



**Namai v National Bank of Kenya Limited (Constitutional Petition
E039 of 2023) [2023] KEELRC 1497 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1497 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E039 OF 2023**

B ONGAYA, J

JUNE 22, 2023

BETWEEN

VINCENT NAMAI PETITIONER

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The petitioner filed the petition on March 1, 2023 through M/S J.A. Guserwa Advocates. The petitioner prayed for:
 - a. A declaration that the petitioner’s fundamental rights and freedoms have been violated by the respondent.
 - b. A declaration that the respondent terminated the petitioner’s employment unfairly.
 - c. A declaration that the respondent discriminated against the petitioner.
 - d. An order directed to the respondent to reinstate the petitioner to his position.
 - e. Aggravated Damages.
 - f. General damages for constitutional breaches and violations.
 - g. Costs of and incidental to these proceedings be borne by the respondent.
 - h. Any other relief that the Honourable Court may deem just to grant.
2. The petition was based upon the petitioner’s supporting affidavit and exhibits thereto filed together with the petition. The petitioner’s case is as follows:



- a. He was employed by the respondent on January 13, 1995 as a clerical staff and served in various ranks and stations until termination on January 17, 2022. He had exemplary service for 27 years and got meritorious promotions.
 - b. Of the 27 years he served as a branch manager for 7 years and upon merited promotion. In 2017 and 2018 there were capability issues which the petitioner explained and matter settled. The capability issues were due to abrupt transfers from one branch to another and internal promotions without proper support mechanism of mentorship and equally without consideration of his core competencies.
 - c. In 2013 he applied for position of Branch Operations Manager as he had served in operations for 20 years. He applied for a vacancy at Kakamega Branch. Upon being successful he was deployed to Wilson Airport Branch, Nairobi. While serving on probation as promoted, he was deployed to Kitengela Branch. He duly performed because Kitengela Branch was ranked amongst the best 5 respondent's Branches.
 - d. He received a show-cause notice dated March 22, 2021 about a business acquisition and development which resulted in product cannibalization that related to one of the respondent's clients. He replied to the notice on March 24, 2021 and the respondent found his explanation satisfactory.
 - e. In December the respondent advertised the position of Branch Manager which the petitioner was already occupying. On January 17, 2022 the petitioner's employment was terminated.
 - f. The petitioner's case is that the termination was unlawful and without reasons. He was not subjected to 2021 performance cycle review and moderation process as per the respondent's policy and guidelines. The respondent violated petitioner's rights and concept of fairness and justice as entrusted in Article 47 of the [Constitution](#) and section 4 of the [Fair Administrative Action Act](#). The petitioner's case is that respondent acted arbitrarily, high handed, prejudicially, and oppressively without due regard to constitutionally protected fair labour practices that accrue to employees like the petitioner. The principles of natural justice were contravened.
3. The respondent filed on March 15, 2023 the replying affidavit of Stephine Obong'o, the Head Employee Relations and through Kiptinness & Odhiambo Associates LLP, and a further affidavit sworn on April 25, 2023. It was stated and urged as follows:
- a. The respondent employed the petitioner by letter dated January 7, 1995 and posted as a clerk at Kitale Branch. On 01.08.1995 he was confirmed into permanent service. On August 8, 2008 he was transferred to Moi's Bridge Agency. He worked in various Branches including Moi's Bridge Branch, Eldoret Branch, Wilson Airport Branch, and Kitengela Branch. The affidavit sets out the employment history which appears not disputed.
 - b. The respondent has instituted a performance policy entailing one half yearly review in the Month of July and a final review at the end of the financial year. In 2020 the petitioner was rated 2.15 after a formal review. In 2021 he was rated 2.1 after a formal review. After completion of 2020 performance review the respondent wrote to the petitioner on March 18, 2021 that he had a moderated score of 2.16 being Partially Meets Targets. The letter stated that he had a right to appeal by close of March 22, 2021. He did not appeal. On April 9, 2021 the respondent issued a memorandum to all staff conveying staff who did not meet targets shall be on a PIP program that supports staff who did not meet expected performance standards to improve performance levels. The memorandum provided that staff with a score of below 3.00 would be placed on PIP for 6-months. On April 15, 2021 the respondent wrote to the petitioner



about his unsatisfactory performance for year 2021. He was given a first warning letter for the unsatisfactory performance and advised to strive to improve within the next 6-months of PIP program. During the PIP he met his supervisor on April 20, 2021, June 20, 2021, and August 20, 2021.

- c. Despite the respondent's support, the petitioner's performance had not improved as at August 26, 2021. he was rated at 2.13- Partially Meets Targets, after a formal review and being below expected performance. He was issued with a final warning letter for unsatisfactory performance in H1-2021. He was advised failure to meet targets by Q3- 2021 could lead to further disciplinary action against him including termination of his employment.
- d. Upon completion of the PIP process with no improvement the petitioner was invited to a capability hearing on 15.12.2021 having failed to turn around his performance in H1 and Q3 of 2021.
- e. The claimant's employment was terminated by the letter dated January 17, 2022 on account of unsatisfactory performance. The termination was effective January 17, 2022. The letter stated that after the final warning dated 26.08.2021 the petitioner had been invited to the capability hearing on December 15, 2021 to discuss why he was not able to improve performance despite the PIP support. He was asked to clear his indebtedness with the bank of personal secured loan and mortgage totalling to Kshs.5, 180, 273.46. He was entitled to appeal the decision.
- f. The petitioner appealed by his letter of appeal dated 23.01.2022. He stated that the capability hearing was full of threats and intimidation pointing to a predetermined; he had 27 years of dedicated service; time to turn around performance had been short upon return to Kitengela Branch; there had been staff issues causing fraud; there had been no business due to poor client relationship; revenue not aligned to the branch, the Covid situation; lack of support mechanism and the supervisor lacked time to support him due to Covid scenario or managing his branch as fellow branch manager; and lack of customers when a major customer terminated all employees. He enumerated performance initiatives he had undertaken. He offered options of redeployment in other roles he had excelled in over the previous e offered options of redeployment in other roles he had excelled in over the previous 20 years of service; extension of tenure as branch manager at Kitengela Branch with a clear support line as he had suggested; or mutual separation agreement with the respondent considering a separation package appreciating his long good service.
- g. He was invited to appeal hearing on February 7, 2022 per letter of invitation dated January 31, 2022 and he attended. By letter dated February 16, 2022 the respondent informed the petitioner that no merit had been found to vary the decision. The termination was upheld.
- h. The respondent stated that the petitioner's loans included staff loans house Kshs. 2, 873, 467.56; and staff loans personal secured Kshs. 2, 044, 479.84 which continued to attract interest at 13% and were recoverable.
- i. The petitioner had been paid all his dues in the January 2022 payslip.
- j. The issue of fairness or otherwise of the termination had remedies under *Employment Act*, 2007. The petition be dismissed so a proper suit is filed. There are no constitutional issues raised at all.
- k. The petitioner's Branch Manager position at Kitengela has since been filled by one Fredrick Mwanzia Musau as of 07.03.2023.



4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
5. To answer the 1st issue, parties are in concurrence that they were in a contract of service whose history and particulars they have set out in their respective pleadings, affidavits and submissions.
6. To answer the 2nd issue, does the petition merit as such beyond an ordinary suit for unfair and unlawful dismissal? It is submitted for the respondent that the matters in dispute ought to have been adjudicated as an ordinary suit under the Employment Act, 2007 so that the facts would have been vigorously tested to reach a determination. It is submitted that the petitioner has failed to show how the respondent exactly violated his rights. On the other hand, the respondent has shown that it strictly followed the law. The Court should therefore dismiss the petition for failing to meet a constitutional threshold. Now what is the petitioner's case. The petitioner's case is that the respondent violated his rights under Article 47 on reasonableness and then Article 41 of the Constitution on fair labour practices. It appears to the Court that as urged for the respondent, the petitioner is alert that the respondent strictly followed the provisions of the Employment Act but nevertheless, in the process, his rights under the Articles were violated.
7. The Court has considered the parties' respective cases. The petitioner's case alleges that his predicament is that he suffered abrupt transfers and then he lacked due support and mentorship so that he suffered the termination in circumstances that Articles 47 and 41 were breached. The Court has examined the disciplinary or capability hearing as was held. The minutes are exhibited for the respondent and marked So-18. The record shows that the petitioner explained his scores rated as unsatisfactory performance as follows:
 - a. He agreed he signed a PIP and he signed the review every month and he raised matters not addressed. He had not been called for coaching or mentoring session to support his performance.
 - b. In July 2013 he was deployed to Wilson Airport Branch. Shortly he was called and deployed to Kitengela Branch reporting in May 2014. In May 2015 he was called and deployed to Rongai Branch. At that time, he left Kitengela as one of the best 5 Branches. He had worked to achieve that performance.
 - c. He was transferred to Kitengela in March 2020. Covid 19 Pandemic was declared after that transfer. It became difficult for him to handle the business with that uncertain new environment. The Branch he had left in top 5 was now performing poorly upon his redeployment. The customers he had brought in had left.
 - d. He was unable to meet customers due to Covid 19 situation.
 - e. The branch had no collector clerk as he repeatedly reported at every review and he needed one due to bad historical book. The support had never been given as requested.
 - f. The audit for 2017 highlighted reasons why Kitengela Branch was performing poorly and he was a victim of those reported circumstances. For the last 8-years the branch had not broken even and on his redeployment it was already on a downward trajectory.
 - g. The targets he signed were adopted from the former managers of the branch and there were no target review meetings.
8. The Court has perused all exhibits on record including the petitioner's appeal and its being disallowed. He raised the same issues he had informed the capacity hearing meeting. The issues were not taken into



consideration. Essentially he was raising well-grounded grievances or complaints as envisaged in section 46 of the *Employment Act*, 2007 and instead of the respondent amicably addressing them, the scores of unsatisfactory performances were taken as if they existed in vacuum or that such valid grievances. The Court therefore finds that in the instant petition and as urged for the petitioner, the respondent acted unreasonably in breach of Article 47 which imposed upon the respondent the obligation to act reasonably. How else could the petitioner urge his case than by alleging unreasonable and unfair labour practices contrary to Articles 47 and 41 of the *Constitution* respectively? Upon looking at the case, while the respondent purported to comply with a notice and a hearing per section 41 of the *Employment Act*, 2007, in the full analysis of the petitioner's lamentations, the respondent acted unreasonably by failing to take into account the petitioner's valid grievances about his work environment at the Kitengela Branch that essentially explained the levelled unsatisfactory performance. On the whole, the Court returns that the petition was well grounded upon the material before the Court and it has been established accordingly.

9. To answer the 3rd issue, it should be apparent that the termination was unfair. It cannot be said that the termination was upon a fair reason as envisaged in section 45 of the *Act*. Yes, the score was returned as unsatisfactory against the petitioner. However, in view of his unresolved valid grievances which the Court finds to have existed in absence of contrary evidence or rebuttal by the respondent, it cannot be found that the poor performance was attributable to the petitioner's capacity, compatibility, contact or the respondent's operational requirements. The evidence instead was that the poor performance was attributable to the respondent's defective operational requirements and cannot be visited upon the petitioner with adverse consequences.
10. The 4th issue is on remedies. The Court returns as follows:
 - a. The petitioner is entitled to a declaration that the petitioner's fundamental rights and freedoms have been violated by the respondent and in particular, Articles 41 and 47 as pleaded.
 - b. The petitioner is entitled to a declaration that the respondent terminated the petitioner's employment unfairly.
 - c. The petitioner prayed for a declaration that the respondent discriminated against the petitioner. The particulars of discrimination appear not established and no submissions were made in that regard. The prayer is deemed abandoned.
 - d. The petitioner prayed for an order directed to the respondent to reinstate the petitioner to his position. As submitted for the respondent, the position has since been filled. The practicability of implementing reinstatement is not established. The prayer fails in practicability as submitted for the respondent.
 - e. As submitted for the respondent aggravated damages are awarded in addition to actual damages when the defendant acted with recklessness, malice or deceit as award to penalise the defendant or deter others. Such parameters have not been established in the present case.
 - f. The petitioner prays for general damages for constitutional breaches and violations. The Court has considered the nature of the violations. It is that they occurred strictly within the contract of service. The Court falls to factors in section 49 of the *Employment Act*, 2007 for some guidance while being alert that the award is not under that provision. The aggravating factors against the respondent are that indeed the alleged constitutional violations actually took place. The claimant's grievances in explaining the unsatisfactory performance were completely disregarded. The Court has considered the long service of 27 years. It was otherwise a clean service with great contributions by the petitioner to the respondent's enterprise. The only



petitioner's contribution, though explained, was that the score for unsatisfactory performance was not in dispute. The Court has as well considered that the respondent acted as was done while the petitioner owed the respondent and without due consideration in that regard. Taking all the circumstances into account, the petitioner is awarded Kshs. 5, 000, 000.00 for violation of rights in the manner his contract of service was terminated.

g. The respondent will pay costs of the proceedings.

In conclusion judgment is hereby entered for the petitioner against respondent for orders:

1. The declaration that the petitioner's fundamental rights and freedoms have been violated by the respondent and in particular, Articles 41 and 47 as pleaded.
2. The declaration that the respondent terminated the petitioner's employment unfairly.
3. The respondent to pay the petitioner Kshs. 5, 000, 000.00 compensation for actual violation of constitutional rights as found and payable by August 1, 2023 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
4. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 22ND JUNE, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

