



Kamuti v KCB Bank Kenya Limited (Employment and Labour Relations Cause E684 of 2022) [2025] KEELRC 845 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 845 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E684 OF 2022**

AN MWAURE, J

MARCH 14, 2025

BETWEEN

PETER KIMEU KAMUTI CLAIMANT

AND

KCB BANK KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant commenced this cause vide a Statement of Claim dated 16th September 2022.

Claimant's case

2. The Claimant aver he was employed by the Respondent as a banking clerk on 14th February 1994.
3. The Claimant avers he was earning a monthly salary of Kshs. 234,757/= at the time of termination.
4. The Claimant avers that as a cashier, his duties included receiving cash and cheque deposits, paying customers, advising on bank balances, issuing bank cheques, and processing money remittances as per customer instructions.
5. The Claimant alleges that in 2020 and 2021, the Respondent conducted malicious and irregular performance appraisals, applying metrics outside the Claimant's duties.
6. The Claimant avers that despite satisfactory appraisals over 28 years, the Claimant's work as a cashier was evaluated against unrelated tasks, such as sourcing customers, promoting mobile and internet banking, issuing credit cards, and encouraging ATM withdrawals for sums under Kshs.50,000/= . These tasks fell outside his responsibilities, yet were included in his appraisal. Additionally, unattainable targets, like cross-selling services and International Money Transfers (IMT), which were



not within his influence, were used as evaluation criteria. The management further reduced the scores on his Performance Appraisal Forms.

7. The Claimant avers that working for 28 years for the Respondent, he has not been questioned by a bank customer or taken through the disciplinary process on account of his performance.
8. The Claimant avers that he was terminated on 10th May 2022, which was unlawful and unfair as no valid reasons were given for his termination and the Performance Appraisal was not fair and just.
9. The Claimant prays for:
 - a. A declaration that termination of his employment was unfair and unlawful.
 - b. 1 month's salary in lieu of notice amounting to Kshs. 234,757/=
 - c. Maximum compensation of 12 months' salary amounting to Kshs.2,817,084/=
 - d. Costs of the suit plus interest.

Respondent's case

10. In opposition to the Statement of Claim, the Respondent filed a Statement of Response dated 28th October 2022.
11. The Respondent avers that the Claimant was employed as a Clerical staff vide a letter of appointment dated 1st February 1994 as a bank teller and not as a clerk.
12. The Respondent avers that the Claimant's duties entailed migration of the Respondent's customers to mobile banking and internet banking, receiving instructions for and executing international Money Transfers; and sale of the Respondent's banking products, including credit cards, loans and account opening.
13. The Respondent denies all claims in Paragraph 6 of the Claim, challenging the Claimant to provide strict proof thereof.
14. The Respondent argues that the Claimant's performance prior to 2020 is irrelevant, and tasks such as sourcing customers, migrating accounts, and issuing credit cards are standard duties for Banking tellers, refuting the Claimant's claims that such were not part of his roles.
15. The Respondent denies that transaction ratings were based on withdrawals below Kshs.50,000/=, and disputes the Claimant's claim of being unable to cross-sell services. Additionally, the Respondent denies allegations of unilateral moderation of appraisal scores, asserting that discussions occurred between employees and supervisors. While acknowledging the Claimant's 28 years of employment, the Respondent denies knowledge of the matters in Paragraph 7 of the Claim.
16. The Respondent avers that the decision to terminate the Claimant was due to his reluctance to adapt to the change in the Banking Teller's role and to take on new tasks, which in turn had an adverse impact on the Claimant's performance.
17. The Respondent avers that the Claimant's final terminal dues were computed and paid upon effecting statutory deduction amounting to Kshs.198,951.35/=.
18. The Respondent avers that he is not entitled to the relief sought as the Claimant was terminated in accordance with both the *Employment Act* and its internal procedures.



19. The Respondent prays that this Honourable Court finds the suit lacks merit and therefore should be dismissed with costs.

Claimant's evidence in court

20. The Claimant is (CW1) adopted his witness statement dated 16th September 2022 as his evidence in chief and reiterated the contents of the memorandum of claim. He also adopted his bundle list of documents dated an even date marked as exhibits 1 to 18.
21. CW1 testified that the Respondent's performance appraisal was established to know the strengths and weaknesses of its staff. He stated that his appraisal was 3.10 but had dropped to 2.94. CW1 stated that in 2020, his duty was to migrate customers to the internet banking platform. He stated that he did not have any influence on the customer's conduct when it came to the international money transfer.
22. CW1 avers that in 2020 when COVID pandemic occurred, there were fewer customers during that time. He stated that the Respondent issued his rating, which was 2.87, and he was given a warning letter. He stated that he did not appeal the said rating as he was on sick leave. He stated that the Respondent placed him on a performance improvement plan.
23. CW1 stated that he was stationed at the Respondent's Embu Branch. He was invited for a capability hearing on 29th March 2022, and he was terminated on 10th May 2022. He stated that he was not given sufficient reason as to what the meeting was all about.
24. In re-examination, CW1 stated that internet banking has been there but was mostly used in 2020. He stated that less than 50% of the banking customers used mobile banking, and 20% used RTGS. He stated that he was maliciously appraised by the Respondent. He stated that scorecards were filled out quarterly. He stated that he did not inform his supervisor about the performance rating.
25. CW1 said that during the meeting held on 10th March 2022, he was accompanied by a representative secretary of the staff committee. The representative secretary of the staff committee advised him that since he was sick, it was fine to submit the appeal at a later period. He stated that there were minutes taken during the capability hearing, and he was asked in the meeting why he did not raise any concerns as he stated that he was not given a chance to raise his concerns. He stated that he was not given support when he came to doing the internet banking as he had no one to assist him.
26. CW1 stated that the Respondent stated he did not know a lot of banking things. He was issued with a termination letter and paid his terminal dues a few months later. He stated that he was issued a certificate of service. He stated that he appealed against his termination, which was declined as he was informed that there was no new evidence.
27. In re-examination, CW1 stated that the added duties that the Respondent gave him were international money transfer and mobile banking, which did not form part of his duties in accordance with his letter of appointment.

Respondent's evidence in court

28. RW1, Lilian Kagwiria, the Respondent's Senior Manager Human Resource, adopted her written statement dated 3rd October, 2023 and the bundle of documents dated 5th October 2023 marked as exhibits 1 to 72 as her evidence in chief.
29. In cross-examination, RW1 stated that the Claimant was a Bank teller and not a clerical staff member who did other duties other than only a teller. RW1 stated that the Respondent is a party to the Collective Bargaining Agreement (CBA), which applied to the Claimant. RW1 stated that on the



Claimant's scorecard, he scored 1 of 3 when it came to money transactions. She stated that the Claimant was reluctant to adapt to his new duties and roles.

30. In re-examination, RW1 stated that at the time of the Claimant's dismissal, he was a clerical staff and bank teller from the year 1994 to 2022. She stated that customers went to banking halls, but with time, customers embraced money and internet banking.
31. Parties were directed to file written submissions.

Claimant's written submissions

32. The Claimant submitted that he was not accorded a fair procedure on his termination as he was not issued with a notice to show cause letter or notice of hearing which was against bank policy which require staff to be issued with letters explaining where there is a misconduct and staff are given an opportunity to give a written response on any particulars of charges. The Claimant submitted that he was issued with 2 warning letters following his performance in the year 2020 and 2021 respectively.
33. The Claimant relied on the case of Hosea Akunga Ombwori V Bidco Oil Refineries Limited [2017] eKLR where the court held that procedural fairness requirements under Section 41 of the [Employment Act](#), 2007, emphasizing the need for a proper show cause notice before taking disciplinary action. Such a notice should clearly state allegations and allow the employee reasonable time to respond. The Court reviewed warning letters dated 28th November 2014, 3rd December 2014, and 10th December 2014, finding that they did not meet the standards of a show cause notice. Instead, these warning letters were sanctions following a disciplinary process, suggesting some disciplinary action had already occurred.
34. In Nicholus Muasya Kyula V Farmchem Ltd [2012] eKLR, the court held that a notice to show cause letter must explicitly outline the grounds for termination, such as misconduct, poor performance, or physical incapacity. It should provide sufficient details to enable the employee to prepare an adequate defense. Additionally, the letter must allow the employee reasonable time to respond. In Jonathan Chepkwony V George Makateto, Acting Chief Executive Officer, Export Processing Zone Authority (EPZA) & 2 others [2021] eKLR, the court laid out the components of a notice to show cause as follows:
 - “(a) be written in a clear and dispassionate manner;
 - (b) be issued as soon as practicable;
 - (c) Identify the workplace issue giving rise to the disciplinary action. This may be a breach of a particular law or code of conduct, or relate to a specific term in an employment contract;
 - (d) identify any relevant workplace history, including any prior written warning letters;
 - (e) address with sufficient particularity the factual allegation or allegations being made against the employee requiring a response,
 - (f) Such-particulars will likely require the times, dates, places and circumstances for each allegation being made. In some instances, names of witnesses or supporting information (such as documents) should be disclosed;
 - (g) be accurate and not omit or misrepresent any relevant circumstance; and,
 - (h) Afford a fair' time for the employee to make an effective response.”



35. The Claimant submitted that he was deprived the right to a fair hearing and he relied on the case of *David Wanjau Muhoro V Ol Pejeta Ranching Limited* [2014] eKLR where the court stated that fair hearing entailed the Claimant's rights in the disciplinary process included sufficient time to prepare, full understanding of the charges, and access to necessary documentation. While the Respondent granted the Claimant more preparation time, no specific charges were provided, leaving the Claimant unable to respond effectively to vague allegations such as "dishonesty" or "fraud." Additionally, the employer is obligated to provide documents they intend to use during the hearing, along with any other requested documents.
36. The Claimant submitted that the Respondent had no valid reason to terminate him from employment. The Claimant submitted that he was terminated on the grounds of poor performance as a result of his performance rating in the years 2020 and 2021. The Claimant contended that his performance was rated against measures that were beyond the scope of his employment as a bank teller and outside his duties, including international money transfer and mobile banking. The Claimant relied on the case of *Okoth V Rafiki Micro-Finance Bank Kenya Ltd* [2023] KEELRC 2772 (KLR) where the court held that the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control.
37. In *Namai V National Bank of Kenya Limited* [2023] KEELRC 1497 (KLR) where the court held that the Claimant raised legitimate grievances, as outlined in Section 46 of the *Employment Act*, concerning his work environment at the Kitengela Branch. However, instead of addressing these issues amicably, the Respondent ignored them and treated the unsatisfactory performance scores in isolation. This failure to consider the grievances led to unreasonable action by the Respondent, as the grievances could have explained the alleged poor performance.
38. The Claimant argued that the Respondent did not take into account his explanation of his low rating in the years 2020 and 2021 and instead undertook a Performance Improvement Plan (PIP) without considering his concern and his client-base. The Claimant relied on the cases of *Naomi Connie Lusiche V Barclays Bank of Kenya* [2021] eKLR, *Peter Kamau Mwaura & Peter Njanja V National Bank of Kenya* [2020] eKLR and *Murage V Style Industries Ltd* [2023] eKLR in support of that proposition.
39. The Claimant submitted that he is entitled to the reliefs sought for 1-month salary in lieu of notice amounting to Kshs.234,757/= and 12 months' equivalent of his salary amounting to Kshs.2,817,084/= . The Claimant prays for the costs and interest of the suit.

Respondent's written submissions

40. The Respondent submitted that the Claimant's challenge regarding the non-issuance of a notice to show cause was not raised in the Claim, the Claimant's Statement, or during hearings on 7th May 2024 and 26th September 2024. The Respondent relied on several authorities, including *Republic V Chairman Public Procurement Administrative Review Board & Another, Ex-Parte Zapkass Consulting and Training Limited & Another* [2014] eKLR, *Kariuki V Kamau (Being the Legal Administrator of the Estate of the Late Joseph Mwiri Kamau) & Another* [2024] KEELC 4182 (KLR) and *Wikio Investment Company Limited V Purity Kimwati Ikayo & Julius Kipolonko Mulei* [2021] KEELC 844 (KLR) in support of that proposition.
41. The Respondent submitted that the Claimant's challenge regarding the issuance of a Notice to Show Cause (NSTC) is an afterthought, as it was not raised earlier in the proceedings. This failure, according to the Respondent, deprived them of the opportunity to respond or provide evidence to refute the allegation. The Respondent contended that addressing this claim at this stage would violate their right



to a fair hearing under Article 50 of *the Constitution*. Furthermore, the Respondent contended that the Claimant is estopped from raising this issue at this point. The Respondent relied on the cases of *Consolata Muthoni Kariuki V Martin Mutembei Kaburu & Others* [2020] KEHC 8976 (KLR) and *Sarah Njeri Mwobi V John Kimani Njoroge* [2013] eKLR in support of that proposition.

42. The Respondent contended that the Claimant is estopped from raising issues regarding the issuance of NTSC or adequate preparation time for the Capability Hearing, as he fully attended and actively participated in the hearing with a representative, Mr. Gordon Osege. The Respondent contended that the Claimant's argument is illogical and self-serving, as sufficient notice must have been provided for the Claimant to arrange for a representative.
43. The Respondent submitted that its decision to terminate the Claimant's employment was substantively justified under Sections 43 and 45 of the *Employment Act*. The Claimant contended that his performance was unfairly evaluated using criteria beyond his role as a bank teller, making the termination substantively unfair. In contrast, the Respondent submitted that the termination was substantively fair under Section 45(2) of the *Employment Act*, which allows termination for reasons related to the employee's conduct, capacity, compatibility, or the employer's operational requirements. The Respondent relied on the cases of *National Bank of Kenya V Samuel Nguru Mutonya* [2019] eKLR and *Naumy Jemutai Kirui V Unilever Tea Kenya Limited* [2020] eKLR in support of that proposition.
44. The Respondent submitted that this Honourable Court should not substitute its judgment for that of the Capability Hearing Committee regarding the Claimant's capacity and suitability. Instead, the Respondent emphasized and maintained that the termination of the Claimant's employment was justified due to his reluctance to adapt to changes in the Bank Teller role, such as taking on new tasks and responsibilities aimed at enhancing the role and improving performance ratings.
45. The Respondent submitted that the Claimant is not entitled to the relief sought as he was fairly terminated. The Respondent urged this Honourable Court to dismiss the suit with costs.

Analysis and determination

46. The court has considered the pleadings and submissions by both counsels, the issues for determination are as follows:
 - i. Whether the Respondent followed substantive justification and procedural fairness in terminating the Claimant
 - ii. If (i) above is in the affirmative, whether the Claimant is entitled to the relief sought
 - iii. Who should be the costs of the cause?
47. In *Walter Ogal Anuro V Teachers Service Commissions* [2013] eKLR, the court held that substantive justification involves demonstrating a valid reason for termination, while procedural fairness pertains to ensuring the proper process is followed by the employer during the termination.
48. In *Unilever Tea (K) Limited V Kenya Plantation & Agricultural Workers Union* [2024] KECA 540 (KLR), the Court of Appeal held that the grievant's dismissal was deemed substantively justified due to gross misconduct and was procedurally fair and lawful. Consequently, the remedies under Section 49 of the *Employment Act* for wrongful dismissal and unfair termination were not applicable to the grievant.
49. In this instant case, the Claimant was having a hard time adjusting to the normal norms that came with the side effects of the COVID-19 pandemic. The Government directive was that people were



not supposed to handle physical money to avoid spreading the COVID-19 pandemic and therefore increasing mobile and internet banking.

50. The Respondent added the Claimant some duties, including the docket of mobile and internet banking. There was no doubt that business was not good during the COVID-19 pandemic in most of the sectors. The Claimant's performance appraisal dwindled during the COVID-19 pandemic, and he was placed on a Performance Improvement Plan for 6 months. This rating of his scorecard was 2.78, and even after the 6 months, the Claimant did not improve, leading him to be issued with 2 warning letters.

51. Thereafter, he was called for a Capability hearing on 29th March 2022 and he was accompanied by a representative from the staff committee and was terminated for poor performance. The capability meeting was aimed to give the Respondent an opportunity to thereafter notify him of their intention to take disciplinary action against him for failing to meet the performance standards set by the bank.

52. The Respondent discussed the poor performance of the claimant as a bank teller on a number of occasions. They took him through various performance reviews and they would notify the claimant in writing after the reviews of the outcome.

He was placed on a Performance Improvement Plan (PPI) but then Respondent reported that even then he did not improve. After the capability hearing that took place on 29th March 2022 the Claimant was issued a termination letter dated 10th May 2022.

53. In the termination letter the grounds for termination of his employment were well articulated. They basically were concerned with Poor Performance.

54. The Respondent however having established grounds for termination they failed to follow the mandatory procedural requirement well set out in Section 41 of the Employment Act. The said Section 41 of the Employment Act provides as follows: -

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

55. The law in terminating the employment of an employee on grounds of misconduct or poor performance or incapacity is to give the Employee notice and invite him for a disciplinary hearing.

The Employee must be informed the grounds for which termination is being considered and must be informed to take a witness of his choice being either a fellow worker or if he is a member of a union he can invite a shop floor union representative.

Failure to follow this mandated process the termination is regarded as unprocedural. Actually the employer must pass the test of both substantive justification where they give valid reasons for termination and procedural fairness.



56. It is not clarified that the capability hearing was a disciplinary hearing. Infact it was stated that the capability hearing was to pave way for a disciplinary hearing that would lead to termination. In the case of Walter Ogal Onuro -vs- Teachers Service Commission Cause 955 of 2011 the court held: -

“For termination to pass the fairness test it ought to be shown that there was not only substantive justification for the termination but also procedural fairness.”

57. In the case of Maina Mwangi -Vs- Thika Coffee Mills Limited (2012) eKLR the court in relation to poor performance held: -

“Where the Employee fails to meet the standards, the first duty of the Employer is to let the Employee know that his performance has fallen below the set standards.

The employer should then propose training, guidance and fresh instruction to the Employee. The Employer is required to allow the Employee time to improve, if no improvement is noted after a reasonable passage of time, the Employer should issue a formal warning to the Employee, and advise the Employee that he may be separated from the Employer on account of poor performance. The next phase involves investigations by the Employer and consideration if the Employee could fit better in another role within the organization. At the investigation, the Employer should engage the Employee, and if it at the end of these steps, dismissal of the Employee is the course that commends itself to the Employer, then Section 41 of the *Employment Act*, 2007, must come into play.”

58. The court has considered the pleadings and submissions of the parties and the authorities cited and the court finds the claimant was clearly underperforming and was showing no efforts to improve. However, he was unprocedurally terminated and for that reason judgment is entered in his favour.

59. The relief awarded will be 2 months equivalent of his salary since the Respondent had valid reasons to terminate him but failed in the procedure.

He is awarded a total of Kshs.469,514/= plus interest at 14% per annum from date of judgment until full payment.

He had already been paid the one month salary in lieu of notice.

60. Each party will meet their costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF MARCH, 2025.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

