



**Cheruiyot v The Co-operative Bank of Kenya Ltd (Cause E228 of 2022)  
[2024] KEELRC 451 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 451 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E228 OF 2022  
DKN MARETE, J  
FEBRUARY 21, 2024**

**BETWEEN**

**NEHEMIAH KIPKORIR CHERUIYOT ..... CLAIMANT**

**AND**

**THE CO-OPERATIVE BANK OF KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. This matter came around by a way of Claimant’s Memorandum of Claim dated 6th April, 2022. The issue in dispute is herein cited;  
  
Unfair/Unlawful termination of employment of Nehemiah Kipkorir Cheruiyot.
2. The Respondent in a Memorandum of Reply and Count Claim dated 5th December, 2022 denies the claim and prays that it be dismisses with costs. She vouches for the Counter Claim, this being the claimant’s outstanding loan with the Respondent.
3. The Claimant case is that on 22nd August, 2013, he was offered casual employment by the Respondent. He proved to be a good worker and was offered permanent employment on 17<sup>th</sup> November, 2015. He was unionised.
4. The Claimant’s further case is that he worked for the Respondent in several branches and was transferred to University way branch as a National Banker. Here his duties included selling of Bank products like loan, debt card, credit cards and account.
5. Its the Claimant’s other case that he was an exceptional performer for five consecutive years from 2013 to 2018. In this time he worked diligently and excellently brings alot of business to the Respondent’ Bank. He has been promoted from a Teller to a Personal Banker and was awaiting to resume his new senior role as Relationship Banker before his termination of employment.



6. The Claimant avers that apart for his sales job the claimant undertook other duties like customer service and handling customer queries in the branch which other roles he performs exemplarily.
7. The Claimant other case is that on 22nd August, 2018 he received a letter from the director inviting him to a performance improvement evaluation meeting. Thereafter, on 24th September 2019, he received a letter of termination of employment with the Respondent. He reported the matter to the union and dispute was reported to the Cabinet secretary for labour on 4th November, 2019.
8. It his further case that: The reasons cited for termination were not explained or illustrated in a language that he would understand. There was no documentation of poor performance of a realistic period of time in demonstration of the same. The Respondent did explain anywhere to claimant that distinction between good and poor performance. The Respondent failed to explain at all in which specific areas the claimant failed to perform. The Respondent did not show the Claimant any comparison between targets set at the start of each evaluation period and what was achieved at the end of such period. That according to the Respondent performance appraisal policy performance targets are suppose to be shared with employees agreed upon and signed of before the beginning of evaluation period. The Claimant was given performance target on 28th March 2019 as opposes to the month of January. Performance targets for the second quarter of 2019 were shared to claimant on 27th August, 2019 when the appraisal period was suppose to end and therefore this was unprocedural and unfair. There was not procedural fairness in the appraisers of alleged poor performance before arriving at a decision to terminating employment. The Respondent did not even follow their own performance and procedure evaluation policy. The Claimant was not given any opportunity to defend himself before termination. He was not afforded an opportunity to present his case in a disciplinary process. His termination was instead an ambush and unprocedural.
9. The Claimant again avers that during performance review meeting, he raised pertinent issues to justify his performance. For example, he had been on leave in January to February, 2019. Again the Respondent did not have favourable products to retain high profile customers like the university of Nairobi and Kenya Institute of Management and these factors were not considered before the decision of termination of his employment.
10. Notably, The Respondent is on record as having violated their own policy regarding performance management by given key performance indicator (KPI) long after the commencement of performance and review in addition. The performance report was not shared or discussed with the claimant before termination. He was not warned of any consequences of non performance in writing ahead of action.
11. The Claimant in the penultimate submits that from the foregoing, the Respondent did not discharge her statutory obligation on substantive and procedural justice as is required of Section 41, 43 and 45 of the *Employment Act*, 2007 on the requisition of being informed of the reason for termination and the actual hearing. Again, no valid reason was issued for the termination of employment.
12. The termination was also a fragrant breach of Section 8 of the *Employment Act*, 2007 and Clause A(5) of parties CBA which outline the practice of performance evaluation and also curtails situations of unfair termination of employment . He prays as follows;
  1. Claimant prays to the Honorable court to find and declare that the termination of Nehemia Kipkorir Cheruiyot was unfair, unprocedural, unlawful and therefore invalid.
  2. The claimant further pray to the court to order for the re-instatement of the claimant back to his former position without loss of employment benefits and seniority in service and status.
  3. That notice pay of Kshs.113,688.85 and leave pay.



4. That the claimant pray to the Honourable to order for the payment of twelve (12) month's salary of Ksh.1,364,266.20 as compensation for having suffered an unfair and unlawful loss of employment.
  5. That the claimant again prays to the Honourable court to order for payment of damages of Kshs.1,500,000 for having suffered humiliation and distress, deprivation of livelihood for himself and his family members, inability to meet his very obligation of providing food, clothing and shelter as a father and a husband, the deprivation of the right to secure alternative employment and retire normally at the age of sixty (60) years provided for the law and the respondent's employment policy.
  6. Costs of this suit.
13. The Respondent's case is an agreement with the employment records and history of claimant as in the expressed in the claim. This is particularised in paragraph 3 of the response.
  14. The Respondent further case is that the claimant was issued with a role of Personal Banker dated 23rd August, 2019 which he duly executed. He was also provided with requisite Anti Money Laundering Policy. The Bank's Business code of Conduct and Ethics (and Revised Provisions therefore), relevant CBK Prudential Guidelines, Staff Manual (and revised provisions thereof), the Respondent's Operating Manual and procedure Manuals. Know your customers (KYC) Manual, which he was required to read, comprehend and acknowledge the same by signing the acknowledgment forms to confirm that he had read and understood the Respondent's policies.
  15. The Respondent further avers that following the Claimants review of work performance sometime in 2019, it became apparent that the claimant fell short of the Respondent's expectation necessitating that he be placed on a performance improvement for a period of 6 months commencing January to 30th June, 2019. He was offered the necessary support, coaching and time to hang around but this was not to be. He continued with unsatisfactory performance and was therefore invited to appear before the staff performance improvement review panel for deliberation on this. He was subsequently and for this reasons terminated from employment.
  16. The Respondent additionally raised a Counter Claim for Kshs. 2,567,307.91 being an outstanding loan remaining as at 5th December, 2022 whose interest continues accruing todate.
- Issues for determination therefore are;
1. Whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful.
  2. Whether the Respondent is entitled to the counter claim as sought.
  3. Whether the claimant is entitle to the relief sought.
  4. Who bears the costs of the case.
17. The 1st issue for determination is whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful. The claimant in his written submission dated 24th October, 2023 brings out a case of unlawful termination.
  18. In reiteration of his case, the claimant submits that his termination of employment on grounds of poor performance was anomalous that he was not awarded an opportunity to be heard in accordance with *Employment Act*, 2007. This provides for substantive and procedural fairness in the event of termination of employment. It is his case that he was not afforded any disciplinary hearing or even



facilitated to present a fellow employee or shop floor representative of his choice in a presentation of the reasons for which the employer is considering termination of employment. On this the claimant seeks to buttress his case by relying on authority of *National Bank of Kenya vs Antony Njue John* Nairobi Civil Appeal No. 117 of 2017 where the court of Appeal pronounced itself on termination on ground of poor performance.

19. The Claimant further submits and faults the Respondent application of her performance management policy and avers this was not effectively pursued in his case therefore leading to his unfair termination of employment. The Claimant displays this in his evidence and bundle of documents and therefore reiterate this in support of his case.
20. The Claimant pleads and submits the case of a confused and lop sided performance evaluation exercise leading to his termination of employment. It is his case that the Respondent outdid herself in not following her laid down policy on performance evaluation and performance improvement programme (PIP.)
21. The Respondent on the other hand reiterates her case and submits sequential performance appraisal exercise in which the claimant was found to be wanting and therefore dismissal from employment. It is her case that the claimant was dully taken through a performance appraisal exercise which he failed and to satisfy and therefore cannot be heard to claim unlawful termination of employment.
22. The Respondent on this seeks to rely on authority of *Jane Wairimu Machari v Mugo Waweru and Associates* [2012] eKLR where the court held thus;

The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable lengths of time. In our view 203 months would be reasonable.

23. She in any even disclaims a violation of Section 43 and 45(2) of *Employment Act*, 2007 in that a valid reason for termination of employment of the claimant was issued frontal.
24. A look at the respective cases of the parties brings out a case in favour of the claimant. The claimant to demonstrate a case of a sloppy performance appraisal exercise from the onset. He ably demonstrate that this was untoward in that performance target and guidelines were not issued on time and on some instances this were notified towards the close of the performance period.
25. The claimant faults the performance evaluation exercise and submits that this was without warning whatsoever of its implications and consequences. The Respondent did warn him on the repercussions of the exercise or even award him an opportunity to discuss and evaluate the exercise. He was merely ambushed with a letter of termination of employment. This was unfair, unprocedural and unlawful and a violation of all statutory requirements for lawful termination of employment.
26. The Claimant's case in the circumstances overwhelms that of the Respondent on a preponderance of evidence. I therefore find a case on unlawful termination of employment and hold as such. And this answers the 1st issue for determination.
27. The 2<sup>nd</sup> issue for determination is whether the Respondent is entitled to the counter claim. The claim for counter claim involves a loan issued to the claimant which continues to earn interest todate. This is well documented and evidenced by the Respondent. The claimant has not gone out of his way to rebut this. I therefore find for Counter Claim and hold as such. This answer the 2nd issue for determination.
28. The 3<sup>rd</sup> issue for determination is whether the claimant is entitled to relief sought. He is. Having succeed on a case for unlawful termination of employment, he becomes entitled to the relief sought.



29. I therefore inclined to allow the claim and counter claim and order relief as follows;

i. A declaration is hereby issued that the termination of employment of the claimant by the Respondent was unfair, unprocedural and unlawful and therefore invalid.

ii. One month salary in lieu of .....Kshs.113,688.85.

iii. 10 months compensation for unlawful termination of employment .....Kshs.1,136,888.5

Total of claim .....Kshs.1,250,577.35

Each party shall bear their costs of the Claim.

**DELIVERED, DATED AND SIGNED THIS 21<sup>ST</sup> DAY OF FEBRUARY 2024.**

**D. K. NJAGI MARETE**

**JUDGE**

**Appearances:**

Mr Tom O. Odero for the Claimant

Ms Cherono instructed by Muthaura Mugambi Ayugi & Njonjo Advocates for the Respondent.

