Respondent was not a matter of right and the same was based on an employee achieving his targets and objectives yet the Claimant's performance was below the Respondent's expectations.
56. Counsel relied on among others the case of *Adera v Sukari Industries (Civil Appeal 88 of 2019) (2023) KECA 1086 (KLR) (22 September 2023)* and submitted on the prayer for general damages and aggravated damages that the Claimant had not proven that she was entitled to these remedies.



57. Counsel submitted that the Claimant had failed to prove the manner and nature of the violation of the rights and was not entitled to an award of general damages.

Determination

58. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by Counsels and has come up with three main issues;Aa. aa.
- i. Whether the court's ruling of 11th May,2017 dealt with the issues raised by the respondent as at 3rd February,2017 conclusively.
 - ii. Whether the Claimant was constructively dismissed
 - iii. Whether the Claimant is entitled to the reliefs sought.

Whether the court's ruling of 11th May,2017 dealt with the issues raised by the respondent as at 11th February, 2017 conclusively

59. This court takes note of the Ruling delivered by Hon. Lady Justice Monica Mbaru on 11th May, 2017 restraining the Respondent from undertaking any disciplinary actions against the Claimant on matters which were within its knowledge as at 3rd February,2017 as that would amount to unfair labour practice. The Claimant was to go back to work on similar role she was before suspension and make good the relationship while noting that the Respondent ought to address the relationship between the Claimant and one Mr. Godwin Onungah.
60. The court's understanding of Honourable Lady Justice's Mbaru's order is that the issues raised by the Claimant were resolved and she started her work on a clean page. To revisit the same would contradict the clear orders of the learned Judge and in a sense amount to res judicata as submitted by Counsel for the Respondent. For the above reasons the Court will concern itself with the happenings of the August, 2017 when the Claimant resigned and the employer and employee relationship ended.

Whether the Claimant was constructively dismissed

61. It is common ground that by a letter dated 21st August, 2017 the claimant tendered her resignation. The resignation was accepted on 23rd August, 2017, and the claimant paid her terminal dues. She was further subjected to an exit interview. According to the respondent, the claimant never raised any issue of bullying and harassment in her resignation letter and that the same were only raised in the exit interview. Counsel further contended that the claimant in spite of her alleged complaints still stated that she would recommend the Respondent bank for work and she would be willing to work there again given a chance.
62. The Court has carefully looked at the resignation letter dated 21st August, 2017 found at page 36 of the respondent's bundle of documents filed with the memorandum of response and agrees with the respondent's counsel that the letter never provided any adverse background necessitating the resignation. Reference was made to a show cause letter dated 22nd August, 2017 (see page 126 of the Claimant's bundle of documents). This letter was neither signed by the author or the recipient. That is to say, neither the respondent nor the claimant signed. It is therefore of now probative value and cannot be a basis for leveraging the allegation by the claimant that her resignation was circumstantiated by it. The Court therefore takes the view that the claimant resigned and that the resignation was accepted by the respondent triggering the exit process which culminated in the exit interview and issuance to the



claimant of certificate of service. The claim for unfair termination by constructive dismissal therefore fails.

63. On the issue of discrimination and other violations of the claimant's constitutional rights as well as claim for general and aggravated damages, the Court having found that the claimant resigned hence was not terminated, will not delve in the same since they were corollary to a finding that the claimant's service was unfairly terminated which is not the case. Besides, Lady Justice Mbaru's ruling delivered on 11th May, 2017, interdicted the respondent from delving into any issues concerning the claimant which were in its possession as at 3rd February, 2017. Further, apart from the impugned show cause letter dated 22nd August, 2017, the Claimant did not produce any evidence to show the respondent subjected her to any adverse disciplinary process after 11th May, 2017. The claimant resumed work albeit in a different role after the learned Judge's order and worked until 21st August, 2017 when she resigned. These claims are there found unmerited.
64. The claimant asked the Court to order that the show cause and warning letters issued to the claimant that became the subject of the ruling by Mbaru J be purged from her personnel file. That is to say all matters adverse to the claimant as at 3rd February, 2017. This is an order fit to grant in the light of the ruling of Lady Justice Mbaru. Although the claimant is no longer in the respondent's employment, these records are hereby directed to be purged from the claimant's personnel file and the respondent is hereby permanently prohibited from considering or taking the same into account in any future employment opportunity within the respondent the claimant may apply for and in any background check over the claimant a third party potential employer may seek from the respondent.
65. On the issue of costs, considering the circumstances of this case and the fact that it took at some point the Court's intervention to protect the claimant, it is only fair that each party bears their own costs of the suit.

Disposition

- a. The claim for unfair termination is found without merit and is hereby dismissed.
- b. The respondent is hereby ordered to purge from the claimant's personnel file all show cause and warning letters issued to the claimant as at 3rd February, 2017 in line with the order issued by Mbaru J on 11th May, 2017.
- c. The respondent is hereby permanently prohibited from considering or taking into account the show cause and warning letters issued to the claimant as at 3rd February, 2017, in any future employment opportunity within itself that the claimant may apply for and or in any background check over the claimant a third party potential employer may seek from the respondent.
- d. Each party to bear their own costs of the suit.
66. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF JANUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE APPEALS DIVISION

