



**Mwihia v Barclays Bank of Kenya Limited (Petition 104 of 2017)
[2024] KEELRC 476 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 476 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 104 OF 2017
MA ONYANGO, J
FEBRUARY 29, 2024**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS IN ARTICLES 20,21,27,35,41,43 & 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION
OF ARTICLES 2,3 & 10 OF THE CONSTITUTION**

AND

IN THE MATTER OF: THE EMPLOYMENT ACT (NO.7 OF 2007)

BETWEEN

BEATRICE WANGUI MWIHIA GARNISHEE

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

Introduction;

1. The Respondent is a commercial bank registered as a Private Company limited by shares incorporated in Kenya under the Companies Act, Cap 486 Laws of Kenya.
2. The Petitioner herein was until 8th March 2017 employed by the Respondent as a Tax and Capital Planning Manager.

The Petition

3. The Petitioner filed the instant Petition against the Respondent on 30th November 2017. The Petitioner invoked various Articles of the Constitution that she avers the Respondent violated. She seeks the following reliefs:



- a. A declaration that the Petitioner's employment was terminated by the Respondent unfairly;
 - b. A declaration that the Respondent has discriminated against the Petitioner in the manner that the Petitioner was treated due to her illness and during her exit from the Respondent's employment and as such she is entitled to General and Aggravated damages for discrimination and breach of human dignity and the right to fair administrative action;
 - c. A declaration that the unfair labour practices and the unfair administrative action by the Respondent amounts to treating the Petitioner in an inhuman and degrading manner which violates Article 29(f) of the Constitution;
 - d. Further, an order for compensation as follows:
 - a. Twelve (12) months compensation for unfair termination of Kshs 7,398,468;
 - b. Three months' notice pay;
 - c. Unpaid leave days for eight days;
 - d. Damages for loss of career;
 - e. Interest on the aforesaid sums at the court rates from the date of termination;
 - f. Staff loans to continue at staff rates for the sanctioned period until full payment and in the alternative the Petitioner be given the option of 40% discount on early repayment;
 - g. General and aggravated damages including exemplary damages for discrimination and breach of human dignity and the right to fair administrative action, unfair treatment and libel;
 - e. Costs of this Petition be borne by the Respondent.
4. It is the Petitioner's case that she was initially an employee of CFC Stanbic Bank from July 2010 to February 2012 where she served as the Tax and Regulatory Manager. The Petitioner avers that she had a long and successful career in the said Bank before being headhunted and subsequently employed by the Respondent vide employment contract dated 27th January 2012.
 5. The Petitioner avers that she diligently and zealously performed her roles and in January 2013, she was recognized together with the entire tax team as the best team after they finalised on the KRA Tax Audit and received the Eagle Award in 2013. The Petitioner avers that she consistently met and exceeded expectations in her performance as is evident from the Performance Appraisals done by the Respondent. That the Petitioner's Appraisals for the Years 2012, 2013 and 2014 were "Fully meets expectation"; "Above expectations"; and "Strong" respectively.
 6. It is the Petitioner's averment that in September-October 2015, she was rated "Good" in the half year performance rating. However, in December 2015, the Petitioner was shocked when she received a performance rating of "Needs Improvement." Thereafter, in Half year 2016 and Full year 2016, the Petitioner received a rating of "Needs Improvement" and "Underperforming" respectively.
 7. The Petitioner was subjected to two Capability Hearings whose fairness, independence and impartiality she avers was compromised. The Panelists recommended that the Petitioner be terminated from employment and vide a letter dated 8th March 2017, the Petitioner's employment was terminated. She avers that upon appeal, the Panelists upheld the decision to terminate her employment and deliberately failed to consider the submissions of the Petitioner as well as her health status which was brought to their attention.



8. Being aggrieved with the decision of the Respondent, the Petitioner instituted the present suit, seeking orders as already set out herein above.

The Respondent's case

9. The Respondent opposed the Petition vide a Replying Affidavit sworn on 9th March 2018 by Vaslas Odhiambo, its Employee Relations and Wellness Manager.
10. It was the Respondent's case that by letter of offer dated 17th January 2012, the Respondent offered the Petitioner employment as a Tax and Capital Planning Manager which she accepted on 30^h January 2012. That in addition to the terms contained in that letter, the Petitioner agreed to be subject to the Respondent's Staff Handbook and HR intranet. That a salient term of her employment contract was that the Petitioner's continued employment was subject to good performance and that the Respondent reserved the right to terminate her employment on account of poor performance against which her performance would be reviewed as set out in "Performance Reviews" at page 2 of the Contract annexed to the Petitioner's Supporting Affidavit.
11. It was the Respondent's case that it continually assessed the performance of its employees including that of the Petitioner. Her tenure was initially characterized by good performance pursuant to which she received accolades and commendations. However, between July 2015 and December 2016, the Respondent assessed the Petitioner's performance and found it to be below its business expectations. The efforts to help her improve her performance through a Performance Improvement Plan were unfruitful. The Respondent therefore subjected the Petitioner to disciplinary action in the form of Capability Hearings in accordance with its policies. Subsequently, it resolved to terminate the Petitioner's employment, and informed the Petitioner of her right to appeal this decision. Her appeal was unsuccessful.
12. It is the validity of this termination that the Petitioner now challenges. She prays that this Court declares that the termination was not only unfair, unlawful and wrongful, but that it also violated her constitutional rights. Specifically, the Petitioner alleges that the Respondent unlawfully discriminated against her on account of illness while in employment, and in the performance appraisal process leading to the termination.
13. According to the Respondent, the Petitioner's employment was terminated on account of poor performance and at no time during the disciplinary hearing did the question of the Petitioner's medical condition come up.
14. In response to the Petitioner's allegations of violations of her constitutional rights it was the Respondent's position that the Petitioner has not provided sufficient justification to demonstrate that her constitutional rights were violated.

The Evidence

15. The Petitioner testified as PW1 on 26th February 2020 and relied on her Petition, the documents attached thereto and her further affidavit sworn on 17th February 2020 as her evidence in chief. In her testimony in court, the Petitioner reiterated the averments in her Petition.
16. The Respondent on its part called its Head of Employment Relations and Wellness Manager, Vaslas Odhiambo who testified as RW1 on 15th February 2022. He adopted his affidavits sworn on 9th March 2018, 30th October 2019 and 21st February 2020 as his evidence in chief. RW1 told the court that all employees of the Respondent have a contractual obligation that their continued employment is subject to good performance.



17. RW1 took the court through the Respondent's employee performance review procedure. He stated that every half year, and at the end of the year, the performance of employees is reviewed. It was his testimony that employees with Performance Ratings of "Improvement needed" and "Underperforming" are taken through an Improvement Plan and thereafter, the employees are taken through a formal capability process. RW1 referred the court to the last sentence of the Petitioner's employment contract which provided that, "continued employment is subject to good performance and that the bank reserves the right to terminate an employee on grounds of poor performance."
18. RW1 testified that the Performance Appraisal Process applies to all employees and that the Petitioner did not raise any grievance that she was discriminated in her appraisals.
19. RW1 while responding to the allegation by the Petitioner that Grace Muamba appeared in both the Capability Hearings contrary to the Respondent's Policy, stated that the Petitioner did not raise any issues on the composition of the Capability Hearing Panel.
20. On the issue of staff loan, RW1 told the court that the Offer letter at Clause 2(d) provides that preferential rates on interests would cease immediately employment is terminated for whatever reason.
21. On cross examination RW1 stated the Respondent was not aware that the Petitioner had a medical condition that impaired her performance.
22. At the close of the Respondent's case, the court directed parties to file written submissions. From the record, the Petitioner filed the submissions dated 19th May 2022 and further submissions dated 28th July 2022. The Respondent's submissions are dated 8th July 2022.
23. I have considered all these submissions.

Determination

24. From the pleadings on record, the evidence of the parties and the submissions filed, the issues that arise for determination in this case are the following: -
 - a. Whether the reasons for termination of the Petitioner's employment were justified;
 - b. Whether due process was followed before the termination of the Petitioner's employment;
 - c. Whether the reliefs sought are merited.

Whether the reasons for termination of the Petitioner's employment were justified

25. The process of termination of the Petitioner's employment was commenced with the letter dated August 26, 2016 which is reproduced below:

Friday, August 26, 2016

Dear Beatrice,

Notification of Interview Arrangements

We refer to your H1 2016 and H2 2015 performance rating which was Improvement Needed and Improvement Needed respectively. These performances are below expectations. I write to advise that a capability hearing has been arranged for 10 am on Thursday, 8th September 2016 and which you are required to attend. It will be held at West End, Waiyaki Way, Bogoria Meeting Room.



You are entitled to be accompanied by a colleague serving in management cadre or management staff association representative.

The meeting will be chaired by Joseph Kigen Sang and Grace Mwangeli Muamba who will access the material provided and your explanation and will make a decision. Edna Grade, Wendo Chawiyah will facilitate the meeting and take notes. Depending on the outcome of the meeting, you may be subjected to disciplinary action and you should therefore attend the meeting fully prepared to state your case.

Kindly note that should you fail to attend, management will proceed to take action as will be deemed appropriate.

Kindly acknowledged receipt of this letter by signing and returning a copy to us.

Yours sincerely,

Signed

Peter Muhoho Mungai

Head of Tax.

26. On the 9th September 2016, the Respondent addressed another letter to the Petitioner which read;

Dear Beatrice,

Final Warning Letter

I write further to the Capability Hearing held on Thursday, 8th September 2016 regarding your performance rating for H1 2016 and Full Year 2015 which was Improvement Needed and Improvement Needed respectively. These performances are below business expectations and the findings of the meetings were as follows:

- You did not meet your H1 2016 and Full 2015 objectives as contracted.
- You did not adhere to the TAT as required in your role
- Your performance remained poor despite your objectives and development areas being communicated earlier in the year 2016 for your action and implementation

Consequently, the Panel found the charges against you are proven. I am satisfied that you have failed to meet the agreed performance standards and objectives contrary to the expectations in your contract of employment for which a written warning is appropriate.

This letter serves as a written warning and a copy of it will be placed on your personal file. Should you fail to improve your performance or should you commit any acts of misconduct, this warning will be taken into account in deciding the appropriate level of disciplinary action applicable at the time.

Kindly take note that this warning will be valid for a period of twelve (12) months effective Thursday, 8 September 2016. Please note that this is your final warning.

You are entitled to appeal against this decision by writing to Human Resources Director within 10 working days of the date of this letter setting out fully your grounds of appeal.

Kindly acknowledge receipt of this letter by signing and returning a copy.

Yours sincerely



Signed
Peter Muhoho Mungai
Head of Tax

27. On 21st January 2017, the Respondent wrote a Show Cause letter to the Petitioner. I reproduce it hereunder;

Dear Beatrice,

Re: Show Cause Letter

We note with great concern that your performance for Full Year 2015 and Full Year 2016 was Improvement Needed and Underperforming respectively. These performances are below business expectations.

In view of this, you are hereby requested to provide in writing the reason(s) hindering your performance and show cause why disciplinary action should not be taken against you.

Kindly note that should you fail to provide sufficient explanation or no explanation, management will proceed to take action as will be deemed appropriate.

Please let me have your response by 5pm, 25th January 2017

Yours sincerely,

Signed
Peter Mungai
Head of Tax

28. Via a letter dated 25th January 2017 the Petitioner wrote a detailed response to the Show Cause letter explaining that her performance had been fairly good and highlighting the challenges she had encountered in the course of her employment.
29. The Petitioner was issued with a termination letter dated 8th March, 2017. The letter reads as below:

Dear Beatrice

Termination letter

We refer to the Capability hearing conducted on 21 February, 2017, the Show CUSE Letter dated 21 January, 2017 and your response dated 25 January, 2017.

Further, we have reasonable grounds to conclude as follows:

1. Your performance rating for full year 2015 was Improvement Needed (in)
2. Your performance rating for Half One (H1) year 2016 was Improvement Needed (IN)
3. Your performance rating for full year 2016 was underperforming UP)

The above therefore confirm that you have failed to meet the agreed performance targets and objectives contrary to the business expectations.



In view thereof, your services are hereby terminated on grounds of poor performance with effect from 08 March 2017 in accordance with your terms and conditions of employment by the payment of one month's salary in lieu of notice.

Where applicable, if you are a member of the Defined Benefit (DB) Fund/Defined Contribution (DC) Scheme, you are entitled to access your current Pension benefits in line with the rules of the Fund. To enable the Trustees provide you with the retirement options, please complete the attached claim form and return back to Human Resources Division.

You have the following loan and card balances as at 06/03/2017 which now become payable in leaving the services of the Bank.

Account	Loan type	Balance
203XXXXXXXX26	Staff Personal Loan-Secure Acc	KES 610,827.15
202XXXXXXXX84	Staff Housing Loan Acc	KES 6,015,197.55
4073*****4728	Gold card	KES 31,041.71
4073*****1586	KQ Msafiri card	NIL
4263*****2727	Company card	NIL
Totals		KES 6,657,066.41

Please note that upon your ceasing to be an employee of the bank, you will not be eligible to enjoy the preferential staff rate on your loans/accounts. Accordingly, you are hereby notified that the interest rate on your loans will be adjusted to the prevailing commercial rates after 30 days from the last working day at the bank as follows:

The interest rate on your home loan shall be adjusted to CBR (currently at 10.00%) plus a margin of 4.00%.

The interest rate on your personal loan shall be adjusted to CBR (Currently at 10.00%) plus a margin of 4.00%.

Please note that these interest rates are variable and will change from time to time. Please contact the Collections Manager on the options available to you.

You will be required to maintain a credit cover for all your loan/s even after ceasing employment with the Bank. You may opt to continue with the previous Credit Life Cover (Group life on loans) where you will be required to pay monthly premiums. The collections department will advise you on other options available to you.

Attached is an exit interview form for your completion. Kindly forward back to us at the earliest opportunity.

You will be required to return all Barclays property that is in your custody, e.g mobile phone, lap-top Company Barclaycard, before your leaving date. Please also remember that



contractual conditions about protecting confidential Barclays information remain in place after your leaving date, details can be found in the Staff Handbook or Code of Conduct.

Please note that any terminal dues owed to you i.e. Salary including today's pay, allowances where applicable, leave pay and notice pay will be earmarked to facilitate completion of the exit process and payment of amounts owed to the bank where applicable. You will be required to ensure that part A of the Leavers checklist has been duly completed and a copy of the form returned to Human Resource department in order for the earmark to be lifted. You will retain the original copy of the Leavers checklist to progress completion of Part B and signoff by respective accountable functions. The duly completed and signed off form must be returned to Human Resources within 2 weeks of your exit date.

You are entitled to appeal against the decision by writing to the HR Director, stating clearly the reason for the appeal within 10 working days of receiving this letter.

Please sign and return a copy of this letter to me as acknowledgment of receipt.

Your sincerely

Singed

Peter Mungai

Head of Tax

Employee's signature....signed date 08/03/2017

30. From the warning letters, the Show Cause letter and the termination letter issued to the Petitioner, the reason given by the Respondent for the termination was poor performance.
31. The Petitioner contends that she was discriminated and the termination of her employment was on account of her bipolar medical condition, which she states the Respondent was aware of. I have perused the minutes of the capability hearings and apart from mention of sick leave, there is no reference to the Petitioner's medical Condition as a factor impacting on her performance.
32. In her response to the show cause letter the Petitioner states:

“ Also management is aware that I do have a medical condition- bipolar [mood disorder] this has however neither incapacity me nor affected my deliverables. Due to this condition, it is imperative that I remain calm to be able to handle aggressive criticism from my superiors.
33. The Court of Appeal in *National Bank of Kenya v Anthony Njue John* (2017) eKLR held as follows on the issue of termination on account of poor performance-

“ The reason advanced by the Bank for terminating the respondent's employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;

 - a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act, 2007*. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
 - b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further,



what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.

34. In the case of *Jane Samba Mukala v Oltukai Lodge Limited* [2010] KLR 225 this Court observed as follows:

“Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.”

35. The Petitioner’s employment contract dated 27th January 2012, had a Clause on Performance Review which provided:

Your performance will be reviewed in accordance with Barclays performance development policies in force from time to time.

You will be required upon taking up your role, to agree on a Performance Development Plan with your Line Manager. Annual performance targets and objectives will be agreed with your Line Manager at the beginning of each year and your performance measured against these targets and objectives in accordance with the Bank’s policy on Performance Development. Your continued employment will be subject to good performance. Should your performance be found wanting, the Bank reserves the right to terminate your employment on grounds of poor performance.

36. In the Respondent’s response to the Petition, it has detailed the efforts it made to assist the Petitioner to improve in her performance. Specifically, by email dated 16th February 2016 the Petitioner was informed of the areas she needed to focus on after the review of her performance for the year 2015. By a follow up email of 25th February 2016, the Petitioner was put on a Performance Accelerator Plan and informed of the areas she needed to focus. After evaluation the Petitioner’s line manager shared with her the specific objectives that she had not met. It is only after these efforts did not result in improvement that the Respondent issued to the Petitioner a warning letter dated 26th August 2016.

37. A capability hearing was conducted for the Petitioner on 8th September, 2016 which recommended that the Petitioner be issued with a Final Warning Letter which was issued on 9th September, 2016. The Petitioner did not appeal against the final warning letter even though the letter notified her of her right to appeal to the Human Resources Director within 10 days.



38. When the Petitioner's performance did not improve after the final warning letter she was issued with a show cause letter dated 21st January 2017 which she responded to on 25th January 2017. She was thereafter invited to another capability hearing on 21st February 2017 at which the recommendation to terminate her employment on grounds of poor performance was made.
39. The petitioner was eventually issued with a termination letter on 8th March 2017 after the Employment Relations and Wellness Manager reviewed and agreed with the recommendations of the Panel.
40. From a perusal of performance ratings annexed to the Respondent's Replying Affidavit, I am satisfied that the Respondent has discharged its duty of demonstrating that there was valid reason to terminate the Petitioner's employment on grounds of poor performance and that efforts to assist her to improve her performance did not succeed.
41. It is therefore the finding of this court that the termination of the Petitioner's employment was on valid grounds.
42. On the Petitioner's contention that Grace Muamba appeared as a panelist on both capability hearings contrary to the Respondent's Disciplinary, Capability and Grievance Policy and Procedure manual, I have perused the Respondent's manual and noted that Clause 5 which provides for the Disciplinary Process is silent on the composition of the panels for capability hearings.
43. Further, as submitted by the Respondent, the Petitioner did not object to the composition of any of the panels. From the evidence on record the Petitioner has not proved that there was bias or discrimination by virtue of the attendance of Grace Muamba in both Capability Hearings.
44. From the minutes of the capability hearings conducted on 8th September 2017 and on 21st February 2017 as well as the minutes of the appeal hearing conducted on 31st March 2017, I am satisfied that the Respondent complied with due process as contemplated by section 41 of the Employment Act.
45. Having established that the Respondent had valid reasons to terminate the employment of the Petitioner and that she was taken through a disciplinary process as envisaged by Section 41 of the Employment Act, it is my finding that the termination of the Petitioner's employment was justified and fair.
46. Lastly, on the issue of staff loan, I have perused the Staff Housing Loan Terms and Conditions annexed to the Petitioner's affidavit in support of the Petition. Clause 2(d) on interest provides:

“The bank may charge of preferential rate of interest on the Borrower's loan while the Borrower remains in the employment of the Bank, but such preferential rate shall cease to apply immediately the Borrower's employment with the Bank is terminated for whatever reason, unless the Bank otherwise agree in writing.
47. The termination of the Petitioner's employment having been found to have been fair, she is not entitled to the preferential interest rate at 6% which is applicable to the Respondent's employees as she is no longer an employee of the Respondent. The interest shall however not be backdated and will commence on the date of judgment.
48. Consequent on the above findings and conclusions, I find the Petition herein unmerited. I accordingly dismiss the same with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO



JUDGE

