



**Saka v Absa Bank Kenya PLC (Cause E383 of 2023)  
[2024] KEELRC 1089 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1089 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E383 OF 2023  
NZIOKI WA MAKAU, J  
APRIL 8, 2024**

**BETWEEN**

**GABRIEL LINYERERA SAKA ..... CLAIMANT**

**AND**

**ABSA BANK KENYA PLC ..... RESPONDENT**

**JUDGMENT**

1. He was working in the Cayman Islands, a tax haven earning a salary in sterling pounds. The Cayman Islands are in the northern hemisphere, given to cold winters and dull summers unlike Kenya which enjoys better climates and is arguably one of the most beautiful spaces on earth. Being Kenyan, he felt a need to return to the motherland at some point. Just before the corona pandemic hit the world, he got an opportunity to realise his dream of a return to the warm beautiful nation of Kenya. He was headhunted for a job at ABSA Bank Kenya PLC, a role where he would be responsible for enhanced customer experiences for the clientele of the Bank. This shift from the job he had to the new one would result in this claim as the engagement came to an abrupt and tumultuous end.
2. The Claimant filed this suit against the Respondent claiming inter alia unfair labour practice, wrongful termination and/or arbitrary, unfair, summary and unlawful dismissal from employment. He averred that in 2018 and partly in 2019, he was previously employed in the Cayman Islands as the Head of Products for a company known as Canterbury Securities and that his was a senior managerial position. That he was then approached by Barclays Bank PLC with an employment offer which he initially turned down and that it was only after the Respondent matched his remuneration that he agreed to join its workforce. It was the Claimant's averment that the Respondent first offered him an Employment Contract dated 15<sup>th</sup> February 2019 but he could not assume his role immediately as he was still engaged with Canterbury Securities Company Limited in the Cayman Islands and was contract-bound to render at least a month's notice before quitting. Moreover, parties had not yet agreed on a few other issues that included remuneration. He asserted that a lengthy negotiation period ensued



thereafter leading to parties finally agreeing to the terms of the Employment Contract. In the end, the Respondent formally employed the Claimant vide an Employment Letter dated 10<sup>th</sup> May 2019, which was signed for and on behalf of the Respondent by one, Ms. Geneva Musau, the Director, People Function at the Respondent Company. The Claimant asserted that he accepted the offer by appending his signature on the Employment Contract on 17<sup>th</sup> of June 2019 and that the Term Sheet accompanying the contract indicated that the probationary period of employment was six (6) months. He further averred that as the Respondent's Senior Manager – Customer Journey Mapping, his duties included researching, designing and developing customer journey maps among other duties outlined in his Employment Contract and the accompanying Term Sheet.

3. The Claimant's case was that his immediate senior, Ms. Sarah Muriuki, treated him with spite and contempt that culminated in her writing him a letter of termination of employment dated 3<sup>rd</sup> March 2020. He averred that neither was he given a computer nor granted access to the Company's software and systems to enable him work smoothly but he nevertheless elected to use his own means to render his services as per the terms of the Contract. He contended that the Respondent unjustifiably extended his probationary period by a further three (3) months despite the fact that he had an impressive score in his Key Performance Indices (KPIs) and the six months probationary period was sufficient to earn his absorption into the Respondent's workforce. That he diligently rendered his expertise to the Respondent Company and was never on a wrong foot against it. It was the Claimant's averment that he was a fully-fledged employee of the Respondent as per the meaning assigned to the term under the Employment Act. That there has never been a sufficient reason to justify his ouster from the employ of the Respondent and that there were never any disciplinary proceedings against him prior to his dismissal. That ultimately, the termination and dismissal of the Claimant were unilateral, arbitrary, irregular, unfair, disproportionate, baseless/unwarranted, discriminatory, wrongful and unlawful.
4. Further, the Claimant submitted that the Respondent engaged in unfair labour practices and wilfully failed to act in accordance with justice and equity in terminating his employment and that the purported termination was thus overreaching, extreme and lacking in proportionality in the circumstances. On unfair labour practice, the Claimant averred that the Respondent was at fault in leading him on to believe that he was being contracted in employment and made him quit his stable overseas job to join the Respondent Company, only for it to terminate his employment contract without a reason. The Claimant reiterated his foregoing averments in particularising the malice, irrationality, unfairness and spite on the part of the Respondent. He further averred that as a result of the unfair, wrongful and unlawful termination of his employment, he is entitled to: maximum compensation for unlawful termination at 12 months' gross pay, general and punitive damages at 6 months' gross pay and accrued leave days. The Claimant thus prayed for Judgment against the Respondent for:
  - a. A Declaration that the summary termination of the Claimant's employment and/or dismissal by the Respondent was/is unfair, wrongful and unlawful.
  - b. An Order that the Respondent compensates the Claimant for subjecting him to unfair labour practices.
  - c. An Order that the Respondent compensates the Claimant under the Doctrine of Legitimate Expectation.
  - d. The sum of Kshs. 16,062,888.89 as particularised under para. 27 of the Statement of Claim with interest at Court rates from the date of filing this suit.



- e. General and Exemplary Damages on an aggravated scale for breach of Articles 10, 25, 27 and 41 of the Constitution of Kenya, 2010.
  - f. Costs of this suit.
  - g. Any other relief or further order as may be just, expedient and necessary in the circumstances of this suit.
5. In his Witness Statement, the Claimant asserted that in early 2019, his recruitment manager, one Mr. Sam Ngotho, informed him of an expression of interest from Barclays Bank Kenya to recruit the Claimant into their workforce. That apart from remuneration, the Claimant and Barclays Bank had also not agreed on the place of work among other terms and this led to a lengthy period of push and forth between parties. The Claimant stated that when Barclays Bank Kenya later matched the employment offer with his remuneration in the Cayman Islands, he jumped ship and joined the Bank's workforce to earn Kshs. 820,000/- per month. The Claimant's position was that his expectation, both before agreeing to terminate his employment contract in the Cayman Islands and at the lapse of the initial probation period, was that the Respondent Company would make good their word and absorb him into its workforce. That since he had further been hopeful he would be absorbed by the Respondent upon lapse of the extended three months, he elected to work for it for that extended period.

### **Respondent's Case**

6. The Respondent filed a Statement of Respondent wherein it averred that it bears no relation with Canterbury Securities in the Cayman Islands and that the Claimant's previous employment relationship is irrelevant to this matter. The Respondent's case was that the probationary Employment Agreement dated 12<sup>th</sup> February 2019 was subject to and conditional upon the completion of the Respondent's recruitment procedures, including receipts of satisfactory references, screening checks, any required statutory or regulatory approvals and documentary proof that the Claimant was eligible to live and work in Kenya where relevant. That the Employment Contract it entered into with the Claimant dated 10<sup>th</sup> May 2019 provided for a six-months probationary period and with a contract term conferring the Respondent with authority to extend the probationary period within the purview of the governing law.
7. According to the Respondent, the unsatisfactory performance of the Claimant led to the termination of his probationary contract as he failed to meet the Respondent's expectations and KPIs even after it extended his probation period by a further three (3) months vide a letter dated 5<sup>th</sup> December 2019. That accordingly, it did not take their engagement further after expiry of the additional three-month probationary period. The Respondent argued that both the probationary Contract and the extension thereto did not entitle the Claimant to be considered a full-fledged permanent employee of the Bank. The Respondent averred that the Claimant's employment relationship with the Bank ended on 3<sup>rd</sup> March 2020 when it informed him that it would neither extend his probationary contract nor confirm his role as a permanent employee. It contended that the Claimant had disciplinary and poor performance issues as shown in the Notice to Show Cause dated 8<sup>th</sup> October 2019 on his absenteeism from 30<sup>th</sup> September 2019 to 7<sup>th</sup> October 2019. That in that regard, the Claimant was invited for a disciplinary hearing held on 22<sup>nd</sup> October 2019 whereat he admitted that he had been absent without leave during the said period as he had gone on vacation. That the Claimant was consequently issued with a written first warning letter dated 22<sup>nd</sup> October 2019 for absenteeism after the said hearing.



8. As regards the alleged particulars of malice, irrationality, unfairness and spite, the Respondent averred that the position for which the Claimant was to be employed was well communicated to him and set deliverables were put forth to guide him in execution of the said mandate. That the Claimant was furnished with all the necessary materials to enable him discharge his duties and that he in fact complained of his chair in his second week at work and the Respondent approved a purchase of a new chair. Furthermore, during his induction, the Claimant was accorded assistance from key stakeholders including experts. It was the Respondent's averment that the Claimant is therefore not entitled to any of the remedies set out in his Memorandum of Claim dated 6<sup>th</sup> June 2022 and prays that the same be dismissed with costs to it.
9. The Respondent also filed a Witness Statement made by Mr. Vaslas Odhiambo, who asserted that the Respondent wrote to the Claimant on 3<sup>rd</sup> March 2020 informing him that his probationary contract that had been extended to 5<sup>th</sup> March 2020 stood terminated. That the Respondent further informed that Claimant that he would receive one month's salary in lieu of notice and payment for 12 accrued leave days. Mr. Odhiambo stated that on 31<sup>st</sup> March 2020, the Respondent paid the Claimant all his terminal dues, namely, basic pay for days worked in March 2020, untaken leave and one month's pay in lieu of notice all for which he received a net pay of Kshs. 854,080.80. He further stated that the Claimant is therefore not entitled to damages as his employment was not terminated unlawfully and that the Claimant was neither subjected to unfair labour practices nor were his constitutional rights breached as alleged. That since the Claimant had failed to prove breach of the said constitutional rights, the prayer for general and exemplary damages ought to be dismissed.

## **Evidence**

10. The Claimant testified before Court that the Respondent convinced him to leave his previous employment and join them and since he was in the Cayman Islands, it promised to give him full support on relocation. He reiterated that when he reported for work, he had to use his own computer and purchase software in order to perform his duties. That his requests for the same through internal emails were not responded to and that proof of the said requests was in the Bank's emails. The Claimant further testified that the foregoing together with sending most of his work from his personal email to the work email affected his ability to deliver. He argued that if the Respondent had an issue with his performance, they should have stopped him and that the law is that the reason for termination ought to be given even in cases of probationary contracts. That however in his case, the head of department called him, gave him a letter and asked the security to kick him out of the building. The Claimant also pointed out that the Respondent neither gave him a notice of termination nor took him through a hearing or disciplinary proceedings and that he was affected financially as it was a corona period and he had to look for employment when the world was terminating employment.
11. Under cross-examination, the Claimant notified the Court that he had as at then gotten employment at VISA as a Senior Manager. He admitted that the Respondent had discretion to extend the probationary period and contended that the six-month probation period ended without any complaints about execution of his duties being raised during the said period. Regarding the notice to show cause on his absenteeism between 30<sup>th</sup> September and 7<sup>th</sup> October, the Claimant maintained that he had applied for sick leave for the said period and had sent an SMS to the employer as required. That his then line manager did not find the dental procedure he had received as satisfactory despite the Claimant providing evidence of the same. According to the Claimant, the payments he received for salary plus one month's salary are factored in his Claim before Court. The Claimant further contended in his re-examination that his extended probationary contract was to end on 17<sup>th</sup> March 2020 and that his termination on 3<sup>rd</sup> March 2020 was not related to the notice to show cause he received.



12. The Respondent's witness, Mr. Vaslas Odhiambo (RW1), maintained that termination of the Claimant's employment was lawful. He asserted under cross-examination that the Claimant was given a company laptop and that there is no proof that he never had a laptop. He also stated that the Claimant was using official bank email and that one cannot use a personal laptop. While admitting that the Claimant's letter of termination does not give a reason for the termination, RW1 argued that at the time, probation could be terminated without giving reason and that the Judgment of the Court that came one year after the termination does not apply to this matter.

### Claimant's Submissions

13. It was the Claimant's submission that the Claim herein calls for this Court to determine the following issues:
- a. Whether the Claimant was on a probationary contract as at the time of termination of his employment;
  - b. Whether the Claimant's termination was wrongful and unfair; and
  - c. Whether the Claimant is entitled to the reliefs sought.
14. The Claimant submitted that section 2 of the *Employment Act*, 2007 defines "probationary contract" as a contract of employment, which is of not more than twelve months' duration or part thereof, is in writing and expressly states that it is for a probationary period. He noted that the import of sections 2 and 42(2) of the *Employment Act* were succinctly analysed in the case of *Narry Philemons Onaya-Odeck v Technical University of Kenya (Formerly, the Kenya Polytechnic University College)* [2017] eKLR, wherein it was held that if a probationary contract is not terminated, confirmed or extended after six (6) months, an employee is deemed to have been confirmed by operation of law and the termination must be in accordance with sections 35, 40, 41 and 44 of the *Employment Act*, 2007 or by mutual agreement of the parties. That this position was reaffirmed by the Court in the case of *Mwilo v Absa Bank (K) PLC (Cause 31 of 2020)* [2022] KEELRC 53 (KLR) (5 May 2022). It was the Claimant's submission that in the instant case, the Respondent failed and/or refused to comply with the provisions of section 35(1)(c) of the *Employment Act* on giving him a termination notice. In addition, that the Court in the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR affirmed that compliance with procedural fairness before relieving an employee on probation of their duties is among the protective mechanisms placed under the *Employment Act* of 2007. The Claimant argued that to this extent, he was entitled to such protective measures during the probationary period.
15. The Claimant noted that through a defective notice dated 5<sup>th</sup> of December 2019, the Respondent purported to irregularly extend his contract for a further period of three (3) months. That this Court should find that the said extension was defective, null and void for want of clear definitive termination terms as to when it was to end because the Respondent cited the end of the probation as 6<sup>th</sup> March 2019 instead of 6<sup>th</sup> March 2020. He invited this Court to rely on the case of *South Nyanza Sugar Co. Ltd v Leonard O. Arera* [2020] eKLR where it was held that Courts are only called upon to interrogate the terms of contracts in cases of alleged breach of such contracts and that a Court will not be able to discharge such a duty in the absence of the terms of the contract. Further, the Court of Appeal stated in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR that a court of law cannot rewrite a contract between parties and that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.



16. As to whether the termination was wrongful and unfair, the Claimant submitted that section 44(4) of the *Employment Act* lays down the grounds for summary dismissal. He cited the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR in which the Court stated that the claimant was entitled to be given an opportunity to defend himself against the allegations of poor performance. That in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR, the Industrial Court noted as follows:

Where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* to show that in arriving at this 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.

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 applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses.

In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee.

17. The Claimant submitted that, in his case, the Respondent never supplied him with tools and equipment for work and did not provide evidence of how he breached the contract. Moreover, the Respondent (employer) is the keeper of records and should therefore have provided evidence of signed release for the said tools it alleges they supplied the Claimant. He argued that the failure to issue him with work tools amounted to unfair labour practices and was thus breach of Article 41(1) of the *Constitution* of Kenya. The Claimant thus invited this Court to find that his employment was unlawfully, unfairly and unprocedurally terminated by the Respondent in clear disregard and breach of the applicable law as submitted and that the Respondent has failed to discharge the burden of proof placed on it by the law.

### **Respondent's Submissions**

18. The Respondent submitted the following as the issues for determination before this Court:
- a. What was the law applicable to the termination of probationary contracts at the time of the Claimant's term to termination?
  - b. Whether the Claimant's termination was justified.
  - c. Whether the Claimant was paid his terminal dues and whether he deserves the reliefs sought.
19. The Respondent submitted that the law applicable to termination of probationary contracts during the Claimant's term between 17<sup>th</sup> June 2019 and 3<sup>rd</sup> March 2020, is section 41 as read with section 42(1) of the *Employment Act*, which provides that the provisions of section 41 shall not apply where a termination of employment terminates a probationary contract. That prior to 30<sup>th</sup> July 2021, Courts



applied the foregoing position and allowed employers to terminate probationary contracts without the need to afford a 'trial' process. The even the decision of 30<sup>th</sup> July 2021 by the three-Judge Bench in the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR upheld the law applicable at the time of the termination and held that:

- 60 . ...The Respondent honestly believed and applied the law as it was prior to the pronouncements contained in this judgment. It would therefore be unjust to condemn the Respondent for applying the Law as enacted by Parliament even if that Law is, as we have found it be, inconsistent with the *Constitution*.
61. Further, it naturally flows from the finding that the respondent could not be faulted for applying the impugned law enacted, that no order for compensation as sought in the Petition can be made..."

20. Further, the Respondent submitted that it is trite law that the law does not apply retrospectively to non-criminal legislation. It relied on the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, wherein the Supreme Court of Kenya held that the general rule for non-criminal legislation is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or evidence, are prima facie prospective, and that retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. The Respondent also noted that in the case of *Okumu v Good Man Agencies Limited (Cause 1895 of 2017)* [2022] KEELRC 13514 (KLR) (9 December 2022), this Honourable Court upheld the application of section 42 of the *Act* as is, for a contract that was terminated prior to the July 2021 decision.
21. It was submitted by the Respondent that the termination of the Claimant's employment was justified and procedurally fair. That as was held in the case of *Danish Jalang'o & another v Amicabre Travel Services Limited* [2014] eKLR, employees are often recruited on face value with the probation period serving to uncover if they are fit for the job and that in determining their fitness, both their performance and conduct is put into consideration. The Respondent opined that the concerns it raised about the Claimant's performance and his absence from duty without official leave are factors that necessitated both the extension of his probationary contract and its eventual termination. It argued that the termination was therefore procedurally fair as the said factors leading up to the termination were well within the Claimant's knowledge. It further submitted that the Claimant's submission that the extension notice is fatally defective is not in consonance with the pleadings he has filed, and should therefore be ignored. That noteworthy, the said extension notice clearly communicated that it would run for a period of three (3) months from 5<sup>th</sup> December 2019 and the extension was subsequently obtained with the full knowledge and consent of the Claimant.
22. Regarding the reliefs sought, the Respondent noted that it gratuitously paid the Claimant an entire month's pay Kshs. 820,000/- instead of the 7 days' notice pay and that he also received Kshs. 323,508/- as his leave entitlement and Kshs. 80,877/- for the days worked in his last month. It asserted that the claim for accrued leave days of at Kshs. 1,302,888.89 is therefore unjustified and submitted that having demonstrated that the Claimant received his terminal dues, he is not entitled to the reliefs sought. On costs, the Respondent urged this Court to consider the fact that the Claimant attempted to unjustly enrich himself by failing to acknowledge the terminal dues he received and further failing to disclose to the Court the facts preceding the extension of his probation, and its eventual termination. It asked that the Court thus awards costs to the Respondent.
23. The Claimant was terminated during a period when the Respondent asserts he was on probation. The letter executed between the parties was that the Claimant was subject to 6 months probation, which



probation could be extended for a further 3 months. The letter was executed on 17<sup>th</sup> June 2019. As such, probation was to run till 17<sup>th</sup> December 2019. The Claimant complained that the Respondent did not fully equip him. This was confirmed by the Respondent's email of 28<sup>th</sup> February 2020 from Ms. Sarah Muriuki to Ms Caroline Ndegwa and copied to Mr. Samuel Ngotho, Mr. Vaslas Odhiambo (the Respondent's witness during the hearing before the court), Mr. Patrick Rono and Ms. Scholastica Thuo. The top end of the email has a subject RE: Weekly Check In: Actions Required Linyerera Saka Gabriel – 2019. The email then details requests for MacBook Pro, MacBook Air laptops. It seems there was a trail of emails seeking the approval of purchase of laptops by the Claimant. Further, in the body of the email, there was a concession that the Claimant was given a desk, telephone extension, notebook, pen and staff pass. There is no mention of a computer or laptop. There has been no indication as to whether any laptops were ever acquired for use by the Claimant. There was also a concession that due to work freeze, it had been agreed that the Claimant would shadow the team until he had system access which would entrench his further understanding of the bank. Despite the Respondent's averments that it made all steps to equip the employee, it is clear the Claimant was handicapped from the onset. The Respondent admits this role he was executing was new and the email from Ms. Sarah Muriuki on 14<sup>th</sup> February 2020 confirms this. She indicated the key areas the Respondent had an issue with. Of note was item 3 in the email where the Respondent's manager indicates that the Claimant had taken longer to fit in the culture and ways of working in the bank which could be pegged to the structure of his previous roles and engagements in the market. It was observed that during the interview process that there were few CX Designers in the market and all of them are shifting from driving User Experience (X) in the digital/technology space hence the challenges around culture fit/ways of working.

24. The Respondent purported to extend the probationary period on 9<sup>th</sup> January 2020. The Respondent did not extend the contract within the time frame for such extension and as such, the contract it had with the Claimant was confirmed by effluxion of time. Handing the Claimant an extension on 9<sup>th</sup> January 2020 and thereafter purporting to terminate a probationary contract that did not exist leads the Court to the inescapable conclusion that the Claimant's termination was unfair and unlawful within the meaning of the Employment Act.
25. The Claimant seeks aggravated and exemplary damages for the termination but in the circumstances of this case, no award will be made in that regard as the Claimant was able to mitigate his losses through engaging with a new employer. As such, the compensation under section 49 of the Employment Act will suffice. Granted the egregious manner of termination with no proper basis, I find that the award of 8 months' salary as compensation to suffice for the Claimant's unfair and unlawful termination. The Claimant was paid for leave days and would not be entitled to any claim under this head.
26. In the final result, I enter judgment for the Claimant against the Respondent for:
  - a. A declaration that the termination of the Claimant's services by the Respondent was unfair and unlawful.
  - b. Kshs. 6,560,000/- as compensation
  - c. Costs of the suit.
  - d. Interest at court rates on the sum in (b) above from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nairobi this 8<sup>th</sup> day of April 2024

**Nzioki wa Makau**

**JUDGE**



