



**Githinji v Kenya Commercial Bank Limited (Cause E043 of 2022)  
[2023] KEELRC 2269 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2269 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E043 OF 2022  
ON MAKAU, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**NICHOLAS NDIRITU GITHINJI ..... CLAIMANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed on 25<sup>th</sup> August, 2008 as a Graduate Trainee Clerk and served in Kang'are Branch in Murang'a, Garissa branch and Murang'a branch as a Teller. His salary as at 2022 was Kshs.189,327.00 per month. On 18<sup>th</sup> January 2020, he was deployed to serve as Universal Channel Consultant (UCC). The new role was to train and recruit bank merchants in Murang'a County who would bring business to the respondent. However, he was deployed without proper training and/or background experience. Nevertheless, he moved across the county recruiting merchants but Covid-19 complicated matters as the Ministry of Health impose restrictions in movement and scaled down operations in most sectors.
2. During that period the employer reviewed his performance and rated him as performing below par even after being placed on Performance Improvement Plan (PIP) for six months. When his performance plummeted, he was invited to a hearing and thereafter his services were terminated on 9<sup>th</sup> May, 2022.
3. He was aggrieved and brought this suit seeking the following reliefs:-
  - a. A declaration that the termination of the claimant by the Respondent was unlawful, unprocedural, wrong and/or unfair against all the tenets of natural justice and in gross violation of Articles 10, 27 and 47 of *the Constitution* of Kenya, 2010 and section 4 of the *Fair Administrative Action Act* No.4 of 2015.
  - b. A declaration do issue that the claimant was wrongfully, unlawfully and unfairly terminated from his employment contrary to section 45 of the *Employment Act*.



- c. That this Honourable court be pleased to issue a temporary injunction restraining the Respondent either by themselves, employees, servants and/or agents from changing and/or applying the interest rates of the claimant's/Applicant's loan facilities from 7% to public terms and conditions with effect from 31<sup>st</sup> October, 2022 or any other interest rate pending the hearing and determination of the application herein.
  - d. That the Claimant/Applicant do continue servicing his outstanding loan arrears in accordance with the initial terms 7% interest rates of the loan agreement pending hearing and determination of the Application herein.
  - e. That the respondent be and is hereby restrained from selling the property known as THIKA MUNICIPALITY BLOCK 24/178 used to secure the loan pending hearing and determination of this suit.
  - f. The unilateral decision by the Respondent to convert the claimant's Pension Savings to facilitate the repayment of the loan owed to it by the claimant, vides the letter dated 30<sup>th</sup> June, 2022, illegal null and void.
  - g. The Respondent be ordered to pay the claimant one month's salary in lieu of notice of Kenya Shillings two hundred and one thousand six hundred and thirty five (Kshs.201,635.00).
  - h. The Respondent be ordered to pay the claimant compensation for the unlawful and unfair termination of Kshs.201,635.00 x 12 (one year) x 19 years (being the remainder of the claimant's years up to retirement)=Kshs.45,972,780.00.
  - i. The Respondent ordered to pay the claimant bonuses for the year ending 2022 and all such benefits his position is entitled to amounting to Kshs.201,635.00.
  - j. The Respondent be ordered to pay the claimant his pension benefits amounting to one million two hundred (Kshs.1,200,000.00).
  - k. The Respondent be ordered to pay the claimant unpaid leave days for the year 2022 of two hundred and thirty six thousand Kenya shillings Kshs.236,000.00.
  - l. The Respondent be and is hereby ordered to pay exemplary damages for discrimination against the claimant.
  - m. That the Respondent is directed to issue the Applicant with a certificate of service in terms of the provisions of Section 51 of the *Employment Act, 2007*.
  - n. The Respondent to pay the costs of this claim.
  - o. Interest on the above at court rates.
  - p. The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- In The Alternative
- q. In the alternative the Respondent be and is hereby ordered to reinstate the claimant to his initial position with all the benefits and pay.
4. The respondent admitted the employment relationship and that it terminated the same due to poor performance on the part of claimant. It averred that, before the termination it placed him under PIP



and thereafter accorded him a fair hearing. It further considered and dismissed his appeal which sought to dislodge the termination of his employment. Finally it paid him his terminal dues.

## Evidence

5. The claimant testified as CW1 and adopted his written statement dated 12<sup>th</sup> September, 2022 and 28 documents as his evidence in chief. In brief his evidence was that he started working for the respondent on 4<sup>th</sup> July, 2007 as a Direct Sales Representative on casual basis at its Ruiru Branch. On 25<sup>th</sup> August, 2008 he was employed as a Graduate Trainee Clerk earning Kshs.40,458.00 per month. His first posting was Kang'are Branch Murang'a, then Garissa and back to Murang'a Branch as a Clerk Teller.
6. On 18<sup>th</sup> January 2020, his Branch Manager deployed him to a new role in the Channel Department as a Universal Channel Consultant (UCC) in Murang'a County. The deployment was done without prior training or experience. No job description was given to him but his role basically involved moving across Murang'a County training and recruiting bank agents and merchants. He did his best to market the bank but matters were complicated by the Covid-19 Pandemic starting 17<sup>th</sup> March, 2020 when the Ministry of Health imposed control measures including restriction on movement and scaling down of operations in most sectors.
7. As a result, his role was seriously affected as he could not reach his clients, train and bring business to the Bank. Most of his clients including schools, petrol stations, hotels, restaurants, supermarkets and individual entrepreneurs had closed down due to the pandemic. He contended that the bank was also affected as was confirmed by the CEO in his address on 18<sup>th</sup> March, 2021 in which he acknowledged that the Bank's profits dropped from 25.2 Billion to 19.6 Billion.
8. Following the address by the CEO, the bank called for rating of all its employees. The claimant was evaluated by his branch manager Mr.Christopher Waweru and rated 3.17 (MET) which meant that he had attained his targets for the year 2020 despite the Covid-19. Thereafter the rating was changed thrice to read 3.11, then 3.03 and finally 2.97 which was below par. The alteration were not counter signed by the person making them and he remained mysterious.
9. As a result of the foregoing rating, he was placed on PIP for six months in March 2021. In 2021 his rating by the Branch and Operations Managers was 3.06 (MET) but again a mysterious person changed it to 2.98 and then 2.92 below par. He was again placed on PIP on 11<sup>th</sup> March, 2022 together with his colleague in the Channels Department Ms Florence Watiri Gathati. However other colleagues who scored the same rating were instead transferred to other branches.
10. Samuel Wahome went to Nkubu Branch, Esther Mutea Thika Branch, Samuel Maina Kamau, Kerugoya while Cyrus Kaguchia was deployed to the Branch Customer service department. Therefore, the claimant contended that he was discriminated against by being treated differently from his colleagues who scored the same rating. His request for transfer to another branch like his colleagues was rejected vide a response from Mr.Amos Kimtai at the Head Office.
11. He maintained that the parameters for his rating were irregular and contrary to his job description, including things like Net promoter score, customer efforts, audit rating, reduction of resource consumption and leave days which are parameters for the whole Branch and not an individual or an agent banker like him. In his view the said parameters reduced his scores to below par.
12. Further, he stated that his performance was affected by factors beyond his control and which he had reported to the Bank for action including lack of proper working tools (PDQ Machines) and facilitation. The failure by the Bank to address the above challenge, coupled with Covid-19 pandemic



and lack of prior training, led to the low performance rating. He stated that his predecessor had resigned in September 2019 due to lack of motivation.

13. Finally he stated that his dismissal was done discriminatively and in breach of his right to fair administrative action. Therefore, he urged the court to grant the relief sought.
14. On cross examination, he stated that his salary was Kshs.103,412.00 before he was transferred to Garissa Branch where his salary was increased to Kshs.206,824.00. He further stated was a teller since he joined the Bank until 2020 when he was deployed to the role of UCC and his role changed. He was however not given the job description for the new role but he was told to prepare a Balance Score Card (BSC), a tool for evaluating performance of an employee.
15. He admitted that his BSC was signed by him, Line Manager and a Reviewer. He further admitted that he was placed on PIP for failing to meet targets in the year 2020 and 2021. He also admitted that he was issued with a warning letter dated 28<sup>th</sup> July, 2021 and on 25<sup>th</sup> March, 2022 he was served with a letter summoning him for a capability hearing. The letter stated the reason for the hearing and allowed him to be accompanied by a representative.
16. He admitted that he attended the hearing with a representative and he responded to questions but his representative was not allowed to speak. Thereafter the decision of the panel was communicated via a termination letter which cited the reason and gave him right of appeal. He appealed against the termination but the appeal was dismissed.
17. He admitted that he had two loans before the termination of his services but denied he had signed agreement that upon termination the interest rate on the loans would convert to commercial rates. He received no terminal dues but he admitted that he received a letter telling him that his terminal dues would be used to settle his loan.
18. The respondent was represented by its Employee Relations Manager, Lilian Kagwiria who testified as RW1. She adopted her written statement and 16 documents as her evidence. In brief her evidence was that the claimant was employed as a Teller clerk in 2008 and worked in different Branches. In January 2020 he was given a new role of Agency Banking as a UCC. He was given training before the deployment to the role and he never raised any complaint about the new role.
19. She testified that the claimant performed poorly in 2020 and 2021 scoring 2.97 and 2.92 (Below par) respectively. She contended that it was not the first time he had scored below par as in 2015 he scored a rating of 2.94. She further testified that by a letter dated 14<sup>th</sup> April 2021 the claimant was placed on PIP and it amounted to first warning under the CBA and the Bank's policy.
20. The claimant never improved his performance after the PIP and by letter dated 28<sup>th</sup> July, 2021 he was notified of second warning and he continued with the PIP. During the PIP, the employee and his line manager do monthly reviews and the employee is supported to improve. However, according to the periodic reports filed, RW1 maintained that the claimant never improved and he was invited to a capability hearing.
21. She testified that the claimant was informed of the reason for the hearing and he was allowed to attend with a representative to the hearing. He was heard and the minutes of the disciplinary proceedings are on record. The decision was communicated via the termination letter dated 9<sup>th</sup> May, 2022. The reason cited was failure to improve his performance.
22. She contended that the claimant was paid his terminal dues including salary in lieu of notice and accrued leave to his account. She reiterated that the claimant had loans with the Bank and he had signed



- an offer letter stating that upon his exit from the bank, the interest on the loans would convert to commercial rate.
23. On cross examination, she testified that the claimant had worked for the Bank for 16 years. She admitted that there was terror attacks in Garissa County in 2015 when the claimant was posted there. She however, testified that the claimant was paid Hardship Allowance and provided with security.
  24. She reiterated that the claimant was deployed from his role of Teller to UCC on 18<sup>th</sup> January 2020 but she did not have evidence as to whether he was given any job Description. She further admitted that in March 2020, Covid-19 Pandemic was declared and the Bank's CEO underscored the effects of the Covid-19 Pandemic vide his letters dated 18<sup>th</sup> March 2021 and 24<sup>th</sup> March, 2021.
  25. She admitted that the claimant was issued with first warning letter in April 2021 for poor performance in the year 2020. She admitted that the year 2020 was interrupted by the Covid-19 pandemic. She further admitted that the alteration of the ratings in the BSC are not countersigned. She further admitted that page 30-32 of the defence documents the reviewer marked the claimant 116% and in page 31 recommended for replacement of broken machines. She further admitted that page 40 the reviewer marked him 99%.
  26. RW1 reiterated that the claimant was given a chance to explain himself as several panelists put questions to him. She admitted that the claimant explained that there were constant breakdown of POS machines, a fact that was acknowledged by the reviewers. She admitted that the POS machines were claimant's tools of work. She admitted that the proceedings were signed by all the panelists but the decision was signed by the chairman and the secretary only. She contended that the decision gave the reasons and was conveyed to the claimant.
  27. She admitted that the BSC have departmental scores but she did not know whether other people were affected since the claimant was the only UCC in the Branch. She contended that the broken machines were affecting the whole Branch and not just the claimant alone. She contended that the claimant never gave satisfactory explanation about his poor performance. She admitted also that the Job Description for Teller and UCC are materially different since Teller is a service role while UCC is sales role.
  28. She stated that, capacity appeals are not always heard except where there is a compelling reason. She contended that not all the employees of the Bank performed poorly due to Covid-19 Pandemic. Further, the alteration on the rating did not require countersigning and the employees' self-assessment does not bind the reviewer. Finally she stated that a PIP takes 6 months but the claimant was called after considering the effects of Covid-19 Pandemic.

### **Submissions**

29. The claimant submitted that the termination of his employment was not substantively and procedurally fair since it was done contrary to section 41 and 45 of the *Employment Act*. In his view, fair procedure should include information of charges, hearing and consideration of representation by the accused employee before dismissal.
30. He submitted that although he was given the notice of the capability hearing, the same was not reasonable to enable him prepare for the hearing. He argued that although there are no strict timelines in any policy document or the law, there must be some level of reasonableness in the disciplinary proceedings. He contended that the service notice on Friday 25<sup>th</sup> March 2022 for hearing on 29<sup>th</sup> March 2022, was not sufficient time to prepare his case. Further there was also no indication whether he was first to make a written defence.



31. As regards the issue of procedure, he submitted that his appeal was not heard properly and no minutes were availed to show how the appeal was conducted. Further, no reasons were given for the decision given to confirm the termination. Therefore, the claimant submitted that the procedure followed in dismissing him and his appeal was unfair and a violation of *the constitution* especially Article 10 and 47 thereof. He relied on *Judicial Service Commission v Mbalu Mutava & another and Naomi Connie Lusiche v Barclays Bank of Kenya Limited (2018) eKLR* among others to fortify his submissions.
32. As regards the substantive fairness, it was submitted that section 43, 45 and 47 of the *Employment Act* places the burden of justifying a termination on the employer. He submitted that all what an employee is required to do is to provide prima facie evidence of a wrongful dismissal and then the burden of proof shifts to the employer. For emphasis, he relied on *Peter Otabong Ekisa v County Government of Busia (2017) eKLR* where the court held that the employer bears the evidential burden of rebuttal once an employee adduces prima facie evidence that there was no valid reason to dismiss him.
33. He submitted that the charge of non-performance was not valid because: -
  - a. The whole country faced a financial meltdown due to covid-19 pandemic which led to lockdowns;
  - b. There was problem of PDQ and POS machines not working and requiring repairs.
  - c. He was not given any job description for UCC and no training was offered to him.
  - d. His request for transfer was declined.
  - e. His colleagues who were rated below par were transferred and not dismissed like him.
34. He submitted that his dismissal was absolutely unfair and discriminative contrary to Article 27 of *the Constitution* and Section 5 of the *Employment Act*. For emphasis he relied on *Gichuru v Package Insurance Brokers Limited (Petition 36 of 2019) (2021) KESC 12 (KLR) (CIV) (22 October 21) (Judgment)* among other authorities.
35. Finally, he submitted that he is entitled to his pension of Kshs.1,200,000.00 which was unlawfully converted to offset his loan. He submitted that pension is a social security which cannot be disbursed at the whims and fancies of the employer. For emphasis, he relied on *Sudhir Chanda Sarkar v Tata Iron and Steel Co.Ltd (1984)3 SCC 369*.
36. He further urged the court to declare the termination unfair and unjustified and award the reliefs sought in this suit.
37. On the other hand, the respondent submitted that it met the threshold of substantive fairness in terminating the claimant's services on account of poor performance because: -
  - a. It has a performance policy and duly informed the claimant of the expectations in his performance.
  - b. The claimant failed to meet his targets for two years and he was placed under PIP but still failed to improve.
  - c. The claimant was notified of his poor performance and taken through the procedure for termination of his employment on that basis.
  - d. Before the termination the claimant had been served with warning letters giving him chance to improve.



38. In view of the foregoing, it was submitted that the termination of the claimant's employment was substantively fair. For emphasis several authorities were cited including *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010*, (2010) LLR 255 (ICK) (September, 2013) and *Meshack Auta Ongeru v Nyamache Tea Factory Company Limited* (2019) eKLR.
39. A regards procedure, the respondent submitted that the termination was in accordance with a fair procedure as provided under section 41 of the *Employment Act*. The claimant was first warned about his poor performance, he was then placed on PIP thereafter he was notified of persistent poor performance, he was then invited to a capability hearing accompanied by a representative, he was given an opportunity to make his representation, the decision of termination was communicated to him in writing, he was given a right of appeal, he appealed, his appeal was not successful and a decision to that effect was communicated to him.
40. Finally, the respondent submitted that since termination of the claimant's services was lawful and fair, he is not entitled to the reliefs sought. For emphasis, reliance was placed on *Langat v Unilever Tea Kenya Limited (Cause E004 of 2021)* (2022) KEELRC 1238 (KLR) (21 July 2022) (Judgment) and *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* (2014) eKLR.

### **Issues for determination**

41. There is no dispute that the claimant was employed by the respondent from 2008 to 2022 when his services were terminated on account of poor performance. The issues for determination are:
- a. Whether the reason for the termination was valid and fair
  - b. Whether a fair procedure was followed.
  - c. Whether the reliefs sought are merited.

### **Reason for termination**

42. The reason for terminating claimant's employment was poor performance for two consecutive years, 2020 and 2021. I have considered the evidence presented. The claimant stated that he had no prior training on the role of UCC and no job description was given to him. RW1 did not produce any evidence to prove that the claimant was given prior training and also provided with any job description for the role of UCC.
43. RW1 admitted that UCC deals with sales while the claimant's previous role of Teller clerk was a service role. On the basis of the foregoing shortcomings I find that the reason for the termination was unfair because it was not based on misconduct but first due to incapacity to perform a role which was imposed on him by the respondent before prior training and without provision of a job description.
44. Secondly, the circumstances under which the claimant was expected to perform better in his new role were not ideal. The role required him to move about meeting, training and recruiting clients which could not work well during the Covid-19 Pandemic. In addition to the claimant's evidence, I take judicial notice that during the said years 2020 and 2021, the Government had put in place measures to contain the spread of the virus. Such measures included restrictions on movement which definitely had a negative impact on the claimant's performance, and also of the Bank as a whole. There is evidence that the Bank's CEO acknowledged that Covid-19 led to financial losses in 2020 and 2021.
45. Although the respondent's case is that other employees of the bank performed well during the 2020-2021 period, there is admission by the respondent that the claimant was the only UCC in the Branch and therefore most affected by the restriction on movement among other containment



measures prescribed by the Government. He could therefore not reasonably be compared with the other cadre of staff of the Bank. I find that no reasonable employer could have dismissed the claimant for poor performance in the said circumstances. Consequently, I hold that the reason cited for the termination was not valid and fair.

46. Although the respondent has demonstrated that it had a performance policy and measurement tools, the same did not take into account the Covid-19 Pandemic, and the containment measures imposed by the Government. It also did not take into account that the claimant had neither been exposed to prior training in the new role nor had he been given a job description. Consequently, I find the reason for the termination was unreasonable. Accordingly, the authorities cited are not applicable to his suit and are distinguishable.

### **Procedure followed**

47. The claimant contended that he was not accorded a fair hearing but the respondent maintained that it complied with Section 41 of the *Employment Act*. The said section provides that: -

- “(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, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

48. I have considered the evidence presented to the court and I am satisfied that the claimant was notified of the reason upon which termination was being considered, he was invited to a capability hearing with a representative, he was heard and his representation were considered before the termination was decided, the decision was communicated in writing giving him the right to appeal, he appealed and his appeal was considered, and finally the decision was communicated to him in writing.

49. The foregoing facts support a finding that the claimant was afforded a fair opportunity to defend himself before the termination. A legion of authorities, including those cited herein, agree that termination is in accordance with a fair procedure if the employee has been given a fair hearing before the termination.

### **Reliefs**

50. Section 43 of the Employment provides that where the employer fails to prove the reason for termination in suit like this one, the termination is deemed unfair within the meaning of section 45 of the *Employment Act*. I have already made a finding of fact that the respondent has not proved that poor performance was valid and fair reason for firing the claimant in the special circumstances of the case. Consequently, I make declaration that the termination of the claimant’s employment was unfair and unlawful.



51. However, I decline to hold that it was discriminatory because the claimant has not proved that any other employee was marked below par, and retained his employment. He has also not shown that any such person were working as UCC and were treated differently from him.
52. As regards the claim for damages, the respondent contended that it paid one month salary in lieu of notice to the claimant's account plus accrued leave. The claimant never rebutted that allegation but my reading of page 130 of the respondent's documents, only Kshs.189,327.00 was paid. He is therefore entitled to the balance of that claim for notice being Kshs.12,508.00.
53. In addition, he is entitled to compensation for unfair termination under section 49 (1) of the Employment Act. He worked for about 14 years without any misconduct. The reason for the dismissal was not due to misconduct. Considering the length of service and that he did not cause the termination through misconduct, I award him 10 months' salary as compensation for the unfair termination.
54. He pleaded a gross salary of Kshs.201,635.00 and produced his pay slip for April, 2022 showing Basic salary of Kshs.189,327.00 and house allowance of Kshs.12,508.00 totaling to Kshs.201,835.00. Consequently, I award him Kshs.2,018,350.00 as compensation for unfair termination.
55. The claim for bonus for the year ending 2022 is declined because he did not serve throughout that year. Besides, he has not demonstrated by evidence that he was entitled to the same for serving half the year.
56. The claim for payment of pension amounting to Kshs.1,200,000.00 has not been substantiated. However, I agree with the claimant that pension is a social security that is protected by the law and it cannot be used by the employer to settle loans. The respondent has denied that it has done so. My direction on the matter is that the claimant must be paid all his pension dues by the pension scheme under the rules of the scheme and it must not be accessed by the employer for whatever reason.
57. The claim for leave totaling to Kshs.236,000.00 lacks particulars and is declined. Therefore, the claimant will have to content with what was paid by the respondent being Kshs.71,257.95.
58. The claim for exemplary damages for discrimination is declined because the same was not substantiated. However, the claimant is awarded the prayer for certificate of service under section 51 of the Employment Act.

## Conclusion

59. I have found that the reason for terminating claimant's employment contract was not valid and fair and therefore the termination was unfair within the meaning of section 45 of the Employment Act. I have further found that the claimant is entitled to some of the reliefs sought and therefore I enter judgment for him in the following terms: -
  - a. Declaration that the termination of his services was unfair and unlawful.
  - b. Awarded  
 Notice.....Kshs.12,508.00  
 Compensation.....Kshs.2,018,350.00  
Kshs.2,030,858.00
  - c. Certificate of service
  - d. Costs and interest of court rate from the date hereof but award shall be subject to statutory deductions.



**DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF SEPTEMBER, 2023.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this judgment 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.

