



Hussein v Family Bank Limited (Employment and Labour Relations Cause E090 of 2021) [2024] KEELRC 237 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 237 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E090 OF 2021
BOM MANANI, J
FEBRUARY 15, 2024**

BETWEEN

KHADIJA HUSSEIN CLAIMANT

AND

FAMILY BANK LIMITED RESPONDENT

JUDGMENT

Background

1. The dispute between the parties was triggered by the Respondent's decision to terminate the Claimant's contract of service. According to the record, the parties had an employment relationship until January 23, 2020 when the Claimant's services were terminated.
2. The parties are in agreement that the Respondent first engaged the Claimant's services as a Sales and Marketing Officer on 1st July 2008. It is also agreed that the Claimant rose through the ranks to the position of Relations Officer with her salary growing from Ksh. 28,000.00 in 2008 to Ksh. 89,400.00 in 2020.
3. The parties also agree that in 2019, the Claimant suffered a significant drop in her work performance. Her productivity dropped from a rating of 3.3 in 2017 to 2.8 at the close of 2019.
4. The claimant attributes the drop in her performance to her waning state of health. She avers that she suffered a bout of hypertension in July 2019 leading to her hospitalization at Nairobi Hospital for approximately three days.
5. She avers that her doctor informed her that her ill health had been triggered by the heavy workload she had to contend with at the workplace. She states that the doctor recommended that she lessens the workload. She also avers that she developed an eye complication which required corrective surgery around the same time.



6. It is the Claimant's case that in September 2019, the respondent put her on a Performance Improvement Plan (PIP) instead of stepping down her workload. She asserts that the PIP set for her unrealistic and unachievable targets given her health challenges.
7. The claimant avers that following her placement on the PIP, the Respondent subjected her to a series of performance reviews between October and November 2019 notwithstanding that she was preparing to undergo the eye surgery. She avers that her contract was eventually terminated on January 23, 2020.
8. The Claimant contends that the Respondent did not give her adequate opportunity to improve her performance. And neither was she subjected to the release process that is contemplated under the Employment Act, 2007. Consequently, she contends that the decision to terminate her employment was unfair.
9. The Claimant has also accused the respondent of subjecting her to discriminatory treatment. She asserts that the respondent's management kept addressing her in the Kikuyu dialect instead of either English or Kiswahili.
10. On its part, the respondent contends that the claimant's performance took to a downward trajectory from the last quarter of 2018 when her rating dropped from 3.3 to 3.0. Subsequently, she dropped to 2.8 in July 2019 forcing the respondent to place her on PIP.
11. It is the respondent's case that after the claimant was put on PIP, she was constantly monitored between October 2019 and December 2019 in a bid to assist her improve her performance. The respondent contends that despite these efforts, the claimant's performance did not improve. As a result, a decision was taken to terminate her contract.
12. The respondent asserts that for the duration of the claimant's reviews, she held regular meetings with the respondent's management to discuss her performance. These meetings are said to have been held on November 14, 2019, December 10, 2019 and January 22, 2020. In addition, the respondent avers that it wrote to the claimant on November 21, 2019 and December 13, 2019 cautioning her about the consequences of her continued poor performance.
13. According to the Respondent, it did all that was required of it to assist the Claimant improve her performance before it took the decision to sever the employment relation between the parties. The Respondent contends that it had valid grounds to terminate the Claimant's contract. In addition, it (the Respondent) contends that it observed due process in releasing her from employment.
14. The Respondent's position is that the regular review meetings that its management held with the Claimant provided her with the opportunity to be heard before her contract was terminated. Further, the Respondent argues that it gave the Claimant the opportunity to improve through the regular review sessions.
15. The Respondent has denied the claim of discrimination. It denies that its managers used to address the Claimant in Kikuyu language as asserted by her. According to the Respondent, its recognized workplace languages are English and Kiswahili.

Issues for Determination

16. From the record, it is apparent that the claimant's advocates filed their list of issues at the pre-trial stage. However, the respondent did not. Nevertheless, it (the respondent) did frame issues for determination at the stage of submissions.



17. At the pretrial stage, the claimant's Advocates identified six (6) issues for determination. However, in their closing submissions, they reduced them (the issues) to two (2).
18. Nevertheless, an analysis of the pleadings and evidence on record yields the following as the broad matters for consideration:-
 - a. Whether the claimant's contract of service was terminated for valid reason and in accordance with due procedure.
 - b. Whether the parties are entitled to the reliefs that they have sought through their respective pleadings.

Analysis

19. Before terminating an employee's contract of service, the employer must demonstrate that he has valid reason to support his decision. In addition, he must follow the procedure that the law prescribes in processing his decision.
20. Section 41 of the *Employment Act* sets out some of the grounds which the employer may invoke to close an employment relation. These include: poor performance, physical incapacity, and misconduct by an employee.
21. The section also requires the employer to inform the affected employee of the reason for the proposed decision in a language that the employee understands. This should be done in the presence of a co-employee or trade union official of the employee's choice, should the employee elect. Further, before making his decision, the employer must hear representations by the employee and his witnesses if any.
22. Sections 43 and 45 of the *Employment Act* place the burden of justifying the decision to terminate a contract of service on the employer. Although the employee ought to present preliminary evidence in support of his case in terms of section 47 of the Act, the overall burden of justifying the fairness of the decision to terminate a contract of service lies with the employer.
23. Case law has now developed the parameters for conceptualizing poor performance as a ground for termination of employment. First, the employer and employee must have jointly developed performance measurement indicators. It is these indicators that are to be used to monitor and measure the employee's performance. It is not open to the employer to unilaterally set performance measurement indicators without the input of the employee.
24. Second, the employer must evaluate the employee against the agreed indicators within the agreed timeframe. In addition, the employee's views regarding the performance review outcomes must be sought.
25. Third, if the employee's performance does not meet the agreed performance targets, the employer ought to notify him of the shortfall and interrogate the reasons for the poor performance. The employer must give the employee the chance to improve under his (the employer's) guidance. This is the stage at which the employee is usually placed on PIP.
26. If the employee fails to improve, the employer may consider terminating his services. At this stage, the employer is expected to invoke the procedure for terminating a contract of service that is inscribed in section 41 of the *Employment Act* (*National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR).
27. This requires that the employer formally notifies the employee of the intention to terminate his contract of service on account of poor performance. The employer is required to do this in the presence of a co-employee or trade union official of the employee's choice, should the employee so desire. The



- employer must then give the employee a chance to respond to the accusations of poor performance leveled against him and hear representations from the employee's witnesses if any before making his decision.
28. The Claimant contends that this procedure was not followed. She states that she was not heard in terms of section 41 of the *Employment Act* before the decision to terminate her services was reached.
 29. The Claimant contends that she had valid reasons to explain her poor performance. She attributes her low performance on her poor state of health around the time that she was placed under PIP and subjected to regular reviews.
 30. On the other hand, the respondent argues that it followed the procedure under statute in processing the claimant's release from employment. According to the respondent, the review sessions that the Claimant held with its (the Respondent's) management provided her with the opportunity to be heard.
 31. In *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR, the Court of Appeal quoting with approval the decision in the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR stated as follows regarding the need by the employer to comply with section 41 of the *Employment Act* when terminating the services of an employee:-

"Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."
 32. The evidence before me shows that the respondent wrote to the claimant on December 13, 2019 warning her about the consequences of her poor performance. The respondent indicated to the claimant that the letter served as the final warning to her regarding the issue of her non-performance. She was informed that her next review was to be undertaken between 8th and January 11, 2020 (erroneously indicated as 8th and 11th January 2019) by which time it was expected that she should have improved. The review meeting was eventually held on January 22, 2020.
 33. There is no evidence that after the review session of 22nd January 2020, the respondent convened a session to process the Claimant's release from employment in compliance with section 41 of the *Employment Act*. Section 41 contemplates a formal quasi-judicial session which entails the employer notifying the employee of the charge of poor performance, hearing the employee on the charge and rendering a decision.
 34. The employer is expected to notify the employee of his (the employer's) intention to release him (the employee) from employment in the presence of a co-employee or a trade union official of the employee's choice, should the employee elect. In addition, the employer must provide the employee with the opportunity to respond to the allegations of poor performance against him.
 35. It is for the employer to demonstrate adherence to this procedure. It is not sufficient for him (the employer) to merely make a bare assertion about compliance. There must be cogent evidence to demonstrate compliance with the requirements of section 41 of the *Employment Act*.



36. There is evidence that the Respondent held performance review sessions with the Claimant between September 2019 and January 2020. However, there is no evidence that it (the Respondent) convened a session with the Claimant where she was required to attend in the company of her colleague or a shop floor official of her choice with the intention of determining whether her contract should be terminated on account of poor performance.
37. There is no record to demonstrate that the Claimant was advised of the need to be accompanied by a workmate or a shop floor official to the review session that was held on 22nd January 2020. There is no evidence that she was allowed to advance her defense against allegations of poor performance on this date and that such defense was considered.
38. The Claimant has stated that her performance dropped because of her poor state of health. She has given evidence to demonstrate that she was admitted at Nairobi Hospital between 3rd and 6th July 2019 and 17th and 20th September 2019. She has also provided a medical report by her treating doctor which attributes her medical condition to her workload.
39. Although the Respondent initially denied that the Claimant had notified it of her health challenges, during cross examination, its witness conceded that she had furnished the bank with medical records for July 2019. It is also evident that one of the grounds of appeal against the decision to terminate the Claimant's contract was her poor health which she indicated had impacted on her ability to attain the performance targets.
40. It is noteworthy that the Claimant's performance began to drop in the last quarter of 2018 when she was scored 2.9. Matters did not improve in 2019 with her rating dropping further to 2.8.
41. From the medical evidence that the Claimant provided, she begun having health challenges in 2019. It is during this year that her performance also plummeted. It is also during this same period that the Respondent heightened its appraisal of her performance.
42. In the face of the medical evidence demonstrating that the Claimant was hospitalized on two occasions in July 2019 and September 2019 for a total of six days, it is difficult to believe that the Respondent was unaware of the Claimant's ailment. The fact that she (the Claimant) was admitted in hospital during the six days which comprised weekdays means that she did not report to work, a matter that the Respondent's management must have noted. Therefore, for the Respondent to turn around and feign ignorance about the Claimant's ill-health appears to me to be an ill devised attempt to justify its decision to terminate her contract.
43. It appears to me from the medical evidence on record that the Claimant had a credible explanation for her waning performance. There is no evidence that the Respondent convened a quasi-disciplinary session as contemplated under section 41 of the *Employment Act* at which the Claimant was given the opportunity to defend her position and call witnesses including her doctors to justify her assertion that her poor performance had been occasioned by her poor health.
44. Although the Claimant raised the matter of her health on appeal, there is no evidence that it was considered. The Respondent's letter declining the appeal does not suggest that the Claimant's plea regarding her failing health was considered notwithstanding cogent evidence tending to show that the Respondent was alive to her health challenge.
45. It appears to me that all that the Respondent was focused on was that the Claimant meets the set performance targets irrespective of her state of health. Even if I was to believe for a moment that the Respondent was unaware of the Claimant's ailment, why did it not take some time to interrogate the matter once the Claimant raised it on appeal? If it is true that the Claimant had not previously



furnished the Respondent with medical evidence on her ailment, why didn't it (the Respondent) require her to avail this proof at the appeal stage after she raised it as the reason for her poor performance? The conduct of the Respondent's officers regarding this matter leaves me with little doubt that they were all along aware of the Claimant health challenges but simply ignored this matter in pursuit of excellent performance.

46. Although the Claimant alleged that she suffered discrimination on account of being addressed in the Kikuyu language, she did not provide cogent evidence to back her claim. The Respondent disputed the Claimant's assertion in this respect and insisted that its official languages are Kiswahili and English.
47. I take cognizance of the fact that the Respondent is a registered national financial institution which serves diverse members of the public. Therefore, it is highly unlikely that it would tolerate the use of Kikuyu as the official language within its precincts. Such action would be inimical to its growth. Therefore, absent cogent evidence to support the Claimant's averments in this respect, I am reluctant to reach the conclusion that she was subjected to the kind of discrimination that she suggests.

Determination

48. Having regard to the foregoing, I arrive at the conclusion that the Respondent's decision to dismiss the Claimant was contrary to the dictates of equity and justice. The decision was in violation of sections 41, 43 and 45 of the Employment Act. It is so declared.
49. On the reliefs to grant, I consider this as a fit case for the grant of compensation for unfair dismissal from employment. Consequently and in terms of section 49 of the Employment Act, I award the claimant compensation that is equivalent to her salary for eight (8) months, that is to say Ksh. 89,400.00 x 8 = Ksh. 715,200.00. In making this award, I have considered the long period of service of the claimant to the respondent.
50. The award is subject to the applicable statutory deductions as contemplated under section 49 of the Employment Act.
51. The claimant is awarded interest on the award at court rates from the date of this decision.
52. I order the Respondent to issue the claimant with a certificate of service.
53. There was no cogent evidence to establish the claimant's assertion that she suffered discrimination at work. Accordingly, this claim is declined.
54. The claimant is awarded costs of the case.
55. Any other relief that was sought but which has not been granted is deemed as having been declined.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF FEBRUARY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived



compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

