



**Muchora v National Bank of Kenya Limited (Cause 80 of 2022)
[2023] KEELRC 1717 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1717 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 80 OF 2022**

M MBARŪ, J

JUNE 29, 2023

BETWEEN

PAUL KUNGU MUCHORA CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. On May 8, 2006 the respondent employed the claimant as a clerical staff and later promoted him through the ranks to the position of salesperson as of 30 May 2014 lastly earning Ksh 95,399. On November 9, 2010 the respondent transferred the claimant from Kitui branch to Nkurumah Road Branch and on January 21, 2014 he was moved from Portway House Branch to Nyalı Centre Branch.
2. On April 30, 2014 the claimant was served with letter terminating his employment on the grounds that during his performance review he was rated as a 1, unacceptable performance and when he was put on a performance improvement plan (PIP) requiring him to improve on his performance and despite several discussions with his supervisors, he was still rated poorly. The claim is that termination of employment was with malice for the reasons that the claimant was not given any notice, he was not given a fair hearing and there was no justifiable cause for the action taken. The claimant was falsely accused without being given a fair hearing and has suffered loss and damage and claims the following;
3.
 - a. And order of reinstatement to his previous position without loss of benefits;
 - b. Salary arrears for the entire period the claimant has been out of employment;
 - c. Notice pay Ksh 190,790;
 - d. Salary for May 2014 Ksh 95,399;



- e. Pay in lieu of 18.6 leave days Ksh 32,121.60; and
 - f. Costs.
4. The claimant testified in support of his case that upon employment by the respondent he worked in various branches and had outstanding performance until April 30, 2014 when he was served with notice terminating his employment on the grounds that he was of unacceptable work performance whereas he had no performance review or any notice challenging his work performance. This was the first time he was hearing about his alleged poor work performance. There was no notice to show cause or notice requiring him to attend hearing to respond to any performance issues.
 - 5.. The claimant testified that the respondent has filed a performance management manual but this did not apply to him. the manual required his head of department to share plans and targets to assist others below him to develop own objectives which was not done for him. he had no set targets.
 6. The respondent had structured the performance reviews at half year in June and full year reviews in December but none of these were done for the claimant. Where such targets and objectives were developed, the claimant should have retained a copy and the other kept in his file but he was not issued with any. The claimant was therefore surprised to receive notice terminating his employment over matters he was not aware about and in his appeal against such decision he requested to be issued with ll records in this regard but none was issued to him. from April 1, 2014 he continued working at his branch waiting for the outcome of his appeal until June 24, 2014 when his appeal was rejected but he was not paid for this time.
 7. In response, the respondent's case is that it had a right to terminate the claimant's employment at any time in accordance with terms and conditions of service and in terms of the Performance Management Policy. There was no malice as alleged and the respondent followed the due process, law and regulations provided including the employment contract. In any event, the respondent was justified to terminate the contract of employment for poor performance in line with Performance Management guidelines which required that an employee whose performance is rated as unacceptable would be subject to immediate corrective action that may include termination of employment.
 8. The claimant was heard on his appeal which was found not to have adequate grounds. The respondent as a business of making profits is mandated to make decisions for the general good of the company including taking action on non-performing employees.
 9. The claimant is not entitled to any reliefs and should be dismissed with costs.
 10. In evidence, the respondent called Stephine Opiyo Obong'o the head of employee relations who testified that on May 8, 2006 the respondent employed the claimant as a clerical officer but he exited the bank on April 30, 2014 upon termination of his employment due to unsatisfactory work performance. the respondent was concerned with the career progression and development of the claimant and embarked on training and equipping him throughout his employment by facilitating his engagement in several courses.
 11. On July 9 to 20, 2007 the claimant attended cashier/passing clerks course;
 12. On August 11 to 20, 2008 the claimant attended banking operations course; and
 13. On May 7 to 11, 2012 the claimant attended leadership and supervisory course.
 14. As a policy of the respondent, the claimant was appraised at the end of every year in order to determine his individual performance. This was an important strategic initiative by the respondent to improve its



business performance and the claimant was required to set his targets at the beginning of the year to be reviewed by his immediate supervisor in conjunction with the human resource division. The claimant was appraised and found to be of unacceptable performance since he had scored below 50% which was subject to termination of his employment. due to poor performance the claimant was placed on PIP but he failed to improve on his performance and in terms of the respondent policy, termination of employment was justified.

15. Mr Obong'o also testified that the claimant was allowed an appeal which he did and on May 22, 2014 he attended hearing but there was nothing to warrant a review of the decision and through letter dated 24 June 2014 the claimant was informed on the outcome of his appeal.

At the close of the hearing both parties filed written submissions.

16. The claimant submitted that termination of the claimant's employment was unfair contrary to Section 43 of the Employment Act, 2007 (the Act) which requires the employer to have valid and genuine reason before terminating employment. before the claimant was allegedly found to be of poor performance, there is no evidence that he was given a hearing or that the respondent followed its own policy on performance management. Upon termination of employment through notice dated April 22, 2014 the respondent invited the claimant to a hearing after the fact which is contrary to the rules of natural justice and the orders sought of reinstatement should issue and, in the alternative, compensation as pleaded. In Santin Oluoch Nyunja v Embassy of the Kingdom of Sweden & another Cause E6486 of 2020 the court held that termination of employment on account of non-performance without a hearing is procedurally unfair. in Peter Muriithi Njoka & 4 others v Style Industries Limited Cause No.699 of 2017 the court held that termination of employment on the grounds of poor performance without evaluation of the employee or being placed on a training programme is unfair.
17. The respondent submitted that in terms of Section 44(4)(c) of the Act summary dismissal is allowed where the employee is unable to perform his duties. Under Section 41 of the Act, the claimant was accorded a hearing through meetings with his supervisors and despite being placed on a PIP he failed to improve on his performance which justified termination of employment as held in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR. The claimant was taken through fair procedure and there were valid reasons leading to termination of employment, that is, poor performance of duties as held in Pamela Nelima Lutta v Mumias Sugar Co. Limited [2017] eKLR.
18. It is common cause that the claimant was employed by the respondent from May 8, 2006 until April 30, 2014. The claimant performed well and was promoted through the ranks until sometime in January 2014 when he was moved to Nyali Centre Branch as Cash Team Leader when his work performance was questioned and leading to termination of employment on the grounds that he was of unacceptable performance having been rated below 50%.
19. It was the respondent case that the claimant had been warned about his poor performance, he was placed on a PIP but still, his performance did not improve and this justified termination of employment in terms of Section 44(4)(c) of the Act this being a case of being unable to perform his duties.
20. Even where the employer finds an employee to be of poor performance or where the employee has been appraised and is placed on a PIP, such administrative measures are subject to the mandatory provisions of the Act. Before termination of employment on account of poor performance, the employer is required to take the employee through the due process under Section 41 of the Act.
21. The response that the claimant was invited to an in-person hearing with his supervisor prior to termination of employment is not a process similar to what is envisaged under Section 41 of the Act. The protections of an employee secured in law are elaborate. Save for the supervisory assessments and



appraisals, the employee found to be of poor performance should be issued with notice and allowed a hearing in the presence of a fellow employee of his choice.

22. In the case of *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] eKLR, the Court of Appeal in addressing a similar matter held that;

... In determining this issue, we must be guided by Section 41 of the *Employment Act* which provides the minimum threshold of a fair procedure that an employer ought to comply with in summarily dismissing an employee. The said section provides for notification and hearing before termination on grounds of misconduct in the following way:- ...

Under this Section, four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being: -

- a An explanation of the grounds of termination in a language understood by the employee;
- b The reason for which the employer is considering termination;
- c Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
- d Hearing and considering any representation made by the employee and the representative chosen by the employee.

23. In this case, before letter and notice dated 30 April 2014 issued to the claimant terminating his employment, substantive and procedural justice demanded that he be accorded a hearing in terms of the mandatory provisions of Section 41 of the Act. Even where the respondent as the employer felt that his case warranted summary dismissal, the motions of Section 41(2) of the Act are mandatory.

24. To allow the hearing of the claimant's appeal was to address another stage and level of his rights as required under Section 45(5) (a) of the Act which is different and separate from the initial hearing envisaged in terms of Section 41 of the Act. without according the claimant his rights secured in law, there was substantive and procedural unfairness.

25. The claimant is seeking an order of reinstatement. Employment terminated on April 30, 2014 and the claimant continued to offer his labours until June 24, 2014 when he was issued with notice that his appeal had been rejected. It is since over three years and due to changing work environment and time lapse, it would not serve justice to return the claimant to the same environment after over 9 years.

26. The court finds the primary remedy sought is not viable as addressed above.

27. In the alternative, the claimant has sought for compensation and payment of his terminal dues.

28. In the letter and notice dated April 30, 2014 the respondent offered to pay one months notice, pay of accrued leave days in terms of the policy. Such rights secured, a claim for payment for notice at two months is not supported by any policy or terms and conditions of the claimant's contract.

29. The claimant is also seeking payment for 18.6 leave days not taken but this was taken into account in his letter and notice terminating employment.

30. With regard to pay for work in May 2014, through notice dated April 30, 2014 the claimant was no longer required to attend work and even though his appeal was still on course, his employment effectively was terminated on such date. As a good employee and hopeful that his appeal had high chances of success, the claimant continued to offer his labours to the respondent. Such puts the



claimant in good standing for an award of compensation at ten months gross salary also taking into account that he had served well without any other record from the year 2006 to 2014.

31. On the gross salary of Ksh 95,399 x 10 compensation is hereby awarded at Ksh 953,990.

32. The award shall be paid within 60 days after which the same shall accrue interests at court rate from the date of the judgment and until paid in full.

The claim being successful the claimant is awarded with costs.

33. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;

34.

- a A declaration that the respondent terminated the claimant's employment unfairly;
- b Compensation awarded at Ksh 953,990;
- c The award (b) above shall be paid within 60 days after which the same shall be due with interests from this date and until paid in full;
- d Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... **and**

