



Muturia & 2 others v Co-operative Bank of Kenya Ltd & 2 others (Cause 1234 of 2017) [2023] KEELRC 1168 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1168 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1234 OF 2017
AN MWAURE, J
MAY 12, 2023**

BETWEEN

**NATHAN ARANJU MUTURIA 1ST CLAIMANT
NATHAN ARANJU MUTURIA 2ND CLAIMANT
NATHAN ARANJU MUTURIA 3RD CLAIMANT**

AND

**OF KENYA LTD 1ST RESPONDENT
OF KENYA LTD 2ND RESPONDENT
THE CO-OPERATIVE BANK OF KENYA LTD 3RD RESPONDENT**

JUDGMENT

Introduction

1. A memorandum of claim was filed by the claimant on the 28th June 2017.

Claimants Case

2. Claimant states he worked for the respondent from 17th June 2010 and worked in different branches of the bank. He says his performance throughout was exemplary.
3. He further says the respondent in 2014 introduced performance evaluation but it kept being reviewed and at time the reviews would be in a duration of months. In September 2016 score sheet he was rated poorly. He was then stationed in Malindi branch.
4. He says on 28 October 2016 he received a letter inviting him to a performance review meeting and he was expected to be in the meeting on 31st October 2016 and that was to be in Nairobi.



5. He says he had no time to prepare or invite a fellow worker or a shop floor union representative.
6. He says after the performance review which was held on 31st October 2016 he was placed on a 3 month performance improvement program (PP1) from December 2016 to February 2017. On 15th December 2016 he was unlawfully terminated due to unsatisfactory performance.
7. The termination was reported to the union and Mr Kilonzi was appointed to try resolve the matter through conciliation. A meeting was held with the conciliator on 6th April 2017 and 24th April 2017 and conciliator found termination was unfair and unlawful and recommended 12 months compensation but the respondent rejected the recommendation.
8. The conciliator observed that claimant had been called for a performance review meeting but it turned into a disciplinary meeting. His services were terminated even before the PIP period expired.
9. The claimant prays for the under listed:-
 1. The claimant would like pray to the honourable court to order that the claimant Nathan Muturia Aranju be reinstated back to work in his former position and status in the bank and branch without any loss of employment benefits and seniority in service.
 2. The claimant herein pray to the honourable court to find and order that the employer's action of terminating the claimant amounted to an unfair and unlawful and invalid termination of employment.
 3. The claimant further pray to the court to order for the payment of all salaries and allowances that the claimant has so far lost as a result of this unfair and unlawful termination of employment of kshs 951,246 to the time of filing this suit and same should be computed up to the time of judgment.
 4. The claimant further prays for compensation of twelve (12) months' salary of kshs 1,902,492 notice pay of kshs 158,541 and leave pay for having lost his job unfairly and unlawfully.
 5. The claimant finally prays for an order of damage for the loss of profession livelihood and all other loses and sufferings during the period of termination.
 6. The costs of this suit.

Respondents Case

10. Respondent filed their response dated 22nd March 2018.
11. They say that they deny every allegation and aver as if the same were set out verbatim and traversed verbatim.
12. The respondent says the claimant was employed as a graduate clerk and was subject to a collective bargaining agreement. This was from 17th December 2010. The claimant was then promoted to section head grade on 22nd November 2013 and confirmed on 22nd August 2014 and subsequently was placed on 6 months' probation on 22nd November 2013.
13. The respondent says they changed role of business development officer and was renamed business banker role and claimant was trained on the job. He says he also gave him requisite operating manuals, policies and code of regulations and was expected to be equipped to handle his role.



14. He says on 23rd April 2012 he was involved in a disciplinary issue and resulted in a verbal warning and this referred to fraudulent withdrawal of Kshs 25,000/- from account of a respondent's customer.
15. He says claimant's employment was subject to respondent's staff manual, administrative circulars and CBA signed with the union.
16. The respondent said they have a performance management policy which administers performance of the employees using key performance indicators. It also has performance improvement program policy which offers employees coaching to enable them turn round. So all performers rated unsatisfactory or poor are considered poor performers. The performance indicators are for rating scale and is not introduced in bad faith.



Rating		Indicative weighted average ranges
Exceptional	Performance far exceeded expectations due to exceptionally high quality of work performed in all essential areas of responsibility, resulting in an overall quality of work tht was superior significantly exceeds standards: performance consistently exceeds standards in all areas and far exceeds normal expectations. Five behaviours rated exceptional strength and one rated at least strength	Over 125%
Exceeds Expectations	Performance consistently exceeded expectations in all essential areas of responsibility, and the quality of work overall was excellent. Annual goals were met. At least four behaviours rated exceptional strength and two rated strength	Between 106%-124%
Met expectations	Performance consistently met expectations in all essential areas of responsibility, at times possibly exceeding expectations, and the quality of work overall was very good. E most critical annual goals were met. Performance expectations fully met. All behaviours rated at least strength	Between 95%-105%
Partially met/needs improvement	Performance did not consistently meet expectations – performance failed to meet expectations in one or more essential areas of responsibility, and/or one or more of the most critical goals were not	Between 71%-94%



	met. At least on behaviour rated strength.	
unsatisfactory	Performance consistently met expectations in most essential areas of responsibility, and/or reasonable progress toward critical goals was not made. Significant improvement is needed in one or more important areas. At least one behaviour rated strength	Below 7-% achievement consistently all year

17. So the claimant signed the key performance indicator targets with the respondent on 6th March 2015. The respondent says claimant performed poorly in 2015 and in 2016 and it is not the respondent who came up with unreasonable targets. He says on 31st October 2016 claimant was invited to a staff performance review and was entitled to bring a staff member of his choice or a member of the union.
18. He says the claimant's letter of invitation was issued to him on 27th October 2016 and was about 4 days before the meeting. He says the claimant attended the meeting and said he chose not to invite a fellow worker or a union representative. His performance was still below standard but he was put on a performance improvement programme for three months.
19. The claimant was placed on performance improvement more than once and did not show measures to improve his performance. He was terminated from his employment in compliance with clause A5 of the CBA and sections 41 and 45 of the *Employment Act*.
20. The respondent says also the claimant was terminated as per their staff manual section 10.9(XXIV) for unsatisfactory performance. Further he says the claimant appealed and his appeal was responded to.
21. The claimant was earning kshs 148,541/- and he was issued a certificate of service even though he did not submit his clearance form. He was paid kshs 198,058/65 which was credited to his internal settlement account and was paid pension benefits being kshs 748,867/22.
22. He owes the bank; personal loan kshs 329,709/- residential property Kshs 1,473,320 commercial loan 1,197,915/-
23. The respondent admits the dispute was referred to a conciliator who recommended claimant to be paid 12 months equivalent salary as his compensation but the respondent did not agree with that recommendation.
24. The respondent prays that the court finds the termination was lawful and fair and uphold the termination.

Claimant's Evidence

25. The claimant in his viva voce evidence retaliate basically what is in his pleadings. He says he was out on a new performance improvement programme (PIP) after going through the performance review meeting the program was for three months but before the three months could end he was terminated on 15/12/2016.



26. He also says the performance meeting he attended was hurriedly convened and so he did not have time to prepare or to call his witness even though he was told he could call a witness.
27. He further says he was assigned the role of a business banker from his former role of business development officer but did not go through training for the new role. He also says the target he signed at the beginning of the year was kshs 87,607,500 but was reviewed to kshs 107,926,557/-. He concludes that the appraisal by the bank was opaque and he did not know how the other colleagues were performing.

Respondent's Evidence

28. The respondent witness is Leah Kericho. The witness says he joined the bank in 2016 but claimant was terminated in 2016. She says she was the employee relations officer. She says the evidence she is giving is from documents kept by the bank.
29. The witness also says there is a performance target document that every employee signs and if he underperforms they are put on an improvement plan. She says there were key performance indicators for January to December 2005 which claimant was expected to achieve and are dated 6/3/2015. She admits from January and February claimant did not have the targets. She also admits the targets were first 47,607,000/- and then revised to 87,607,501/- and finally 107,926,507/- and she says the same were revised with the consent of the employee.
30. The witness says claimant was placed on a PIP from December 2016 but was terminated on 15/12/2016 as he had been on PIP from the beginning of 2016. The witness says the claimant underperformed from quarter 1 to quarter 4 (2016).
31. The claimant's submission dated 20th February 2023 as well as the authorities quoted were well noted and considered by the court.

Respondent's submissions.

32. The court did not have the benefit of the respondent's Submissions but nevertheless made a well-considered determination based on and all the evidence in court.

Analysis and Determination

33. The issues the court will decipher for determination are twofold:
 - a. Did respondent terminate the claimant fairly and did he adopt the right procedure.
 - b. Is claimant entitled to the reliefs sought
34. The claimant worked for the respondent from 2010 and worked in various branches of the bank. In 2015 the claimant was put on performance improvement program after he was offered the role of a business banker and was stationed in Malindi. He was placed on performance improvement plan between July 2015 and September 2015 and in 2016 quarter 1 and quarter 2 but apparently his performance did not improve.
35. He was invited for performance review for 31st October 2016 to discuss his unsatisfactory performance. The letter dated 25th October 2016 was titled performance improvement program review meeting. He was informed the meeting was to deliberate on his review. There was no reference that he was being invited for a disciplinary meeting.



36. After the review meeting held on 31st October 2016 he was put on a performance improvement programme from December 2016 to February 2017 and was told it was for a period of 3 months with no option to renew.
37. On 15th December 2016 and before the period for the performance improvement program was over the claimant was issued with a termination letter and it was with immediate effect. The reason given was low performance as compared to other bank employees.
38. The respondent may have had reason to terminate the claimant but it seems there were some lacuna in the process.
39. For one the claimant seemed to have performed his work pretty well until 2015. Then his performance was found wanting from 2015 and 2016. The court however noted that 12th February 2016 his rating was marked as excellent but from hence it seems things started going down for him. Incidentally in July 2015 his performance was low and in October 2016 he was invited for a review meeting.
40. In cases of poor performance of an employee the statutes applicable is section 41 and 45 of the Employment Act 2007. Section 41(1) and (2) provides:
- 41.
- (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part,
 - (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
41. Section 45(1) as well provide as hereunder:-
- No employer shall terminate the employment of an employee unfairly.
42. The respondent severally informed the claimant about his poor performance but the problem was the unclear parameters of the evaluation tool of the performance. The respondent indeed stated they had a performance management policy to administer the employees key performance indicator but from the evidence adduced it was not stable and the targets kept being reviewed without clear guidelines on why and how the same were being reviewed.
43. The respondent witness admitted in her evidence that the target was reviewed from kshs 46,607,000/- to kshs 87,607,501/- and to kshs 107,926,507/- in a year. That was one of the main complaint by the claimant that the targets kept on shifting and there was no clear explanation why that was the situation.
44. Then the claimant was informed in the termination letter that his performance was poor compared to other bank employees. The respondent used a general measurable of “other bank employees” and with no specifics as to the employees he was being compare to.



45. As for the procedure that the respondent followed to terminate the claimant it was quite flawed and was in contravention of section 41 of the employment act. The claimant was just invited for a meeting to deliberate on his unsatisfactory performance”.
46. He was in no way informed it was a disciplinary meeting and even though he was advised to invite a fellow worker of his choice but he observed the time given 28th October 2016 to 31st October was too little. He was working in Malindi and the meeting was to be in Nairobi. So he attended the meeting alone.
47. After the meeting he was put on a performance improvement program for 3 months but he was not allowed to complete that period. On 15th December 2016 he was issued with a termination letter.
48. Going by the principles of terminating an employee on the basis of poor performance from various authorities an employee should be notified of his shortcomings and should be given an opportunity to improve for a reasonable period of time. In the case of *Kenya Science Research International Technical & Allied Workers Union vs Magnate Ventures Ltd & Industrial Court Case No 273 of 2010*) held that 2-3 months was a reasonable period for an employee to improve.
49. Further provision on poor performance as in *Maina Mwangi vs Thika Coffee Mills Limited* (2012) eKLR the court held as follow:
- “Where the Employee fails to meet the standards, the first duty of the Employer is to let the Employee know that his performance has fallen below the set standards. The Employer should then propose training, guidance and fresh instructions to the Employee. The Employer is required to allow the Employee time to improve. If no improvement is noted after a reasonable passage of time, the Employer should issue a formal warning to the Employee, and advise the Employee he may be separated from the Employer on account of poor performance. The next phase involves investigations by the Employer and consideration if the Employee could fit better in another role within the organization. At investigation, the Employer should engage the Employee, and if at the end of these steps, dismissal of the Employee is the course that commends itself to the Employer, then Section 41 of the Employment Act 2007, must come into play”.
50. Also in the case of *National bank of Kenya vs Samuel Mutonya* (2019) eKLR the Court of Appeal addressed the principles and procedures on termination of employment on poor performance 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.



51. Going by the foregoing the court has considered the pleadings and the evidence and law both statute and case laws and is of the conviction that the respondent rushed to terminate the claimant even if they may have had reasons to do so. They failed in following the right procedure.
52. The court must therefore pronounce the summary dismissal of the claimant was unfair and unlawful and so enter judgment in his favour.

Remedies

53. The claimant worked for the respondent for a period of about (6) six years. Under section 49 (c) six months equivalent of his salary is reasonable compensation and this is sufficient to cover the general damages in total and so prayers no 3 and on 5 are not granted. The effect of the total award are therefore Kshs 158,541 as per the annexed payslip times 6 months= Kshs 951,246/-
54. Costs are also awarded to the claimant.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF MAY 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

