



**Onyango v Family Bank Limited (Employment and Labour Relations Cause E508 of 2019) [2025] KEELRC 471 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 471 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E508 OF 2019  
HS WASILWA, J  
FEBRUARY 19, 2025**

**BETWEEN**

**PAUL VICTOR ONYANGO ..... CLAIMANT**

**AND**

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

**JUDGMENT**

1. The claimant instituted this suit through a Statement of Claim dated 29<sup>th</sup> July 2019, stating that he was an employee of the respondent, serving on a full-time basis at its Dagoretti branch. He was employed as a Relationship Officer, Micro Banking – Gikomba, effective from 1<sup>st</sup> October 2015. Throughout his employment, he demonstrated exemplary performance and adhered to the terms of his contract and the declaration of secrecy he had signed. His salary was Kshs. 80,000 per month, and he was confirmed in his position on 26<sup>th</sup> April 2016 after completing six months of probation. The respondent subsequently transferred him to the Dagoretti branch and changed his role to Relationship Officer – Personal Banker, effective 16<sup>th</sup> February 2016.
2. The claimant asserts that he did not take any leave during his tenure with the respondent. On 17<sup>th</sup> August 2017, he was placed under a performance improvement plan, though no specific duration was provided. The respondent only indicated that he would be required to meet his line manager over the next several weeks or months. In November 2017, he was directed to go on leave and resumed work in December, meaning he did not perform any duties in November. Upon his return, he was asked to file his return of service for September, October, and November. He contends that the respondent's request for the November report, despite knowing he was on leave, was made maliciously.
3. The claimant alleges that his termination was actuated by malice, citing the respondent's failure to discuss the performance improvement plan with him, directing him to take leave to use it against him, unfairly assessing his performance for the period he was absent, and terminating his employment without notice or discussion. He further states that no warning was given prior to his termination,



- making the dismissal unlawful and illegal. Despite demands and notice to sue, the respondent failed to compensate him for his losses.
4. He also claims that he purchased a motor vehicle through bank financing, relying on his employment for loan repayments. However, following his termination, he was unable to service the loan, leading to the respondent taking possession of the vehicle without due notice. As a result, he has suffered significantly, being unable to secure alternative employment since hiring companies require a recommendation from the respondent, which he has been denied. His children have also suffered due to the loss of income, lacking basic nutrition, clothing, and shelter.
  5. The claimant submits that his termination was unlawful and illegal, contrary to Article 41 of *the Constitution* of Kenya, 2010, and sections 35, 36, 43, 44, 45, 46, and 47 of the *Employment Act*. He is therefore entitled to the relevant remedies under section 49 of the Act.
  6. Reasons wherefore, the claimant prayed for:
    - i. Declaration that the termination was unlawful and illegal.
    - ii. Twelve months' salary for the unlawful termination (12 x 80,000) – Kshs. 960,000/=.
    - iii. One-month notice salary – Kshs. 80,000/=.
    - iv. Motor Vehicle Model – Mazda Premio KCM262K.
    - v. Costs of the suit.
    - vi. Interest on prayers (i), (ii), (iii), and (v) above.
  7. The claimant swore a Verifying Affidavit dated 29<sup>th</sup> July 2019 to support his claim. He confirmed that he had instructed the firm of M/s Vivian Aketch & Company Advocates to file the suit on his behalf. He further stated that he had read and understood the contents of the memorandum of claim and affirmed their correctness and truth. He asserted that there was no other pending case in any court nor had there been any prior case between him and the respondent regarding the same claim. He affirmed that the contents of the affidavit were true and correct to the best of his knowledge, information, and belief.
  8. The claimant further filed his witness statement of even date and stated that he is the claimant in the suit and well-versed with the facts of the case. He was employed by the respondent on 31<sup>st</sup> August 2015 as a Relationship Officer, Micro Banking – Gikomba, with his appointment taking effect from 1<sup>st</sup> October 2015. During his employment, he demonstrated exemplary performance and adhered to the terms of his contract and the declaration of secrecy he had signed. His salary, as per the offer letter, was Kshs. 80,000, and his appointment was confirmed on 26<sup>th</sup> April 2016 after completing six months of probation. He was later transferred to the Dagoretti branch, where his role changed to Relationship Officer – Personal Banker, effective 16<sup>th</sup> February 2016.
  9. On 17<sup>th</sup> August 2017, the respondent informed him that he had been placed under a performance improvement plan, though the duration was not specified. The respondent merely indicated that he would be required to meet his line manager over several weeks or months. He stated that despite the respondent's knowledge that he was on leave in November, he was maliciously asked to file his return for that month. He concluded by further asserting that he was not issued any notice and was instead maliciously and unlawfully terminated from employment.



### **Claimant's Written Submissions**

10. On 21<sup>st</sup> January, 2025 Miss Onyango was holding brief for Miss Aketch, the Claimant's Advocate on record. Miss Onyango stated that they had filed their submissions on 13<sup>th</sup> December 2024. The same cannot be found on the physical file or the Case Tracking System of the Judiciary.

### **Respondent's Case**

11. The respondent filed a reply to the Memorandum of Claim dated 6<sup>th</sup> March 2020, denying all allegations contained therein except where expressly admitted. They admitted the descriptions of the parties in paragraphs 1 and 2 of the claim but stated that its address for service was care of Mbaluka & Company Advocates. They denied the contents of paragraphs 1 to 21 of the claim and put the claimant to strict proof.
12. The respondent asserted that the suit was premature as the claimant had never made an initial demand for payment of his terminal dues and benefits, which had already been settled at the time of his termination. It further stated that the claimant had not complied with the internal disciplinary requirements of the respondent. The respondent denied any allegations of malice and maintained that the claimant was lawfully dismissed for absconding duty.
13. The respondent contended that the claimant was lawfully terminated for professional misconduct and that the claim of unfair termination was baseless. It argued that the suit was legally flawed and only served to tarnish its reputation. Consequently, the respondent prayed for the dismissal of the suit and an award of costs in its favour.
14. The respondent further filed a witness statement dated 4<sup>th</sup> June 2024 through Stephen Kimani Ngaru, who was employed as the Human Resource Business Partner and was duly authorized to make the statement. He confirmed that the claimant was employed through a letter of appointment dated 31<sup>st</sup> August 2015, with employment commencing on 1<sup>st</sup> October 2015. The claimant's probation ended, and he was confirmed on 1<sup>st</sup> April 2016, as per the confirmation letter dated 26<sup>th</sup> April 2016.
15. The respondent stated that the claimant's performance was unsatisfactory, which was communicated to him in a letter dated 17<sup>th</sup> August 2017. As there was no improvement, his employment was terminated on 18<sup>th</sup> January 2018 through a letter dated 17<sup>th</sup> January 2018. The claimant was required to clear with the Human Resource Department to receive his terminal benefits, but he failed to do so and only contacted the bank when he served the demand letter.
16. During his employment, the claimant obtained a loan facility from the respondent to purchase a motor vehicle, KCM 262K, amounting to Kshs. 863,153.30. He was obligated to repay the loan under the agreed terms, and upon termination, the loan reverted to commercial terms. However, the claimant frequently defaulted, and as of 31<sup>st</sup> August 2022, the outstanding amount was Kshs. 669,408.09. The loan agreement allowed the bank to repossess the vehicle in case of default. Due to continued non-payment, auctioneers were instructed to repossess and sell the vehicle on or about 1<sup>st</sup> July 2019, recovering Kshs. 350,617.80, which was credited to the claimant's loan account.
17. The respondent argued that any award in favour of the claimant should account for the outstanding loan balance. It further contended that the claimant was responsible for repaying the loan despite his termination and that his failure to do so could not be attributed to the bank. The respondent maintained that the claim was an abuse of process and should be dismissed with costs.



## Respondent's Written Submissions

18. The Respondents filed written submissions dated 18<sup>th</sup> January 2025, opposing the claim through the Memorandum of Response dated 6<sup>th</sup> March 2020. They also relied on the witness statement of Stephen Kimani Ngaru and a Bundle of Documents dated 4<sup>th</sup> June 2024. The Respondents submitted that the claim should be dismissed since the termination of the Claimant's employment was based on valid reasons, specifically poor performance, and that due statutory procedure was followed in effecting the termination.
19. The Claimant was employed as a Relationship Officer Micro Banking at the Respondent's Gikomba Branch until 18<sup>th</sup> January 2018, when his employment was terminated on the ground of poor performance. During his employment, the Claimant was advanced a loan facility of Kshs. 863,153.30 for the purchase of a motor vehicle, which was registered jointly in the names of the Claimant and the Respondent as the financier. The Respondent observed that the Claimant's performance was unsatisfactory and, following discussions between the Claimant and his line manager, he was placed on a Performance Improvement Plan (PIP) through a letter dated 17<sup>th</sup> August 2017. This plan was designed to assist the Claimant in meeting the expected performance requirements and also served as a warning that failure to meet the required standards would result in disciplinary action.
20. Despite the PIP, the Claimant did not improve his performance, leading to his termination. The Claimant was advised to clear with the Human Resource Department to receive his dues but failed to do so. At the time of termination, the loan advanced to the Claimant remained unsettled, and he did not make any effort to repay it after leaving employment. This was admitted in cross-examination. Due to the Claimant's default, the Respondent repossessed the motor vehicle in order to recover the outstanding amount.
21. The Respondent identified several issues for determination: whether the termination was justified, whether due procedure was followed, whether the Respondent had a right to repossess the motor vehicle, and whether the Claimant is entitled to the reliefs sought. On the first issue, the Respondent submits that Section 41 of the *Employment Act* recognizes poor performance as a ground for termination. The Claimant admitted during the hearing that he had been placed under a PIP, which lasted three months and included regular coaching and monitoring by his line manager. The Claimant failed to show improvement within this period, justifying the Respondent's decision to terminate his employment. The Respondent relied on *Jane Wairimu Machira v Mugo Waweru & Associates* (Cause 621 of 2012) [2012] KEHC 39 (KLR) (9 November 2012) and *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanui & Magnate Ventures Ltd* (Cause No 273 of 2010), which held that a reasonable period for an employee to improve performance is two to three months. The Respondent thus maintains that the termination was valid and justifiable.
22. Regarding the fairness of the termination, Section 45(2) of the *Employment Act* 2007 states that termination is unfair if the employer fails to prove that it was grounded on a valid reason and a fair procedure. The Respondent followed due process by discussing the Claimant's poor performance with him, placing him on a PIP for three months, and giving him adequate time to improve, which he failed to do. The Respondent was willing to pay the Claimant's terminal dues upon clearance, but the Claimant did not complete the process. The Respondent submits that the Claimant was fairly terminated.
23. On the repossession of the motor vehicle, the Claimant admitted during the hearing that he defaulted on his loan repayment. The vehicle was jointly registered as security for the loan, and at the time of termination, the Claimant had an outstanding balance of Kshs. 857,444. The loan statement,



marked as Exhibit No. 5, proved this outstanding balance. Termination of employment did not waive the Claimant's obligation to repay the loan. The Respondent relied on *Francis Kalama Mulewa v Kenya Commercial Bank* [2015] eKLR, where the court refused to restrain a bank from exercising its statutory power of sale after a claimant defaulted. The Claimant did not prove that the Respondent breached his rights in recovering the outstanding loan, nor did he challenge the validity of the loan agreement. The Respondent argues that allowing the Claimant to retain the vehicle without repaying the loan would amount to unjust enrichment.

24. The Respondent submits that the Claimant is not entitled to the reliefs sought. The Claimant failed to clear with the Respondent, which is a prerequisite for receiving terminal dues, as upheld in *Amos Kitavi Kivite v Kenya Revenue Authority* [2020] eKLR, where the court dismissed a similar claim and held that terminal dues are payable upon clearance. In the event the court finds fault with the process, the Respondent urges that only one month's compensation be awarded, citing *Joseph Mwaniki Nganga v United Millers Limited* [2022] eKLR, which emphasized considering factors such as the employee's contribution to termination and mitigation of losses. In *Michael Oimo v ICEA Lion Life Assurance Company Limited* [2018] eKLR, the court awarded only three months' compensation due to the employee's substantial admissions.
25. The Respondent also contends that the Claimant failed to prove his inability to secure employment due to a lack of a recommendation letter. Section 51 of the *Employment Act* states that an employer is not bound to provide a testimonial or reference. Further, the Claimant's attempt to avoid repaying his loan is an unjust enrichment attempt. The motor vehicle, a Mazda Premio KCM 262K, was lawfully repossessed, and its recovery was within the Respondent's rights. The Respondent submits that the Claimant's claim should be dismissed in its entirety. The Respondent was within its rights to terminate the Claimant for poor performance, followed due process, lawfully repossessed the motor vehicle upon default, and was ready to pay terminal dues subject to clearance. The Respondent relies on the authorities filed in support of its submissions.
26. I have examined all evidence and submissions of the parties herein. The issues for this court's determination are as follows:
  - i. Whether there were valid reasons to warrant the claimant's termination.
  - ii. Whether the claimant was subjected to due process
  - iii. Whether the claimant is entitled to remedies sought.

#### **Valid reasons**

27. From the letter terminating the claimant's services he was terminated for non performance. The respondents witness also testified that he was terminated for continued underperformance despite coaching sessions with his managers.
28. Before this termination vide a letter dated 7/2/2016, the claimant's role was changed and he was transferred from Gikomba Branch to Dagoretti branch as a relationship officer w.e.f 16/2/2017 vide a letter of 17/8/2017. The claimant was notified of the fact that his performance was unsatisfactory. He was then placed on a performance improvement plan (PIP) and was informed that he was going to meet with his line manager to support him through the process. The period of the PIP was not stated but he was informed that the letter was also going to be his 1<sup>st</sup> verbal warning due and that failure to meet the performance standards on a sustained basis was going to result in disciplinary action. This letter was served upon the claimant and he signed against it on 24/8/2017.



29. It is however evident that in November the claimant was asked to go on leave and on resumption he was to account for his performance in the 3 months when he had been on leave for 1 month. Vide a letter of 17/1/2018 he was terminated on 18/1/2018. There is no indication that he was subjected to any disciplinary hearing or given ample time to improve on his performance.
30. In my view 3 (three) months he was placed on PIP were not adequate. There is no indication of what the respondents did to help him improve. This position has been stated in *Samba Mukaki vs Ol Tukai Lodge Ltd (2010) LLOR 255LCK* where the hon court held that in case of non performance, the employer must demonstrate measures taken to assess performance and support an employee before terminating his service.
31. In *Otieno vs Pena Health Ltd (2024) eKLR* hon. J Nzioki wa Makau restated this position and found that in cases where an employee is dismissed for poor performance the employer is placed on a high level of proof as outlined in section 8 of the *Employment Act 2007* which states as follows:
- The provisions of this Act shall apply to oral and written contracts.
- The same position was stated by the hon Court in *Timothy Nchore Sironkia vs JSC (2020) eKLR*.
32. Having considered the case law and the manner in which the claimant was treated, it is my finding that the respondents did not establish the existence of valid reason to warrant the dismissal of the claimant as provided for under section 43 of *Employment Act 2007* which states as follows:
- 1 In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

### Issue no 2 Due Process

33. On this issue, there is no disciplinary process the claimant was subject to. After being placed on PIP for 3 months he was issued with a termination letter and it is evidence that the respondents did not adhere to provisions of section 41 of *Employment Act 2007* which states as follows:
41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

### Issue no 3

34. In view of these findings, it is my finding that the claimant's termination was unfair and unjustified as per section 45(2) of *employment act 2007* which states as follows:
2. A termination of employment by an employer is unfair if the employer fails to prove—
- a. that the reason for the termination is valid;
- b. that the reason for the termination is a fair reason—
- i. related to the employees conduct, capacity or compatibility; or
- ii. based on the operational requirements of the employer; and
- c. that the employment was terminated in



35. I therefore find for claimant and I award her:

1. Compensation equivalent to 8 months' salary = Kshs 80,000x8=640,000/-
2. I also award her 1 months' salary as notice pay = Kshs 80,000/-.
3. As concerns motor vehicle KCM 262K which was repossessed by the respondent, the claimant is entitled to the motor vehicle of kshs 863,153.30 as per the loan value.
4. Total payable = 1,583,153.30 less statutory deductions.
5. The respondent will pay costs of this suit plus interest at court rates w.e.f the date of this judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2025.**

**HELLEN WASILWA**

**JUDGE**

