



**Mutua v Absa Bank Kenya Limited (Cause E036 of 2021)
[2025] KEELRC 1192 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1192 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E036 OF 2021**

**AK NZEI, J
APRIL 25, 2025**

BETWEEN

DOREEN NALIKA MUTUA CLAIMANT

AND

ABSA BANK KENYA LIMITED RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 26th March, 2021 and filed in Court on the even date, the Claimant, Doreen Naliaka Mutua, sued the Respondent Bank (the Respondent) seeking the following reliefs:-
 - a. A declaration that the Claimant's termination was unfair.
 - b. Kshs.1,661,760/= being twelve (12) months' (salary in) compensation for unlawful and unfair termination.
 - c. Kshs.138,480/= being one month's salary in lieu of notice.
 - d. Kshs.2,991,168/= being unpaid house allowance.
 - e. Costs of the suit and interest.
 - f. Any other relief at the Court's discretion.
2. The Claimant pleaded that she was, at all times material to the suit, an employee of the Respondent, having been employed in January 2007 until 27th March, 2019 when she was unfairly terminated from employment.
3. It was the Claimant's pleading:-



- a. that she was employed by the Respondent in 2007 as a Direct Sales Representative on contractual basis, and was confirmed to permanent employment in August 2008; and thereupon transitioned from the position of a Direct Sales Representative to a Customer Advisor, and that her position was later revised to that of a Universal Banker-with increased responsibilities.
 - b. that on 23rd October, 2017, the Claimant was diagnosed with pulmonary tuberculosis, leading to decrease in her performance.
 - c. that the Respondent sought an opinion from a Medical Practitioner on the Claimant's ability to perform her role in the bank, but which was not disclosed to the Claimant.
 - d. that the Claimant's trajectory in performance picked up as she continued her medical treatment, thereby being declared tuberculosis free.
 - e. that the Claimant conducted her duties faithfully and diligently at the Respondent's behest until 28th January, 2019 when she was served with a show cause letter.
 - f. that despite showing cause, the Claimant's employment was unlawfully and unfairly terminated; and the Claimant's appeal against termination was unsuccessful, with the Respondent upholding the termination.
 - g. that the Claimant worked for the Respondent for over 12 years, and was earning a salary of Kshs.138,480/= at the time of her unfair termination.
 - h. that the Claimant's rights as conferred under the *Employment Act*, particularly Section 45 thereof, and Article 27 of the *Constitution* of Kenya 2010, were contravened.
4. Documents filed alongside the Claimant's Memorandum of Claim included the Claimant's affidavit in verification of the Claim, the Claimant's written witness statement dated 25th March, 2021 and a list of documents dated 26th March, 2021, listing some 45 documents. The listed and filed documents included the Claimant's letter of permanent employment and terms of employment, a medical report on the Claimant dated 23rd October, 2017, the Claimant's sick-off sheets dated 28th October, 2017 and 4th November, 2017 respectively, and a doctor's letter/report dated 19th January, 2018 recommending light duties for the Claimant due to occasional weakness and easy fatigability due to the medication taken (by her). Other documents included a show cause letter dated 12th February, 2018 for underperforming, the Respondent's letter dated 2nd March, 2018 referring the Claimant for assessment and independent comprehensive medical opinion on her ability or inability to continue with her work in the bank, a warning letter dated 2nd March, 2018; a show cause letter dated 4th September, 2018, the Claimant's response to the show cause letter dated 7th September, 2018, a final warning letter dated 21st September, 2018, the Claimant's response to a show cause letter dated 28th January, 2019, termination letter dated 18th February, 2019, an appeal letter dated 22nd February, 2019, and the Respondent's letter dated 28th March, 2019 upholding termination, among other documents.
5. The Respondent defended the suit vide a Response to Claim dated 7th May, 2021. The Respondent admitted having employed the Claimant from the year 2007 upto 18th February, 2019 when she was terminated. The Respondent however denied the Claimant's claim and pleaded:-
- a. that the Claimant underperformed in the 2nd half of the year 2015 (H2) and in half of 2016 and was invited for a hearing on 25th August 2016, upon which she was issued with a final warning letter dated 9th September, 2016, which was to be valid for 12 months.



- b. that the Claimant was issued with a show cause letter dated 25th January, 2017, and was called for a capability hearing on 8th February, 2017, whereupon she was issued with a written final warning letter, warning her that disciplinary action will be taken if she did not improve in performance within 12 months.
 - c. that the Claimant did not improve, was served with a show cause letter dated 17th August, 2017, and was issued with a closure letter dated 8th September, 2017.
 - d. that the Claimant was taken ill in October 2017 and was admitted into hospital over chest infection, and that the Respondent supported her by giving her leave and medical cover for her hospitalization and medication; and by a letter dated 7th September, 2018 confirmed that she had cleared her medication, was back on her feet and had zeal to work on her performance and to improve her score card.
 - e. that the Claimant's full year performance for 2018 was rated underperforming and the Claimant was invited to a capability hearing on 7th February, 2019; was terminated vide a letter dated 18th February, 2019, and her appeal against termination was disallowed and her termination upheld vide a letter dated 28th March.
 - f. that the Respondent accorded the Claimant proper and fair hearing as envisioned under Sections 41 and 43 of the [Employment Act](#).
 - g. that the Claimant's salary was consolidated, and included house allowance and other allowances.
6. Other documents filed by the Respondent included a written witness statement of Vaslas Odhiambo dated 6th May, 2021 and a list of documents dated 7th May, 2021, listing 55 documents. The listed documents included the Respondent's Disciplinary Capability and Grievance Policy and Procedure. Others included the Claimant's contract of employment dated 30th April, 2010 and the Claimant's terms of employment, show cause letter dated 17th August, 2017, the Claimant's response to the show cause letter dated 21st August, 2017, notice of capability hearing dated 28th August, 2017, closure letter dated 8th September, 2017, show cause letter dated 12th February, 2018 and the Claimant's response thereto dated 14th February, 2018, notification of capability hearing dated 20th February, 2018 and minutes thereof dated 26th February, 2018 whereby the Claimant requested for a change of role (to operations).
 7. Other documents listed and filed by the Respondent included a warning letter dated 2nd March, 2018, notice of performance dated 3rd May, 2018, a show cause letter dated 4th September, 2018 and the Claimant's response thereto dated 7th September, 2018, notification of capability hearing dated 10th September, 2018, a final written warning dated 21st September, 2018, the Claimant's appeal against the warning (dated 27th September, 2018) and the Panel's minutes and recommendations dated 15th October, 2018; whereby the Panel noted that the Claimant's extended illness and medical situation had impacted on execution of her work. A show cause letter dated 28th January, 2019 and a termination letter dated 18th February, 2019, among other documents.
 8. The Claimant filed Reply to the Respondent's Response on 26th May, 2021, and joined issues with the Respondent.
 9. Trial opened before me on 18th May, 2022. The Claimant adopted her filed witness statement dated 25th March, 2021 as her testimony, and produced in evidence the documents referred to in paragraph 4 of this Judgment. The Claimant further testified that her problems with the Branch Manager started



in 2017 when she brought her sick mother to Mombasa and also had another relative who underwent surgery in August 2017.

10. It was the Claimant's further testimony that she (the Claimant) fell sick and was on 23rd October, 2017 diagnosed with TB and was hospitalized in Mombasa Hospital for a week; and thereafter had sick offs. The Claimant further testified that:-
 - a. that she developed problems due to the TB drugs that she was taking, including memory lapses, nervous issues/numbness.
 - b. that she was under heavy medication from 27th October, 2017 to 18th July, 2018.
 - c. that on 19th January, 2018, the Claimant's doctor requested/recommended that the Claimant be given light duties at work due to the complications brought about by medication; but the bank gave her a show cause letter in the same month.
 - d. that the bank even sent the Claimant to its doctor to find out whether the Claimant was really sick.
 - e. that according to the termination letter, the Claimant was terminated for underperforming for 9 months; those being the months when she was under heavy medication.
 - f. that the Respondent had declined to give the Claimant light duties, according to information given to the Claimant by her Branch Manager; and that the Claimant was given a show cause letter in the same month.

11. Cross-examined, the Claimant testified:-
 - a. that prior to being diagnosed (with TB) on 23rd October, 2017, the Claimant had been unwell for a full month.
 - b. that the Respondent bank conducted appraisals twice a year, in February and in August.
 - c. that the Claimant was given the closure letter dated 8th September, 2017 because the bank stated that the difference between the Claimant's performance and business expectation was less than 1%; and that closure meant that the matter had been closed.
 - d. that in February 2018, the period under review was the last part of the year 2017, which was the period that the Claimant was unwell; and the panel sent the Claimant to the bank's doctor. That the Claimant was not given a copy of the medical report.
 - e. that the Claimant was given a final warning on 2nd March, 2018. That all the warnings given to the Claimant read "last warning", even when she did not have a previous warning.
 - f. that on 4th September, 2018, the Claimant got a show cause letter for underperformance during half of the year 2018, and a final warning dated 21st September, 2018.
 - g. that in January 2019, the Claimant received another show cause letter dated 28th January, 2019, to show cause regarding the whole of the year 2018 performance; and was terminated on 18th February, 2019.
 - h. that the Claimant was not given any support during her period of sickness, being the period under review. That she was not given an extra person to assist her with sales during her sickness. That she kept on asking for sick-offs, which were denied.



- i. that the Claimant was not given light duties despite the doctor's letter in that regard dated 19th January, 2018, which the Claimant took to the bank; this despite Clause 7 of the contract of employment providing for transfer of duties.
 - j. that at the point of exit, the Claimant was earning a consolidated monthly salary of Kshs.138,000/=; which included house allowance.
 - k. that the last hearing was not fair as the Respondent/Panel did not capture the Claimant's improved performance for November and December 2018 and January 2019, and just made generalised accusations of poor performance.
12. When the matter came up for defence hearing on 15th February, 2023, the Court was informed that the Claimant had died in December 2022. Subsequently, the deceased Claimant's personal representatives, Titus Mutua and Kelvin Mwendwa Mutua, filed an application dated 8th August, 2023 seeking to be substituted with the deceased Claimant in the suit. A certificate of death filed with the application and a Limited Grant Ad Litem were among documents filed with the application. The Claimant was shown to have died at Premier Hospital in Mombasa on 7th December, 2022. I allowed the said application on 3rd October, 2023, and directed the applicants (the deceased Claimant's personal representatives) to file and serve an amended Memorandum of Claim reflecting their character in the suit, which they eventually did.
13. For record purposes, the deceased Claimant was shown to have died on 7th December, 2022.
14. Defence hearing opened on 5th February, 2024. The defence called one witness, Vaslas Odhiambo, who adopted his filed witness statement as his testimony and produced in evidence the Respondent's documents referred to in paragraphs 6 and 7 of this Judgment. The Respondent's said witness (RW-1) further testified:-
- a. that the Claimant was the Respondent's employee based in Mombasa as a Universal Banker in the Sales Team, and that her services were terminated on 18th February, 2019. That from 2015 upto the time of termination, the Claimant's performance was below expectation.
 - b. that the Respondent had in place a performance measurement policy whereby performance was measured from January to June (Half One), and from June to December (Half Two). (The witness demonstrated the procedure, and the capability hearings/proceedings through which the Claimant was taken between 2016 and 8th September, 2017 when the Claimant was given a closure letter).
 - c. that by the end of 2017, the Claimant was still underperforming, and was given a show cause letter dated 12th February, 2018, to which she responded on 14th February, 2018; and a hearing was held on 26th February, 2018 and a final warning dated 2nd March, 2018 given.
 - d. that the Claimant's performance did not improve by the end of Half One of 2018, and was given a show cause letter on 4th September, 2018, followed by a hearing on 18th September, 2018 and an extension of her final warning for one year vide a letter dated 21st September, 2018. That the Claimant appealed against the warning and stated that she was fully healed and was pushing her numbers as per business expectations.
 - e. that RW-1 wrote to the Claimant on 9th October, 2018 and invited her for a hearing on 15th October, 2018 to discuss her appeal; and the final warning (dated 21st September 2018) was upheld vide a letter dated 23rd October, 2018.



- f. that the Claimant was given another show cause letter dated 28th January, 2019, to which the Claimant responded vide a letter dated 31st January, 2019. That the Claimant was invited for a capability hearing vide a letter dated 1st February, 2019 and the hearing was held on 7th February, 2019, followed by termination for poor performance vide a letter dated 18th February, 2019.
 - g. that the Claimant appealed against her termination, but the termination was upheld and decision communicated to the Claimant vide a letter dated 28th March, 2019.
 - h. that the Claimant's termination was fair.
 - i. that the Claimant earned a consolidated salary as per her job offer dated 30th April, 2010.
15. Cross-examined, RW-1 testified:-
- i. that he was employed by the Respondent on 16th November, 2016 and was based at Nairobi; that the Claimant was based at Mombasa, and was under her Branch Manager, Anne Langat.
 - ii. that the Claimant was employed by the Respondent in 2008 and eventually moved grade to management level on 30th April, 2010, on merit.
 - iii. that the Claimant's performance started going down in 2015, after working for about 8 years.
 - iv. that each performance year is independent, as the Claimant's employment contract stated that performance would be reviewed every year.
 - v. that the Claimant may have reported at a given time that she was unwell, as it was normal for employees to go through medical process.
 - vi. that the Claimant responded to each show cause letter issued on underperformance.
 - vii. that the show cause letters issued to the Claimant were for different performance periods.
 - viii. that the Claimant was issued with a closure letter on 8th September, 2017, thus giving her another chance.
 - ix. that the Respondent's policy states that there would be a first written warning, a final warning and then dismissal; and that the warning system allows an employee a fair chance to improve.
16. Having considered the pleadings filed and evidence adduced by both parties, issues that fall for determination, in my view, are:-
- a. Whether termination of the Claimant's employment was fair and equitable.
 - b. Whether the Claimant's estate is entitled to the reliefs sought.
17. On the first issue, Section 45 (1) and (2) of the *Employment Act* provides that no employer shall terminate the employment of an employee unfairly, and that a termination of employment is unfair if the employer fails to prove that the reason for termination is valid and that the employment was terminated in accordance with fair procedure. Under Section 45(4)(b) of the Act, termination of employment shall be unfair if it is found that in all circumstances of the case, the employer did not act in accordance with Justice and equity in terminating the employment of the employee.
18. In determining fairness or lack of it in terminating an employee's employment, a Court must look for both substantive and procedural fairness in the termination, and in doing so look at both the relevant



statute and the employer's internal procedures and processes. It was stated as follows in the case of Walter Ogal Anuro – vs – Teachers Service Commission [2013] eKLR:-

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

19. Evidence on record, as adduced by both parties herein, stated and demonstrated that on 8th September, 2017, the Respondent gave the Claimant a letter of closure regarding performance capability issues upto Half One of the year 2017; and that on 23rd October, 2017, the Claimant was diagnosed with pulmonary tuberculosis. The evidence on record further demonstrates that the diagnosis was made after the Claimant had been ill for a whole month, and that in the period that followed the diagnosis, the Claimant was put on tuberculosis medication whose effect on the Claimant negatively impacted on her work performance. Evidence on record also shows that the Claimant was hospitalised at Mombasa Hospital following the diagnosis, and subsequently took offs during the lengthy treatment which, according to the evidence adduced, lasted until July 2018.

20. Indeed, Dr. Rishad A. S; a Consultant Physician & Nephrologist, wrote a report on the Claimant on 19th January, 2018 stating as follows:-

Re: Mrs. Doreen Naliaka Mutua

The above patient is on follow-up in my clinic at Mombasa Hospital due to Pulmonary Tuberculosis, currently on therapy.

She's haemodynamically stable but feels occasional weaknesses and easy fatigability due to the medication taken. Therefore, we recommend her to be given light duties at work until completion of her treatment.

Please assist her accordingly.”

21. The Claimant testified that she gave the said medical report to her Branch Manager, who called her after a week and told her that the request had been declined. The said Branch Manager was not called by the Respondent to testify, and the Respondent's witness (RW-1's) denial of having seen the foregoing Doctor's letter is of no evidential value. It is just a denial. The Claimant's un rebutted evidence was that she continued undertaking her usual front desk duties without any assistance during the period of sickness and treatment. Evidence on record shows that the Claimant was issued with fresh show cause letters for poor performance from September 2017 (after the tuberculosis diagnosis) upto 28th January, 2019, culminating in her termination on 18th February, 2019.

22. During the aforesaid period, the Claimant is shown to have been subjected to capability hearings and that upon such a hearing held on 18th September, 2018, the Respondent's panelists made the following findings/observations:-

- “(i) Doreen is an experienced UB, having worked on the role for 10 years.
- (ii) She had documented health issues in 2017/2018 that resulted in poor performance 61.1%.
- (iii) Performance improvement noted in July at 91% after completion of medication and clean bill of health from a doctor.



(iv) Sales which was the weakest point has grown from 10.4% in June to 40.3% in July . . .”

23. Minutes of the said hearing and the Panelists’ observations/findings were produced in evidence by the Respondent. The Panel recommended that the Claimant be given a second chance, and that her position be reviewed at the end of the 2018 performance period. That the warning given to the Claimant earlier be extended. The Claimant was thereupon given a written final warning letter, dated 21st September, 2018, which was to be valid for 12 months.
24. On 28th January, 2019, however, the Claimant’s Branch Manager issued the Claimant with a show cause letter, accusing her of underperformance as at end of September 2018. The Claimant lamented in her evidence in Court that in issuing the said show cause letter, the Respondent made generalised accusations of underperformance, and did not take into account the Claimant’s performance for October, November, December 2018 and January 2019. The Respondent did not controvert or rebut the foregoing evidence.
25. Failure by the Respondent to take into account the Claimant’s performance for the last quarter of 2018 as recommended by the Respondent’s Panelists on 18th September 2018 and proceeding to terminate the Claimant’s employment on 18th February, 2019 on account of poor performance casts a heavy cloud of doubt on the validity of the reason for termination, and I make a finding that validity of the reason for termination was not proved, on a balance of probability.
26. Further, the Respondent’s act of accusing the Claimant of poor performance during a performance period of documented and undisputed sickness and treatment that had negatively impacted on the Claimant’s performance, and proceeding to terminate her employment on such accusations, was not in accordance with Justice and equity.
27. Further, the procedure adopted by the Respondent in effecting the termination of employment was not fair, as it did not accord with the Respondent’s Disciplinary Capability and Grievance Policy and Procedure. Whereas the Respondent’s said policy and procedure provided that a first warning would issue and would remain valid for 12 months from the date of issue; and that a final warning would issue if the first warning failed to correct the issue involved, and that the Final Warning would be valid for 12 months from the date of issue, and that dismissal could only be imposed after the warnings had been issued, the Respondent never issued the Claimant with any first warning, but issued final warnings. The Claimant testified as much. The Respondent contravened its own disciplinary policy and procedure.
28. I make a finding that termination of the Claimant’s employment was procedurally and substantively unfair, and that the Respondent did not act in accordance with justice and equity in terminating the Claimant’s employment.
29. On the second issue, and having made a finding of unfair termination, I award the deceased Claimant’s estate the equivalent of six months’ salary being compensation for unfair termination of employment. It was a common ground that the Claimant’s monthly salary at the time of termination was Kshs.138,480/=. The Claimant also produced copies of her payslips in evidence, which confirmed her monthly earnings to have been Kshs.138,480/=. The equivalent of six months’ salary is Kshs.138,480/ = x 6 = Kshs.830,880/=:, which I award to the Claimant’s estate.
30. The claim for one month salary being notice pay is declined as notice pay is indicated in the Claimant’s termination letter as one of the payments made to the Claimant upon termination. The Claimant did not tell the Court that any of the indicated payments was not made to her by the Respondent.



31. The claim for Kshs.2,991,168/= being alleged unpaid house allowance is declined. The Respondent pleaded, and its witness (RW-1) testified that the Claimant earned a consolidated salary which included house allowance. The Respondent produced in evidence the Claimant's employment contract (as a Customer Advisor) dated 30th April, 2010, which indicated that the Claimant's salary was consolidated. Under Section 31(2)(a) of the *Employment Act*, an employee earning a consolidated salary is not entitled to housing by the employer or to a house allowance. The consolidated salary must, however, include an element intended to be used by the employee as rent.
32. I have noted from the Claimant's earlier offer letter dated 11th September, 2008, vide which the Claimant was employed by the Respondent as a permanent and pensionable employee, that the Claimant's salary included house allowance.
33. I have noted from the documents referred to in paragraph 12 of this Judgment that the Claimant (now deceased) is survived by two under age children, Daniel Etyang and Natasha Naliaka Amejje; with the Claimant's two brothers, Titus Mutua and Kelvin Mwendwa Mutua, being the deceased Claimant's personal representatives; having been granted a Limited Grant Ad Litem by the Chief Magistrate's Court at Mombasa on 8th June, 2023.
34. Having considered written submissions filed on behalf of both parties herein, Judgment is hereby entered in favour of the Claimant, for the benefit of the deceased Claimant's (Doreen Naliaka Mutua's) estate, in the sum of Kshs.830,880/= being compensation for unfair termination of employment. The awarded sum shall be subject to statutory deductions as applied to the Claimant at the time of termination.
35. The Claimants are awarded costs of the suit and interest on the awarded sum. Interest shall be calculated at Court rates from the date of this Judgment.
36. The deceased Claimant's personal representatives (the present Claimants) shall file an appropriate application regarding investment and/or preservation of an appropriate part of the awarded sum for the benefit of the deceased Claimant's minor children named in paragraph 33 of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL 2025

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearances:

Mr. Busieka for the Claimant

Miss Kimanthi for the Respondent

