



Okoth v Rafiki Micro-Finance Bank Kenya Ltd (Employment and Labour Relations Cause 200 of 2018) [2023] KEELRC 2772 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2772 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 200 OF 2018**

**K OCHARO, J
SEPTEMBER 28, 2023**

BETWEEN

ABIERO PETER OKOTH CLAIMANT

AND

RAFIKI MICRO-FINANCE BANK KENYA LTD RESPONDENT

JUDGMENT

Introduction

1. At all material times the Claimant was an employee of the Respondent as its Relationship Officer, whose contract of employment with the latter was terminated on the 17th of January 2018. Contending that the termination was wrongful and unfair, he has sued the Respondent in this matter seeking the reliefs put forth in his amended Memorandum of Claim dated 18th July 2019, thus;
 - a. A declaration that the Claimant’s termination by the Respondent was wrongful, unfair ab initio and in violation of the Claimant’s fundamental right under Article 41 (1) of the Constitution of Kenya.
 - b. A declaration that the summary dismissal of the Claimant from employment by the Respondent was un-procedural, irregular and discriminatory.
 - c. 12 months’ salary compensation for the unfair and unlawful summary dismissal..... Ksh. 480,000.
 - d. House allowance 1/3 X 40,000 X 48 months worked for the Respondent.....Ksh. 640,000.
 - e. Overtime..... Ksh. 296,363.
 - f. Unpaid annual leave 84 days X 1333.....Ksh. 112,000.



- g. Unpaid salaries for January 2018.....Ksh. 40,000.
 - h. A month's salary pay in lieu of notice.....Ksh. 40,000.
 - i. N.S.S.F at 14 months.....Ksh. 140,000.
 - j. N.H.I.F at 14 months.....Ksh. 7000.
 - k. Service pay for 4 years worked at ½ month's salary for every year (Ksh. 20,000 X 48)Ksh. 960,000.
 - l. An order that the Respondent do pay the Claimant such general damages as shall be assessed by this Court for the violation of the Claimant's fundamental right to fair labour practice under Article 41 (1) of *the constitution* of Kenya, breach of the contract and discrimination.
 - m. An order that the Respondent do issue the Claimant with a certificate of service.
 - n. An order that the Respondent do pay the costs of this cause.
 - o. The Respondents do pay the Claimant interest on (3) and (6).
2. Contemporaneous with the filing of the Memorandum of Claim, the Claimant filed a witness statement, and documents under a list of documents dated 21st of February 2018
 3. Upon being served with the summons to enter an appearance, the Respondent filed a Memorandum of Reply on the 26th of March 2018 which was later amended on the 16th of January 2020. The Respondent denied the Claimant's claim in toto and his entitlement to the reliefs sought. The Memorandum of reply was filed side by side with a Witness Statement and list of documents that it intended to place reliance on in support of its defence.
 4. The matter was heard inter-partes on merit. The Claimant's case was heard on 30th May 2022 while the Respondent's case was heard on 29th June 2022.
 5. At the hearing, the parties urged the Court to adopt the witness statements they had filed as well as the documents on record as their evidence in chief and documentary evidence, respectively. The Claimant and the Respondent's witness briefly gave oral evidence, clarifying matters in their witness statements and documents that required clarification before proceeding to give testimony under cross-examination and re-examination.

The Claimant's case.

6. The Claimant stated that he first came into the employment of the Respondent in February 2014 as a Relationship Officer Credit. His confirmation into employment was subject to a successful probationary period of six months. Upon the successful completion of the said probationary period, he was confirmed into employment through a letter dated 6th September 2014. His gross salary was set at KShs. 40,000.
7. The Claimant contended that he served the Respondent diligently, with loyalty and without any disciplinary issue[s] throughout his tenure with the latter until 17th January 2018 when the Respondent terminated his employment.
8. It was the Claimant's case that the termination was at the recommendation of the Respondent's Branch Manager under whom he was serving. Before the letter of termination was issued to his Branch Manager had intimated to him of the intention, through a letter dated 15th November 2017. Further, the decision to terminate his employment was arrived at without him being notified of any



- act of commission or omission that stirred the intention for the termination and being accorded an opportunity to defend himself. The Respondent did not constitute any disciplinary Committee to hear him.
9. It was the Claimant's case that he wrote a letter dated 23rd November 2017 seeking clarification on the issue[s] that was raised in the Mana letter. The letter was ignored despite being received. The Concerns he raised therein were not addressed. However, the Respondent went ahead to dismiss him from employment.
 10. He contended that the Claimant contends that the termination letter did not specify any particular breach of the Respondent's policies. He believes that he was unfairly and without justification picked for termination by the Branch Manager following the latter's ill attitude towards him.
 11. The Claimant further asserted that he was dismissed from employment on reason[s] that can hardly be justified. The Respondent anchored the termination on an alleged failure to meet the 'Bank's Standard minimum', completely ignoring the fact that at the time of the alleged failure, the bank was under receivership and no one in all the branches had met the said standard requirements as shown in the reports. His core mandate under the employment contract was to grow the loan as a Credit Officer, an aspect which was not mentioned anywhere in the termination letter.
 12. The Claimant contended that during the four years, he worked for the Respondent, he was never paid a house allowance. At separation in employment, the Respondent failed to issue him with a Certificate of service.
 13. The Claimant stated that he worked continuously, hardly taking his leave days for the entire 2017 up to and including January 2018 when he was dismissed or paid in place thereof. At the time of the summary dismissal, he had 16 earned but unutilized leave.
 14. The Claimant asserted that in the discharge of his responsibility, he proposed to the senior management of the Respondent Bank to venture into the Boda Boda asset business. The proposal was disregarded and "killed". All this was orchestrated by the Branch Manager to facilitate his discharge employment because of the personal differences they had.
 15. It is the Claimant's position that as per his employment contract, his main duty was to grow the asset book with targets given on both the number of borrowers and growth of the loan book. Surprisingly the termination notice mentioned 71/88 achievement thus an 80% achievement. Imperative to note that there was a reduction in the number of borrowers after some had completed and closed their loan accounts, unfortunately, it is listed in his termination as a failure.
 16. The Respondent deliberately does not mention the growth of the loan book because it was commonplace that the operations at his department had been disrupted and lending activities even stopped for a while. When it resumed, many stringent conditions were set for lending, for instance, not giving unsecured loans, which were largely micro-loans the bank is licensed to serve by the Central Bank of Kenya in this space. This was an additional reason why the portfolio could not grow successfully.
 17. When Chase Bank, the parent company to the Respondent was put under receivership, the Respondent could not run its core business optimally. The Respondent's balance sheet that was publicized in various dailies and the trend in performance of the branch shown in the regular branch meeting minutes is a testament.
 18. The Claimant further contended that the notice that was issued to him indicated that he had only managed to achieve deposits of 1.6 million. The figure was incorrect. Nobody verified the same from the bank systems.



19. The Claimant argued that nobody can be sanctioned because of fluctuating customer deposits. It is at the customer's discretion to withdraw his or her money as and when he needs it. The bank staff will have no control over it.
20. The Respondent's Credit Policy has guidelines on the recovery of defaulted credit facilities, placing different stages of the process in the hands of different bank units. He is being accused of matters that were not for his desk. He raised this in his letter dated 23rd November 2017, but the Branch Manager didn't address the issue at all.
21. The Claimant contends that when a client is given a loan, he or she offers security and when the Client fails to honour repayment, the process of recovery starts from the credit officer who urges the Client to honour his/her obligation. If there is further failure on the part of the Client, the matter moves to the Bank Manager who requests him/her to pay. At this level when there is no fruition, the matter is referred to the debt recovery unit. At this level, it is the responsibility of the credit recovery to realise the security.
22. It is his case that he was put under the Performance appraisal twice. As per the policy of the bank when one is put under the Performance Improvement Plan (P.I.P) for not attaining targets, he or she is subjected to disciplinary proceedings where he/she must be heard. The Supervisor has options to sort out the problem i.e. by counselling, training and the redistribution of jobs. Only repeated poor performance can justify the disciplinary process. His case didn't warrant the process. He was never placed under a Performance Improvement Plan.
23. Cross-examined, he testified that his job description was to increase bank loans and ensure the growth of deposits. The growth of loan book is measured by the number of customers one gives loans to. The targets can be assessed in numbers or volumes. The increase in deposits refers to the number of new accounts one opens for customers.
24. He testified that the balance Score Card of the 11th -31st October 2015 was never used to measure his performance in 2015.
25. Under Clause 5.1 of the Policy, the balance scorecard is what was used apparently to gauge an employee's performance. Some of the functions reflected thereon do not fall under the docket of a Credit Officer.
26. He testified that though the Respondent has tendered a document before this court purportedly regarding a Performance Improvement Plan and signed by him, he is a stranger to the document. He never executed it.
27. Shown the Respondent's document marked No 2(a), the Claimant accepted that it is a document titled Performance Improvement Plan. He executed the document. Further, the document set out three areas in which he needed to improve on namely; Marketing; Arrears management; and Relationship Management. The period for improvement was set as 30th August 2017-30th September 2017. After signing the document, and noting the areas identified, he was prompted to write a letter to his supervisor seeking clarifications. After 30th September 2017, he didn't write any letter objecting to the Performance Improvement Plan.
28. The document dated 3rd of October 2017 also spoke to a Performance Improvement Plan. In the document support areas were identified as; Marketing; Early arrears management; and Relationship management. According to him, he made a rating of 80% achievement. However, the Supervisor returned that he had failed to meet the targets and suggested the areas he needed to improve on to meet



- the targets. The said document was forwarded to the Talent Organizational Development [T.O.D] for action.
29. The scorecard for 2015 had PAR. The various forms also indicated that he was to reduce Portfolio at Risk [PAR] from 53% to 30%. Further, the Bank's credit manual outlined what a credit officer was expected to do in cases where there was a default in credit facility repayment by a customer. It wasn't within the powers of a credit officer to attach the customer's property to realize the property offered as security for the repayment of the facility.
 30. It was his testimony that in the letter that in his letter, he explained the specific cases and the efforts that he had made. He too explained why he couldn't bring the PAR below 50%. Other matters were being handled by other departments and others escalated from his department to another. This is why he wanted a discussion with his supervisor.
 31. The Respondent was a subsidiary of the chase bank and the position of the Chase Bank affected their performance as a subsidiary. This is discernible from the Managing Director's email presented as evidence.
 32. He asserted that it was the duty of the Respondent's Legal Department to follow up on court litigations. One Abel was in charge of the Credit Department at the Branch. The legal Department used to update him on the follow-ups.
 33. Referred to a letter dated the 17th of November 2017, he admitted that it showed that he had not achieved the targets. He responded to the said letter on the 30th of November 2017. However, in the letter, he did not express his lack of awareness that he was on the Performance Improvement Plan [P.I.P]. In its letter, the Respondent had indicated to him that he was to remain under the Performance Improvement Plan [P.I.P] and that the next review was to be in December 2017.
 34. It is his testimony that he received a letter of termination in January 2018. It had the reasons for the said termination. The Score Cards were used to gauge his performance and some of the areas against which he was rated were unconnected to his functions.
 35. He asserted that when he joined the Respondent, he was performing very well. According to the Manager's notes, in 2017, his performance had improved.
 36. His salary was Kshs. 40,000 per month. He was paid for the days he worked in January. He was also paid for the 16 untaken leave days.
 37. Lastly under Clause 10:3 of the Credit Manual, he was required to submit the leave plan at the start of every year.
 38. When re-examined, and commenting on the fluctuations in the deposits, he stated that he couldn't prevent the clients from withdrawing their money, as that was a right they had.
 39. The Balance Score Card [B.S.C] for 2015 was not the basis for his termination.
 40. In all the performance notices, he was not invited to discuss the areas that were being raised therein.
 41. The Claimant testified that he did not sign the Performance Improvement Programme [P.I.P] for the 28th of April 2017 but signed the ones for the 5th of June 2017, the 30th of August 2017 to the 3rd of September 2017 and lastly for the 3rd October to 4th November 2017.
 42. He was supposed to discuss the Performance Improvement Plan [P.I.P] with his supervisor. He never called him for a discussion on the same.



43. He was never given a copy of the said Performance Improvement Plan [P.I.P] documents. He was seeing them for the time in Court. Therefore, it would not have been possible for him to complain about the contents thereof.
44. He further clarified by stating that it was not possible for him to bring the Portfolio at Risk [PAR] down, the matter had left his hands. Reduction therefore depended on the other department's performance.
45. Lastly, he insisted that he was not heard, and stated further that his right of appeal wasn't explained to him.

The Respondent's case

46. The Respondent's case was presented by Judith Ndunge, the Head of Talent and Organizational Department of the Respondent.
47. The witness urged the Court to adopt the contents of her witness statement dated 5th May 2022 as her evidence in Chief. She tendered the Respondent's documents herein filed as the Respondent's exhibits 1-11.
48. It was the witness's evidence that during the tenure of his employment, the Claimant's performance against his targets was sub-optimal. The Claimant was subjected to several Performance Appraisal by his immediate supervisor. Areas where improvement was needed were highlighted. He was accorded an opportunity to point out areas in which he required help. The said appraisals were conducted between 28th April 2017-5th June 2017, 30th August 2017- 3rd September 2017 and lastly 3rd October 2017-2nd November 2017.
49. Despite the numerous opportunities that were accorded to the Claimant for improvement, his Performance remained unsatisfactory. Resultant therefrom, he was issued with a performance notice dated 15th November 2017 wherein the areas of non-performance were outlined. The Claimant was further put on one month's notice of requirement for improvement, failing which the Respondent would consider termination of employment.
50. The witness further stated, that the Claimant responded to the said performance notice via a letter received on the 23rd of November 2017 enumerating various challenges to which he attributed his underperformance. Upon receipt of the said response, the Respondent wrote to the Claimant vide a letter dated 7th December 2017 referring to the Balance Score Cards duly executed by the Claimant as well as the revised figures in the Performance Improvement Programme (PIP) documents and further pointing out the deteriorated performance. The Claimant was further advised of timelines for improvement to 31st December 2017.
51. No improvement was noted in the Claimant's performance even though he was accorded an opportunity to be heard and even granted an extension of the notice period. As a result, the Respondent exercised its contractual and legal rights and proceeded to issue the Claimant with a termination letter dated 17 January 2018. The said termination letter advised on the areas of unsatisfactory performance and further advised on the settlement of the final dues. The Claimant duly received his termination letter on 19th January 2018.
52. The Respondent contends that the Claimant's averments on excellent performance during his tenure of employment and the failure of notification before termination are unfounded and purely meant to mislead the court. On the contrary, the Claimant was given sufficient opportunity to improve his



- performance with adequate support. The Respondent further states that the requisite notice was issued prior to effecting the termination. To the Respondent, the Claimant's termination was fair and lawful.
53. The Respondent avers that the Claimant's termination was not made on the Branch Manager's resolution but was rather a culmination of the Claimant's underperformance. Further, the response by the Respondent comprehensively addressed the issues raised by the Claimant as is evident from the said letter.
 54. The witness asserted that during the Claimant's tenure of employment, the Claimant utilized his leave days which were as rightly pointed out by him sixteen 16 (sixteen). Compensation for the unutilized leave days was paid out upon the settlement of the terminal dues on termination. Furthermore, the Claimant's application for leave was declined with reasons thereof duly advised to him vide an email dated 23rd November 2017, which position was well in line with the Respondent's policy which was within his knowledge.
 55. Lastly, the witness stated that the termination of the Claimant's employment was fair and justified. He has no cause of action against the Respondent. He is not entitled to the reliefs he has sought.
 56. Cross-examined, she testified that in the performance management system of the bank, the optimal performance level of a Relationship Officer refers to a situation when the Officer meets the targets set by the Manager in consultation with the officer. The bank Manager informs him of the deposit levels to be attained. The levels set usually are not similar for all officers, they depend on the position of the officer. They too vary from branch to branch and region to region.
 57. The optimum growth level for a Relationship Officer is Ksh. 2 million. At the material time, the Claimant had a target to grow deposits from KShs. 1.8 million to 3.0 million. He was to grow number the number of borrowers from 77 to 88 according to the document dated 2nd November 2017.
 58. The Claimant was appraised three times, and this is supported by the appraisal documents dated; 8th April 2017, 30th August 2017 and lastly the 3rd October 2017. The first appraisal concerned itself with the Claimant's task to grow the deposits and the loan book. She [RWI] appraised him on the deposit growth and the portfolio quality (Loan book quality). She didn't appraise him on the growth of loans. The witness explains that portfolio quality refers to money given out vis a vis money recovered.
 59. It was her testimony that in the second appraisal, she appraised him on the deposit growth, the number of borrowers, the growth of the loan book and the portfolio quality. Therefore, she appraised him on the three parameters. In the 3rd Appraisal, he was appraised on portfolio quality, number of borrowers, growth of loan and deposit growth.
 60. The witness stated that an appraisal entails a discussion between the concerned officer and his Manager. As regards the Claimant's appraisal the discussion revolved around marketing, early arrears management, and relationship management as areas in which he needed support.
 61. To ensure that the set parameters were improved on, there had to be a joint effort involving the supervisor and even the head office. In this case, the bank was involved. She admitted that she had no document to demonstrate that the Respondent did give the Claimant support to enable him to improve on the areas identified and attain the targets.
 62. RW1 told the court when an officer fails to meet the targets in the Performance Improvement Programme he or she is given a chance to redeem himself or herself by being placed under a performance improvement plan twice. A 3rd performance improvement plan is normally the last one. If an employee fails to meet the targets in regard thereto, he shall be on his or her way out. The Claimant was placed under three Performance improvement plans thrice.



63. She testified that before an employee's contract of employment is terminated, he or she has to be accorded training, coaching, and mentorship. Weekly meetings at the branch level could be held where all the Credit Officers could be listened to.
64. It was her testimony that Clause 5 of the Talent and Organizational Development Policy provides for the process that has to be followed before termination on account of poor performance.
65. That during the process of appraisal, the employees are allowed to make proposals on how to improve on his or her performance. In his email of the 17th of April 2017, he proposed to fund the Boda Boda. The proposal was received by various officers of the bank. One John Wamalwa, reviewed the proposal and assured the Claimant Support subject to satisfaction of some conditions. She stated further that for a proposed product to be successful, there had to be a joint effort within the Bank.
66. Referred to the Claimant's pay slips, the witness refuted the assertion that the commissions reflected thereon as paid to the Claimant were for his good performance. The Bank could run campaigns from time to time, and out of the same employees could earn commissions.
67. RW1 told the court that when an employee performs dismally, there is a procedure to be followed before termination. A notice to show cause has to be issued. In this case, one was i.e the performance notice dated 15th November 2017. In the notice, there was no clause suggesting that he was invited for a disciplinary hearing.
68. She testified that a disciplinary hearing was conducted. However, the Respondent didn't place any document forth whence from it can be discerned that indeed there was one.
69. It was RW1's testimony that Clause 13: 2 (d) provides for the disciplinary procedures. The Claimant was not issued with the three written warnings contemplated under this Clause.
70. The Claimant's basic salary was Kshs. 40,000. The page for the remuneration under the contract was not filed.
71. RW1 further testified that she was not aware that during the Claimant's tenure, the bank was doing Sunday banking. She however confirmed that the bank had written to the Central Bank seeking approval to do Sunday banking. They got the approval from the Central Bank of Kenya for the Managers only. The Claimant was not a manager.
72. The officer is only involved at the level of early arrears collection. Once the Matter moves to the Debt Recovery Unit [DRU] for debt collection using various avenues like the realization of securities or civil suits, the Credit Officer is not involved.
73. It was her testimony that once the bank writes off a debt, the same would not form part of the Portfolio at Risk [PAR] of the Officer.
74. On re-exam, she testified that the minutes of the 12th April 2017 are a testament that the bank put in an effort, to assist the Claimant herein improve his performance.
75. The minutes of 19th May 2017- plenary, indicate that the Manager was coming up with ways of assisting the officers improve their performance.
76. The Performance Improvement Plan [P.I.P] was to help the bank improve its business and help the employees meet their targets.
77. The witness stated that it was within his right for the Claimant to make the boda boda proposal. In practice, anyone with a proposal makes the same through the Manager who forwards the same to the



direct supervisor who then forwards it to the Head of the Department before forwarding it back to the manager for approval.

The Claimant's submissions

78. The Claimant's Counsel filed written submissions on the 25th of July 2022 distilling the following issues for determination:
- i. Whether the Claimant's list of documents should be admitted by the court as evidence.
 - ii. Whether the Claimant's termination was procedurally and substantively/lawfully fair.
 - iii. Whether the Claimant worked and paid for the overtime.
 - iv. Whether the Claimant's termination was discriminatory.
 - v. Whether the Claimant was paid house allowance.
79. Out of ingenuity the Claimant's Counsel decided to do submissions totalling 25 pages, employing font size 10 with single spacing. In my view, this is bad practice which this court cannot condone. At this point, I will only say that I have considered the submissions and the authorities cited therein. May the Claimant take comfort.

The Respondent's submission.

80. The Respondent filed its submissions on 30th September 2022 ventilating the following issues for determination:
- i. Whether the affidavit evidence is admissible.
 - ii. Whether the Claimant was unfairly and unlawfully terminated.
 - iii. Whether the Claimant's termination was discriminatory.
 - iv. Whether the Claimant is entitled to the reliefs sought.
81. On the first issue the Respondent submitted that the affidavit by Eric Okinyi Tolo ought to be struck out as the same ought to have been produced by the maker thereof. Reliance was placed on section 35 (1)(b) of the *Evidence Act*. The Respondent further submitted that the Claimant having not called the said witness for cross-examination, his evidence can only be deemed as hearsay.
82. For the second issue, Counsel for the Respondent submitted that at all material times, the Claimant understood his role under his contract of employment. He was to grow the asset book. In his evidence in cross-examination, he admitted that the role entailed growth of deposits and growth of the loan book. Further, he admitted that his performance was always evaluated quarterly through a Balance Score Card. The Score Card outlined the applicable standards of performance and targets thereof.
83. Counsel submitted further that Respondent through evidence demonstrated that the Individual BSCs were reviewed quarterly by the management together with the employee. Weekly performance meetings between the Respondent's management could be held. The meetings were geared towards enabling the employees to state challenges they were experiencing and they could be advised on how to navigate out of them. Trainings were accorded to the employees to enable them to improve on areas



they had challenges in. The termination of the Claimant's employment met the threshold established in the case of *Jane Samba Mukala vs OL Tukai Lodge Limited (2013) eKLR* where it was held:

“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. Section 5 (8) (c) further outline the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.

Therefore, 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. Otherwise, it would be an easy option for abuse.”

84. The Respondent further relied on the case of *Jane Wairimu & Associates (2012) eKLR* where the court held:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

85. When his poor performance was noted, he was placed on a performance Improvement Plan from 17th April 2017 up to his termination in January 2018. The areas in which he needed to improve were made known to him. He admitted that in the Course on the P.I.P, he attended the weekly performance held with his supervisor and colleagues to help him and all other employees improve their performance.

86. It was further submitted that contrary to the Claimant's assertion that the process leading to his termination was unfair, there was procedural fairness present. The Respondent followed to the letter the procedure provided under Clause 5 of its TOD. To buttress his submissions on procedural fairness, reliance was placed on the case of *Obara, Lydia Moraa vs Tusker Mattresses Limited 2016 eKLR* where this Court stated:

“In sum, in considering whether the procedure was fair, the test is whether there has been substantial compliance with the overall obligation to allow an employee an opportunity to, rebut the allegations of misconduct, or offer a representation on any ground[s] that the employer has indicated to be basis for his intention to terminate the employment, and bring to the attention of the employer any relevant information before a final decision is taken.”

87. Counsel further submitted that whereas the Respondent admits that the Claimant was not called for a hearing, the Court should note that he was given a whole nine months to improve his performance but he didn't.

88. For the third issue, it was submitted that whereas the Claimant pleaded the violation of Article 41 (1) of *the Constitution*, which provides that “Every person has the right to fair labour practices”, the Claimant, however, did not plead how the alleged contravention of the right to fair labour practices ensued in the circumstances of the case and did not state with precision which of those values of the labour practices were infringed. This Court should reject the claim under this head.



89. Further, in his evidence under cross-examination, the Claimant admitted that he didn't have any evidence to demonstrate that the Respondent's Kisumu Branch Manager discriminated against him.
90. On the last issue, the Respondent's counsel submitted that the Claimant's termination was fair, lawful and non-discriminatory, the compensatory relief sought by the Claimant cannot be availed to him. The General damages for breach of his rights too.
91. On the claim for house allowance, it was submitted that the same stands on loose sand. The contract of employment provided that the KShs. 40,000 was to be paid as a consolidated salary.
92. On the claim for overtime, it was submitted that the same was unjustified and that the Claimant had not adduced any evidence that he worked on Sunday. He was a Relationship Officer whereas Sunday banking was left only for the Managers.
93. For the Claim of 84 days unpaid annual leave, it was submitted that the same was still unjustified and unfounded. The Claimant's entitlement for annual leave was for 16 days which was settled with his terminal dues as evidenced in his pay slip.
94. It is submitted that the Claimant admitted receiving the salary for the days worked in January and further his claim for one month's salary in lieu of notice is baseless having been served with a notice in December 2017 that he would be terminated in December 2017.
95. The Claim for the NHIF and the N.S.S.F payments are unfounded. The Respondent dutifully remitted contributions to the relevant authorities for the Claimant's Account. The payslips tendered evidence demonstrates this.
96. Lastly the Respondent submitted that the Claimant was not entitled to service pay. He was a member of NSSF. Section 35[5] and [6] of the [Employment Act](#) do not allow him to claim service pay.]

Analysis and determination

97. From the pleadings, the evidence on record and the rival submissions by the counsel of the parties herein, the following issues emerge for determination thus:
 - i. Whether the Claimant's termination was procedurally and substantively unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Who should shoulder the costs of the suit?

Whether the Claimant's termination was procedurally and substantively unfair

98. Whenever a court is invited to interrogate fairness in an employee's dismissal or termination of an employee's employment, the court has to consider two aspects, procedural and substantive fairness. The two constitute the total unit of fairness. The absence of both or any of them in the process leading to the decision to terminate or dismiss and the decision itself deprives of the termination or dismissal of the character of fairness and, the ability to pass the fairness test. Both substantive and procedural fairness requirements are statutory. Sections 41 and 45(2) of the Act, speak to procedural fairness, whilst sections 43, 45(2) and 47(5) speak to substantive fairness.
99. Section 41 of the [Employment Act](#) 2007 provides for a mandatory procedure that must be followed by any employer intending to terminate an employee's employment, or summarily dismiss an employee. The fair procedure contemplated under the section has firstly; the notification component-the employer must notify the employee of his or her intention, and the grounds arousing the intention,



secondly, the hearing component- the employer has to give the employee an adequate opportunity to prepare and defend himself or herself against the grounds, thirdly, the right of accompaniment-the employee shall be allowed to be accompanied to the hearing with a colleague[if the employee is not a member of a trade union]. Lastly, the consideration component-the employer has to consider the representations[s] by the employee and or the accompanying person, before making a decision.

100. In the case of *Walter Anuro Ogal vs The Teachers Service Commission (2013) eKLR* the court held:
- “For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”
101. Similarly in the case of *Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR* the court held that:-
- “A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.....”
102. In the case of *Lydia Moraa Obara v Turskeys Mattresses Limited [2021] eKLR*, this Court stated;
- “Section 45 of the *Employment Act* dictates that no employer shall terminate the employment of an employee unfairly. Section 45[2][c], provides the foundation for insistence on the engagement of a fair procedure if a termination of employment were to be considered fair.
- The answer as to what fair procedure is, is found in the provisions Section 41 of the *Employment Act*, 2007.....
- This should be looked at, not in isolation from, but in conjunction with, the provisions of *the Constitution* of Kenya 2010 regarding the right to a fair hearing, and Fair Administrative Act.”
103. Elaborating on the procedural fairness requirement in a situation where the employer is contemplating terminating the employment on account of poor performance, the Court in *Jane Samba Mukala V Ol Tukai Lodge Limited [2013] eKLR*, stated and I agree, thus;
- “Beyond having such 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 weakness. 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.”
104. From the onset, through his pleadings, the Claimant asserted that before the termination of his employment, he was not given a chance to defend himself. No disciplinary hearing process was undertaken by the Respondent. This assertion, he maintained in his testimony and submissions. The Respondent’s witness admitted in her evidence under cross-examination that there were no disciplinary proceedings carried out in respect of the Claimant’s poor performance. In essence, she was saying that he was not given a chance to make representations and the right of accompaniment contemplated under section 41 of the *Employment Act*.
105. The Respondent’s Counsel’s submissions on the procedural fairness aspect have caught the eye of this Court. With great respect, the submissions are in ignorance of the radical change that set in post-2007



with the coming into being of the new employment and labour relations regime. A regime dictates that disputes in regard thereof be given a human rights approach. One that appears constitutionally inspired. The submissions ignore the whole essence of the new regime, to a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.

106. By reason of the foregoing premises, I am convinced that the termination was non-compliant with the edicts of procedural fairness.
107. Now I turn to the substantive justification aspect. Section 43 of the Act places a duty on the employer to prove the reasons for the termination of an employee's employment in a dispute as is herein. Section 45 of the Act imposes a further burden on the employer, to prove that the reason[s] for the termination was fair and valid. Where the employer fails to discharge the first burden, no doubt, it isn't possible for him or her to discharge the second one under section 45.
108. According to the Respondent, it terminated the Claimant's employment on the grounds of poor performance. There is ample Judicial precedent on what the employer who has terminated the employment of his or her employee must demonstrate for the termination to be adjudged as founded on fair and valid grounds [s]. In my view, the employer must demonstrate:
- i. That he or she had in place a workplace policy or practice on how to identify and measure good performance as against poor performance.
 - ii. That the policy and practice were known to all employees whom it affected.
 - iii. That the policy and practice embodied a dependable, fair, accountable and verifiable performance evaluation system.
 - iv. That the employee didn't meet existing and known performance standards.
 - v. That the failure to meet the expected standards was serious.
 - vi. That the employee was given sufficient training, support, guidance, time or counselling to improve his or her performance but could not perform in terms of the expected standards.
 - vii. Furthermore, the failure to meet the standard of performance required was due to the employees inability to do so and not due to factors that were outside his or her control, and
 - viii. That before the decision was taken to terminate the employee's employment, he was notified of the noted poor performance and given an opportunity to defend himself or herself and or given an opportunity to defend himself or to address his or her areas of weakness.

109. There is no dispute that the termination of the Claimant's employment was effected through the termination letter dated 17th January 2018, which read in part:

Abiero Peter Okoth

C/o Rafiki MFB,

Nairobi.

Dear Abiero,

Termination

Reference is made to your one – month Performance Improvement Plan which was issued to you on the 3rd October 2017. In the said P.I.P, you were expected to raise deposits from Kshs. 1, 812, 825 to



Kshs. 3,000,000 increase the number of borrowers from 71 to 88 and reduce Portfolio at Risk [PAR] from 53.9% to 30%.

As at the end of the P.I.P on 2nd November 2017, your performance standards were unacceptable with your deposits standing at Ksh. 1, 848, 723. The number of borrowers remained the same at 71 and your Portfolio at Risk remained at 53.9%.

We also refer to our letter to you dated 15th November 2017 through which the bank formally placed you on notice that if your performance Improvement Plan did not improve to meet the specific performance level detailed in the P.I.P, the bank in exercise of its rights to terminate your contract on the basis of non-performance effective 14th December 2017.

Please note that from where the Bank stands, your notice has now ended and there is no valid reason to keep you in service due to the noticeable decline in your performance. The decision is therefore to terminate your services with immediate effect.”

110. No doubt the Respondent had in place a policy and practice on employee performance. The same is true under the Talent and Organization Development Policy. Its sufficiency has not been challenged by the Claimant in this matter. The Court takes it that it meets the characteristics set out in 108 [iii], above.
111. Chapter 5 of the policy and practice document mentioned above is dedicated to Performance Management. The chapter is well-detailed. It encapsulates in detail; the purpose of performance management in an institution; the prayers and their role in the process; performance appraisals and how they are to be conducted and the keeping of performance appraisal records. The Court however notes that the document does not specifically and in an express manner provide for Performance improvement Plans. It doesn't provide for how long one is supposed to be placed under the plan and on how the decision leading to the placement shall be reached. A recipe for abuse.
112. The Respondent asserted that the Claimant's performance over time was unsatisfactory, leading to him being placed on a performance Improvement Plan that was extended again and again in a bid to enable him to “redeem himself.” The Claimant contended that he was not put on any Performance Improvement Plan and that if he was then he was not made aware. It is commonplace that a performance Improvement Plan follows a performance appraisal/evaluation of an employee who has been considered not meeting the expected standards. Considering the position taken by the Claimant, and the general expectation in disputes like the instant one, the Respondent was under duty to show that there was such an appraisal that triggered the performance improvement plan. This it didn't do. Consequently, I am persuaded by the position taken by the Claimant. The effect therefore being a diminished fairness and validity on the reason basis for the termination of the Claimant's employment.
113. In a matter like the instant matter where the substantive justification for termination of an employee's employment on account of failure to meet the expected standards is in dispute, it becomes imperative for the employer to demonstrate that there were performance targets set following consultations between the employee and his or her supervisor. In her evidence under cross-examination, the Respondent's witness testified that the true, setting of targets has to be there and it is a joint effort. The court notes that Chapter 5 of the TOD contemplates the same. The Respondent did Put forth any material to demonstrate when, how and what targets were set.
114. The respondent's witness heavily concentrated on explaining the alleged performance improvement plans, without leading any evidence on whether or not there was a performance evaluation.



115. On the 15th November 2017, the Respondent's Kisumu Branch Manager issued a performance notice to the Claimant which read in part;

” We note that the parameters below were not achieved as at the end of your PIP [performance improvement plan] 2nd November 2017;

1. That you only increased your deposits portfolio to Kshs. 1,848,723.00 from Kshs. 1,812,845.00 against a target deposit closing balance of Kshs. 3,000,000.
2. That your number of borrowers still stands at 71 against a target of 88.
3. That your PAR still stands at 53.9% against a target of 30%.

116. In his letter dated 23rd November 2017, in response to the performance notice, the Claimant gave a detailed explanation as to why some targets could not be met while asserting that some targets were met. Principally, he attributed the failure to reasons outside his control. For instance, he asserted that on the portfolio quality, he couldn't reduce the outstanding rate of 53.9% to 30%. To recover unpaid loans heavily depended on the efforts of other departments of the bank that had the authority to pursue recovery of the unpaid facilities through various avenues like litigations and initiation of realisation of securities. Departments for instance Debt Recovery Unit, and the Legal Department. He elaborately set out the various customers whose accounts had been referred to the Departments for action.

117. The Respondent's witness admitted that indeed there were some Departments in the Bank whose mandate was to pursue recovery of unpaid facilities, through various avenues. Once the matters left the Credit Officer's desk for these departments, the accounts could no longer be in the control of the credit officer.

118. As regards the raising of deposits, the Claimant asserted that the fact that during the material time, the parent company of the Respondent was under liquidation affected the customers' will to continue making deposits.

119. In my view, the explanations that the Claimant raised were not idle. They are plausible. Any reasonable employer would want to listen to an employee raising the concerns as the Claimant did. With due respect, the casualness with which the Respondent's Manager responded to the explanations was appalling. The Response by the Claimant heightened the need to give him a hearing. It was not availed.

120. The Respondent's witness did not at all disabuse the Claimant's assertion that the failure to meet the targets was occasioned by factors outside his control.

121. The Respondent needed to demonstrate the efforts it put in place to support the Claimant in improving on areas of weakness that were allegedly identified. The Respondent's witness attempted to state generally that he was given support, but pressed further she acceded that she didn't have proof. In a bid to try and convince the court that support was given to the Claimant she alleged that there were weekly meetings between the Credit Officers and the Management of the Branch. In my view, those general meetings could not suffice for an employee who was under P.I.P, for his could require specific attention to specific areas of concern.

122. The Claimant stated that in a bid to improve on deposits and growth of loans, he proposed a product for Boda Boda financing. In his estimation, the product was to be a wonder product that would turn around the Respondent. Unfortunately, and frustratingly, nobody ever bothered to support the proposal and make it a reality. The Respondent's witness admitted that the proposal was made. It was reviewed by one Mr. Wamalwa. With surprise, this Court notes that the witness did not state why it



was not supported for implementation, and whether or not if implemented it was to have an impact on the relevant parameters on which the Claimant's performance was being gauged.

123. In the case of *Gold Fields Mining South Africa [PTY] Ltd [Kloof] Gold Mine vs Commission of Conciliation, Mediation and Arbitration and Others* [2014] 1 BLLR 20 [LAC] at paragraph 25, the court held:

“In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance standards; that the failure to meet the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore, the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control.”

124. In the case of *National Bank of Kenya vs Samuel Nguru Mutonya* (2019) eKLR the court set forth the requirements to be satisfied by the employer who purports to terminate the employee on account of poor performance. The requirements are 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.
- c. 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 given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

125. This Court's decision on substantive fairness finds fortification in the authorities I have cited above.

126. By reason of the foregoing premises, I have come to an inevitable conclusion that the Claimant's termination was substantively unfair and unjustified.

Whether the Claimant is entitled to the reliefs sought.



i. 12 months compensation for the unfair or unlawful termination

127. The Claimant sought to be awarded Ksh. 480,000 as compensation for the unfair termination. This Court is alive of the fact that 12 months' gross wages or salary is the maximum awardable compensation provided under section 49 [1] [c] of the [Employment Act](#) 2007. Granting of the relief is discretionary. Whether maximum compensation or an extent thereof or none at all, depends on the circumstances of the case.
128. I have considered the period the length of the period the Claimant was in the service of the Respondent as a Credit Officer, the fact that his termination was both procedurally and substantively unfair, that without any justifiable cause the termination appeared rushed and that the Respondent's action in my view appears unequitable and come to a conclusion that he is entitled to the compensatory award under the above stated provision. I award him eight [8] months gross salary. Kshs. 320,000.

ii. One month salary in lieu of notice

129. The Claimant sought salary in lieu of notice of Kshs. 40,000. The Respondent resisted this claim on the reason that having been summarily dismissed, he is not entitled to the relief. Having found that the termination was both procedurally and substantively unfair, and cognizant of the fact that his employment was terminable by a twenty eight days' notice, I am convinced that he is entitled to salary in lieu of notice pursuant to the provisions of section 35 of the [Employment Act](#) as read together with section 36 thereof.
130. By reason of the foregoing, I hereby award the Claimant Kshs. 40,000, salary in lieu of notice.

iii. House allowance for 48 months.

131. The Claimant asserted that throughout his tenure with the Respondent, the latter didn't pay him house allowance. In my view, house allowance is a statutory right for employees and a legal obligation on the part of the employer to honour. Section 31(1) of the [Employment Act](#), 2007, is couched in mandatory terms. It enjoins the employer to provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary. Looking at the payslips presented before the Court, it is clear and the Respondent does not contest, that the item house allowance is present.
132. The Respondent however contends that that the Claimant's salary was a consolidated figure of Kshs. 40,000, which figure therefore included housing allowance. No doubt, Section 31(2) of the [Employment Act](#), 2007, envisages such consolidation. Imperative to state however that where such consolidation is alleged, basis for the allegation must be demonstrated. The Respondent stated that its assertion flows from the contract of employment. No specific clause of the contract was cited to the Court to support it. Equally, I have gone through the appointment letter, it mentions not the consolidation aspect.
133. A house allowance is a monthly entitlement which accrues at the end of every month. Section 90 of the Employment provides that no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage, within twelve months next after the cessation thereof.
134. Applying the limitation imposed by the provision foretasted, I find that part of the Claimant's claim under this head is statute barred. This suit was lodged on 21st February 2018, which means that the



only valid part of this claim, house allowance for three years immediately preceding the date of filing the suit herein. Therefore 20th February 2015-February 2018. Therefore 36 months.

iv. Overtime

135. The Claimant further sought for overtime totalling to Ksh. 296,363. In the case of Rogoli Ole Manadiegi vs General Cargo Services Ltd [2016] eKLR the court held:

“The Employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee.”

136. The Claimant’s pleadings and evidence does not aid him in any manner to meet the foretasted threshold. This court is unable to comprehend how the figures sought were arrived at. His evidence under cross-examination watered down his claim completely.

137. By reason of the foregoing, I hereby decline to make any award under this head in favour of the Claimant.

v. Unpaid annual leave

138. The Claimant further urged this court to award him Kshs. 112,000 for the 84 days unpaid leave. During cross-examination, he admitted having been paid for all his un-utilized leave days. Consequently, the Claim under this head is declined.

vi. Unpaid salaries for January 2018

139. Similarly, the Claimant during cross-examination admitted having been paid salary for the month of January 2018.

vii. N.S.S.F & N.H.I.F for the 14 months

140. I have perused through the Claimant’s payslips placed forth. It is evident that the Respondent religiously deducted the N.S.S.F and N.H.I.F contributions from the Claimant’s salary pursuant to its statutory obligations. It is not the Claimant’s case that the deducted amounts were not remitted to the authorities, for the Claimant’s account. I am unable to understand what informs the claim under this head. It is hereby rejected.

viii. Service pay for the 4 years worked for the Respondent

141. The service pay is payable under section 35 (5) of the *Employment Act* 2007. However, the provision bars some employees from claiming to be entitled to the benefit of service pay. Among those barred are employees who are members of the National Social Security Fund. No doubt, the Claimant was one. By reason of this premise, I decline to grant the relief.

Damages for breach of the right to fair labour practice and not to be discriminated against.

142. I note that the Claimant seeks for damages asserting for violation of his constitutional right to fair labour practice and not to be discriminated against. I have carefully considered his amended memorandum of claim, and see not where he has with specificity set out the manner in which the alleged violation occurred. The relief as sought in the reliefs section of the memorandum does not at all flow from the body of the pleading.



143. It is a trite principle that where a party seeks reliefs upon premise of an alleged violation of *the Constitution*, Constitutional rights and fundamental freedoms, he or she must plead with a higher degree of precision, showing the Constitutional provision in question or violated and the manner in which the violation occurred. See *Anerita Njeru vs Attorney General* [1979] eKLR. The claim under this head is for rejection. It is hereby rejected.

Who should bear the costs of this Claim

144. The Cost of this Claim to be borne by the Respondent herein.

145. The Respondent is hereby ordered to issue the Claimant with a Certificate of Service pursuant to section 51 of the *Employment Act* 2007.

146. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

- a. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
- b. 8 [Eight] months' gross salary as compensation pursuant to the provisions section 49 (1) (c) of the *Employment Act* 2007,Kshs. 320,000.00.
- c. One month's salary in lieu of notice, Kshs. 40,000.00.
- d. House Allowance for 11 [Eleven] months worked..... Kshs. 146, 666.67.
- e. Interest on the sum awarded above at the court rates, from the date of this judgment till full payment.
- f. Cost of this suit.
- g. The Respondent to issue the Claimant Certificate of service pursuant to the provision of section 51 of the *Employment Act* 2007.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023.

.....

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Abiero for Claimant

Ms Wamuyu for Respondent

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.

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OCHARO KEBIRA

JUDGE

