



**Tolo v Rafiki Microfinance Bank Ltd & another (Cause 630 of 2017)
[2023] KEELRC 3356 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3356 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 630 OF 2017
JK GAKERI, J
DECEMBER 18, 2023**

BETWEEN

ERICK OKINYI TOLO CLAIMANT

AND

RAFIKI MICROFINANCE BANK LTD 1ST RESPONDENT

CHASE BANK KENYA 2ND RESPONDENT

JUDGMENT

1. The Claimant filed the instant suit on 31st March, 2017 alleging wrongful dismissal from employment.
2. The Claimant avers that he was employed by the Respondent effective 17th February, 2014 in business development.
3. It is the Claimant's case that following email communication between him and the Senior Retail Manager, Mr. Reuben Kimani Mwangi between 15th April, 2015 and 17th April, 2015, the Claimant was summoned to Nairobi from Kisumu for a face to face meeting which did not take place until the following day, 21st April, 2015 when the Claimant and Reuben Kimani discussed the Kisumu Branch and a meeting with the General Manager was proposed which was never to be but he was given a termination letter which he refused to sign and was given the option to resign which he did on an undisclosed date but received the termination letter on 21st April, 2015 vide email.
4. The Claimant prays for;
 - a. Declaration that termination of the Claimant's employment was unfair and be awarded damages amounting to Kshs.3,232,800/=.
 - b. An order directing the payment of all the Claimant's dues arising out of the period of service.
 - i. General damages at 12 months' salary Kshs.1,320,000.00.



- ii. House allowance Kshs.513,333.00.
- iii. Overtime Kshs.815,000.00.
- iv. Unpaid leave 21 days Kshs.110,000.00.
- v. Unpaid salaries for April 2015 Kshs.110,000.00.
- vi. Pay in lieu of notice Kshs.110,000.00.
- vii. NSSF at 14 months Kshs.231,000.00.
- viii. NHIF at 14 months Kshs.23,800.00.
- c. Certificate of service.
- d. Costs of this suit.
- e. Any other relief this court deems fit to grant or order.

1st Respondent's case

- 5. The 1st Respondent admits that the Claimant was its employee as alleged and the termination of his employment was lawful.
- 6. It is the Respondent's case that the Claimant's performance was poor and was negligent in the performance of his duties and on termination of employment he refused to clear.
- 7. That the termination letter dated 21st April, 2015 was issued on 23rd April, 2015.
- 8. It is the Respondent's case that the Claimant backdated his resignation letter and sent it to the Human Resource Manager on 25th April, 2015.
- 9. The 1st Respondent states that termination of the Claimant's employment was justified.
- 10. It denies owing the Claimant overtime, house allowance and avers that NSSF and NHIF deductions were paid.
- 11. The 1st Respondent prays for dismissal of the Claimant's suit with costs.

2nd Respondent's response

- 12. The 2nd Respondent denies having employed the Claimant and denies all the averments by the Claimant.
- 13. The 2nd Respondent avers that the Claimant's action is misplaced as an abuse of the court process as it does not disclose any action against it.

Claimant's evidence

- 14. On cross-examination, the Claimant confirmed that under his employment contract, he worked from 8.45 am to 5.15 pm on weekdays and 8.45 am – 12.00 on Saturday and could work after hours. The witness admitted that he had no evidence to prove the overtime pay claimed.
- 15. He admitted that the contract was terminable by one (1) month's notice by either party.



16. The Claimant testified that he was reporting to Mr. Reuben Kimani Mwangi and he was invited for a meeting on 20th April, 2015 which was postponed for lack of quorum but took place on 21st April, 2015 when he was served with a termination letter.
17. The Claimant admitted that the resignation letter dated 22nd April, 2015 was his but he had no evidence as to when it was served on the Respondent.
18. The Claimant further admitted that the reason for termination was failure to meet targets.
19. The Claimant testified that performance was an imperative and the issue was discussed on 21st April, 2015.
20. The witness admitted that the sum of Kshs.228,360.35 was transferred to his account in April 2015 and the sum was higher than his monthly salary.
21. The Claimant admitted that he had taken a loan of Kshs.100,000/=.
22. Although the Claimant testified that he returned the Respondent's keys and laptop, he did so in July 2018.
23. It is the Claimant's testimony that his advocate wrote a demand letter on 16th March, 2017 demanding the Claimant's dues.
24. That the sum of Kshs.151,208.50 was debited from the Claimant's salary account and credited to his loan account and the loan was cleared.
25. The witness admitted that his performance was being measured and non-performance was subjected to performance improvement plan after which a decision would be made. That he was supported to improve performance.
26. That out of 8 targets, he met only 2 and his weighted score was 2.110 and the reason for termination was poor performance.
27. The Claimant conceded that prayers 18(c), (d), (e), (g) and (h) were not sustainable.
28. On re-examination, the Claimant testified that while the payslip on record had an entry for basic salary, it had no entry for housing allowance.
29. Similarly, clause 7 of the Letter of Appointment makes no reference to housing allowance.
30. The Claimant further testified that he was given and read through the termination letter on 21st April, 2015 but refused to acknowledge receipt.
31. He denied having signed a performance matrix and target setting.
32. Finally, it was the Claimant's testimony that he had no performance issues prior to 21st April, 2015 and the Respondent had not written to him on how he could enhance performance.

1st Respondent's evidence

33. RWI, Judith Ndunge confirmed that the Claimant's payslip had no entry on housing allowance but was quick to mention that the salary was consolidated, though the contract of employment did not state so, a fact the witness admitted.



34. The witness stated that the Claimant's employment was terminated because of his poor performance and emphasized that performance planning with the supervisor was an annual affair, including joint target setting and execution of the agreement.
35. That in the instant case, performance planning commenced in January 2015 and the targets on record had not been signed by any person.
36. The witness confirmed that the Respondent issued neither a warning nor notice on the Claimant's performance and confirmed that she relied on the termination letter.
37. The witness confirmed that the unsigned document was a performance management form.
38. That the document on the performance of Kisumu was generated from the system.
39. The witness testified that the Claimant received the termination letter, read but refused to sign it, a fact he admitted in evidence.
40. On re-examination, the witness testified that the Claimant had good documents which the Respondent relied on to employ him and his remaining in employment was based on performance.
41. That the variable pay was based on performance and the Claimant did not earn any point for bonus pay.
42. That the letter of termination tabulated is performance and variables and the Claimant had mobilised very few loans.
43. According to the witness, the Claimant had not complained about house allowance or demand it and payslips were online.
44. That the Claimant did not work for the entire month of April but was paid Kshs.103,562.00 as well pay in lieu of notice.

Claimant's submission

45. Counsel addressed three issues on whether;
 - i. Termination of the Claimant's employment was lawful.
 - ii. Termination of the Claimant's employment on account of poor performance was lawful.
 - iii. The Claimant is entitled to the reliefs sought.
46. On the 1st issue, counsel submitted that the termination was unfair as the Claimant addressed the concerns raised by his supervisor and had meetings in Nairobi where he was given an option to resign or pick the termination letter and he was not given the opportunity to defend himself.
47. That no discussion on poor performance took place and no termination letter was issued.
48. Counsel submitted that the provisions of the *Employment Act*, 2007 were not complied with specifically the provisions of Sections 41, 43 and 45 of the Act.
49. Reliance was made on the decisions in *Loise Otieno V Kenya Commercial Bank Ltd and Kenfreight (EA) Ltd V Benson K. Nguti* (2016) eKLR to reinforce the submission.
50. On the 2nd issue, counsel submitted that the provisions of Section 45(2)(b) of the *Employment Act* were not complied with.



51. Reliance was also made on the sentiments of the court in *Jane Samba Mukala V Ol Tukai Lodge Ltd* (2013) eKLR and *Samuel Nguru Mutonya V National Bank of Kenya* on how an employee ought to be terminated from employment on account of poor performance, to submit that the employer is bound to demonstrate attempts to address performance and the same did not happen in the instant suit.
52. The holding in *Maina Mwangi V Thika Coffee Mills Ltd* (2014) eKLR was cited to urge that poor performance could not be addressed by one evaluation.
53. According to counsel, the Claimant's performance was exemplary, as exemplified by the confirmation and the Claimant had no warning letter.
54. On the reliefs sought, counsel urged that since the Claimant worked for one year, two months and served diligently, 12 months' salary would be fair compensation and was entitled to one (1) month's notice, unpaid house allowance pursuant to the provisions of Section 31 of the *Employment Act, 2007* and certificate of service, total Kshs.2,385,000/= with costs as held in *Hewitt & Co. V Joseph* AIR (1918) Cal 717 and *Myres V Daffris* (1880) 5 Ex D 180.

Respondent's submissions

55. Counsel submitted on termination of the Claimant's employment, entitlement to reliefs and costs of the suit.
56. On the 1st issue, counsel relied on various provisions of the *Employment Act, 2007*, specifically Sections 43, 44, 45 and 47(5) as well as Clause 17 of the contract of employment to urge that the Respondent had a justifiable reason to terminate the Claimant's employment as he was underperforming at the workplace, a fact the Claimant admitted on cross-examination. That the Claimant additionally confirmed that remaining in the Respondent's employment was dependent on performance.
57. Reliance was also made on the decisions in *Joseph Mwaniki Ng'ang'a V United Millers Ltd* (2022) eKLR as well as *Heritage Insurance Co. Ltd V Christopher Onyango & 23 others* (2018) eKLR to urge that the termination of the Claimant's employment was neither wrongful nor unfair.
58. Counsel submitted that since the Claimant had withdrawn prayers number (c), (d), (e), (f), (g) and (h) of the Memorandum of Claim, the same were unsustainable.
59. Counsel further urged the court to dismiss the claim for general damages as it was unjustified as the Respondent invoked clause 17 of the contract of employment which permitted either party to terminate the employment contract.
60. Counsel further invited the court to award one (1) month's salary, if it found that termination of the Claimant's employment was unfair.
61. Reliance was made on *Isidor Rachuonyo V Brava Food Industries Ltd* (2021) eKLR and *Joseph Mwaniki Ng'ang'a V United Millers Ltd* (Supra) where the court awarded 2 and 3 months' salary as compensation respectively.
62. Counsel urged the court to dismiss the claim with costs.

Determination

63. The issues that commend themselves for determination are;
 - i. Whether termination of the Claimant's employment on account of poor performance was lawful and fair.



- ii. Whether the Claimant is entitled to the reliefs sought.
64. Before delving into the issues isolated above, it is essential to determine whether the Claimant resigned from employment or was dismissed by the Respondent.
65. The Claimant testified that after he came from Kisumu to Nairobi, the meeting slated for 21st April, 2015 could not take off for want of quorum and was adjourned to the following day when he met with two managers.
66. The Claimant's written statement and the evidence adduced on cross-examination, on this issue are contradictory. While in the statement he states that the General Manager was absent and there was no word from his supervisor, Mr. Reuben Kimani Mwangi or head of talent Nicholas Kaweru, and he received a termination letter effective immediately but refused to sign, in court, he was explicit that a meeting took place.
67. It was his testimony that he received the letter, read it but refused to acknowledge receipt but purported to resign on the following day by letter dated 22nd April, 2015 whose delivery date was unclear as he had no evidence of the email forwarding that letter.
68. In the court's view, having been given the termination and read its contents which stated that the termination was with immediate effect, the Claimant's employment stood terminated on 21st April, 2015.
69. Having admitted that he was aware of the contents of the letter, the refusal to acknowledge receipt was of no consequence as notice had been given, a fact he did not contest.
70. Fortunately, none of the parties contested this issue and the Claimant's case is grounded on unlawful termination as opposed to resignation.
71. Strangely, counsel for the 1st Respondent submitted that the Respondent did not issue a termination letter yet the Claimant testified that he was given a copy and read through on 21st April, 2015.
72. As regards termination, parties have adopted contrasting positions with the Claimant maintaining that his termination was substantively and procedurally unfair. The Respondent, on the other hand avers that it was conducted procedurally and it had a valid reason for the termination.
73. Regrettably, the Respondent did not issue a notice to show cause or any notice informing the Claimant that his performance was wanting.
74. The letter of termination of employment dated 21st April, 2015, which RWI relied on exclusively accuses the Claimant of poor performance and tabulates parameters involved, targets, achievement and the variance which prima facie reflected a poor performance.
75. That the Kisumu Branch was making losses 14 months since commencement of operations and finally that despite counselling sessions by management, written and verbal warnings, the Claimant's performance had not improved. That the Claimant's inability to perform amounted to gross negligence.
76. Under Section 45(2) of the [Employment Act](#), 2007, for a termination of employment to pass the fairness test, it must be proved that the employer had a valid and fair reason to terminate the employee's employment and conducted the termination in accordance with a fair procedure.
77. The first limb of the issue is whether the Respondent had demonstrated that it had a valid and fair reason to terminate the Claimant's employment.



78. Pages 70 – 72 of the Respondent’s undated and unsigned Talent and Organization Development Policy version 0115 embodies detailed provisions on performance management.
79. According to the Manual, Performance Management was a systematic process involving employees and was carried out throughout the year as confirmed by RWI.
80. The process included planning i.e setting expectations, job description and Balanced Score Card (BSC), continually monitoring, monthly/weekly reporting, developing capacity, ie training and development, periodical rating performance and rewarding good performance.
81. The manual required the preparation of a BSC by all employees annually.
82. It requires no emphasis that the BSC was an agreement between the appraiser and the appraisee.
83. The appraisal process entailed the employee completing a self-appraisal form and forwarding the same to the evaluator who after completing the evaluation would meet the evaluatee to discuss the performance and the employee would sign the evaluation to confirm that it had been explained and discussed.
84. That areas of improvement must be addressed highlighting the strategies for improvement.
85. Appraisals were carried out twice in a year, mid-year and end year and appraisal forms were maintained in personal files.
86. Finally, the policy provides that new employees with unacceptable ratings would be given an opportunity to improve performance and repeated failure to achieve in critical areas would necessitate disciplinary action.
87. Managers of the company are enjoined to focus on training, counselling, restricting jobs or redistributing jobs to remedy bad or substandard performance.
88. In a nutshell, the Respondent’s policy succinctly captured the performance management framework.
89. As correctly submitted by the Claimant’s counsel, termination of an employment on the ground of poor performance was addressed in *Jane Sambu Mukalla V Ol Tukai Lodge Ltd (Supra)* 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 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.”

90. The court expressed similar sentiments in *Samuel Nguru Mutonya V National Bank of Kenya Ltd.*
91. I will now proceed to determine whether the Respondent acted in accordance with the provisions of its Talent and Organization Development Policy version 0115.
92. It is not in dispute that the Respondent had put in place a Performance Management Policy to enable it measure performance and had institutionalized the Balance Score Card and RWI confirmed as much on cross-examination.
93. Puzzlingly, although RWI testified that performance planning and monitoring was an annual affair, the policy provided for 2 appraisals annually and the witness had not executed the Balance Score Card between the Claimant and the supervisor since 17th February, 2014 when he joined the Respondent.
94. RWII confirmed that targets were agreed upon by employees and their supervisors but had none to show in respect of the Claimant.
95. Although RWII confirmed that the Performance Planning herein commenced in January 2015, she availed no verifiable evidence of the agreement.
96. The Respondent’s policy is unambiguous that the “Balance Score Card is an essential agreement between the appraiser and the employee.”
97. Even assuming that the Claimant had a BSC, RWII availed no evidence of continual monitoring of performance or periodical rating as demanded by the policy.
98. Equally, although RWII confirmed on cross-examination that the Claimant’s employment was terminated for poor performance, she provided no evidence as to when the Respondent discovered that the Claimant’s performance was wanting or when it notified him of the same and whether it placed him on a performance improvement plan and for how long.
99. Instructively, RWII confirmed that the Respondent neither issued a warning nor other notice to the Claimant on his performance
100. In a similar vein, although the termination letter makes reference to counselling sessions with management and warnings, the Respondent had no evidence to substantiate the allegations.
101. Finally, the Respondent adduced no evidence to demonstrate that the Table reproduced in the termination letter was part of the Balance Score Card or the Balance Score Card itself and when it was executed by the Claimant and his supervisor.
102. The totality of the evidence herein is that the Respondent has failed to prove that it evaluated or appraised the Claimant on the basis of mutually agreed targets, was invited to discuss the issue and defended himself and was put on a performance improvement plan and invited again to discuss his performance before the decision to terminate his employment was taken.
103. However, the Claimant owned up the table reproduced in the termination letter and his performance was wanting having met targets in 2 items only out of 8 and was also aware that he was obligated to perform to remain in employment.
104. Significantly, the Claimant also confirmed that he was supported to improve performance.



105. He also admitted that the Kisumu Branch was not doing well.
106. From the foregoing, it is the finding of the court although the Claimant had not signed a formal Balance Score Card, he was aware of the targets he had to meet and worked towards their attainment but his overall performance was unsatisfactory. The Respondent has proved on a balance of probabilities that it had a substantive justification to terminate the Claimant's employment within the meaning of Section 43(2) of the *Employment Act*, 2007.
107. Arguably, the Respondent had a reasonable ground for the genuine belief that the Claimant's performance was poor.

Procedure

108. As underscored by the Court of Appeal in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR, the procedural precepts provided by Section 41 of the *Employment Act*, 2007 are mandatory and any termination of employment or summary dismissal conducted without due compliance with the provisions is irregular as held in Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR.
109. Section 41(1) of the Act provides that;

“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.”
110. In Postal Corporation of Kenya V Andrew K. Tanui (Supra), the Court of Appeal itemised the elements of Section 41 of the *Employment Act*, 2007.
111. From the evidence on record, it is clear that the Respondent did not comply with the provisions of Section 41 of the *Employment Act*, 2007.
112. For instance, as adverted to elsewhere in this judgement, RWII confirmed that neither a warning nor notice was given to the Claimant to inform him that termination of employment on the ground of poor performance was being considered nor was he invited for a hearing and no disciplinary hearing took place.
113. The Respondent did not allege that the meeting held on 21st April, 2015 was a disciplinary hearing.
114. In any event, the Respondent availed neither the list of attendees of the meeting nor minutes of the proceedings, the Claimant was thus denied the opportunity to defend himself and attend a hearing in the company of a representative of his choice.
115. He was denied the opportunity to be heard.
116. For the foregoing reasons, it is the finding of the court that the Respondent has failed to establish that termination of the Claimant's employment was conducted in accordance with the provisions of Section 41 of the *Employment Act*, 2007.
117. The court is persuaded that the termination was procedurally flawed and thus unfair within the meaning of Section 45(2) of the *Employment Act*, 2007.
118. As regards the reliefs sought, the court proceeds as follows;



A. Declaration

119. Having found that termination of the Claimant's employment was unfair, a declaration to that effect is merited.
120. During the hearing, it became apparent that the Claimant had no evidence to prove the claims for overtime, unpaid leave, unpaid salary for April 2015, NSSF and NHIF deductions for 14 months and conceded the same.
121. The outstanding prayers are general damages at 12 months' salary, house allowance, pay in lieu of notice and certificate of service.

B. Certificate of service

122. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#), 2007 and the same must be issued within 30 days.

C. Pay in lieu of notice

123. On cross-examination, the Claimant confirmed that the payslip for April 2015 revealed that salary in lieu of notice had been paid and that of the total amount due to him, the sum of Kshs.151,208.00 was credited to his loan account, having admitted that he had taken a loan.
124. RWI, on re-examination, testified that the Claimant was paid in lieu of notice and out of the Kshs.158,000/= shown as pay in lieu of notice Kshs.48,000/= was untaken leave.
125. The claim for pay in lieu of notice is unsustainable and is dismissed.

D. House allowance

126. On cross-examination, RWI confirmed that the Claimant's contract of employment did not state that his salary was consolidated and similarly confirmed that the payslip on record had no component on salary allowance, a fact the witness repeated on re-examination that the salary indicated was basic pay.
127. Under Section 31 of the [Employment Act](#), 2007, provision of housing or payment of an allowance to enable the employee obtain reasonable accommodation is imperative.
128. Needless to emphasize, Section 20 of the [Employment Act](#) requires an employer to give an itemised pay statement.
129. Having failed to demonstrate that it was paying the Claimant housing allowance, the claim for an allowance at 15% of the basic salary is merited, Kshs.331,800/= for the duration served.

E. General damages at 12 months' salary Kshs.1,320,000.00

130. The Claimant herein has not demonstrated entitlement to an award of general damages.
131. However, having found that termination of the Claimant's employment on account of poor performance was unfair for want of procedural propriety, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act](#), 2007.
132. In ascertaining the quantum of compensation, the court has taken into consideration the following;
 - i. The Respondent did not express his wish to continue in the Respondent's employment.
 - ii. The Claimant did not appeal the Respondent's decision to terminate his employment.



- iii. The Claimant substantially contributed to the termination of employment.
 - iv. The Claimant was an employee of the Respondent for a duration of one (1) year and 2 months, a fairly short time.
 - v. The Claimant had no previous cases of misconduct or warning.
133. In the circumstances, the court is satisfied that the equivalent of 2 months' salary is fair.
134. Noteworthy, it is unclear as to why the Claimant sued the 2nd Respondent as he neither accused the 2nd Respondent for any act or omission nor adduce evidence implicating the 2nd Respondent in the termination of employment.
135. The suit against the 2nd Respondent is dismissed with costs.
136. In the upshot, judgement is entered for the Claimant against the 1st Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
 - b. Housing allowance at 15% of basic salary, Kshs.331,800.00.
 - c. Equivalent of two months' salary Kshs.220,000/=.
 - d. Costs of this suit.
 - e. Interest at court rates from the date of judgement till payment in full.
 - f. Certificate of service to issue within 30 days.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF DECEMBER 2023

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil 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.

DR. JACOB GAKERI

JUDGE

