



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO.867 OF 2019**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**JUDITH WAWIRA KIRAGU.....CLAIMANT**

**VERSUS**

**KENYA WOMEN MICROFINANCE**

**BANK PLC.....RESPONDENT**

**JUDGEMENT**

**PREAMBLE**

1. The Claimant filed her claim vide a memorandum of claim dated 17<sup>th</sup> December, 2019.

The Respondents response is dated 27<sup>th</sup> January, 2020.

**CLAIMANT'S EVIDENCE**

2. The Claimant was employed by the Respondent on 3<sup>rd</sup> May, 1999 as Business Development Officer. She says due to her industry and dedication she was promoted over the years.

At the time of her termination, she was on a contract of 5 years from 1<sup>st</sup> January, 2017 and was earning Kshs.544,500/= and the allowances hereunder: -

- (i) Car allowance Kshs.40,000/=
- (ii) Entertainment allowance Kshs.30,000/=
- (iii) Telephone allowance Kshs.10,000/=
- (iv) Gratuity per month 25% of basic salary per month.
- (v) Car Loan entitlement Kshs.2,500,000/=.
- (vi) Health club membership per year Kshs.100,000/=
- (vii) Annual leave 30 days.

3. Claimant says she worked diligently and for the 20 years she served she never had any disciplinary issues.

4. On 23<sup>rd</sup> July, 2018 Respondent transferred Claimant from Central Zone in Nyeri to Eastern Zone in Machakos as General Manager Operations Department. Barely a year after on 11<sup>th</sup> March, 2019 she was transferred to Head Office.

5. She says the transfer to Head Office was to inconvenience her to cause her to resign.

6. She says on 7<sup>th</sup> March, 2019 George Kinyanjui called her for a meeting on 8<sup>th</sup> March, 2019 and she met George Kinyanjui and Nancy Mwangi who was Director Operations. The two asked her to resign or else she would be terminated.

She declined to resign and was sent on 48 days compulsory leave with effect from 12<sup>th</sup> March, 2019 to 21<sup>st</sup> May, 2019.

7. She says at the time she was compelled to go on leave there was no disciplinary issue against her as required in the Kenya Women Finance Trust (KWFT) Human Resource Policies and procedure Manual (2018).

Performance appraisal are done once per year and should be submitted by 3<sup>rd</sup> January, 2018.

She says she underwent appraisal in 2018 but was subjected to another by Director of Microfinance the same year and the first one was by her Supervisor Operations Director.

8. She says at the same time her entertainment allowance, telephone and car allowance were withdrawn and were part of her contract.

9. She says when she was about to resume her duty, she was sent a notice to show cause dated 17<sup>th</sup> May, 2019 which she received on 20<sup>th</sup> May, 2019.

She responded to the notice to show cause and was forced to undergo a further performance review though she had already undergone one.

10. She says she was not given the appraisal but was called for a disciplinary meeting for 24<sup>th</sup> May, 2019. She requested for more time and so the disciplinary meeting proceeded on 31<sup>st</sup> May, 2019.

11. She says in the meeting was General Manager, Human Resource, Operations Director, Microfinance Director and Finance Director.

She says the committee was biased as her accuser one George Kinyanjui was present.

12. After the disciplinary meeting, her employment was terminated with effect from 6<sup>th</sup> June, 2019 due to alleged unsatisfactory performance.

She says her termination was already planned with the successive transfers, compulsory leave and dismissal soon after.

She says disciplinary process was hurried and prejudiced the Claimant.

13. She says she served respondent for 20 years and the actions of Respondent were uncalled for.

14. She says she has not been able to secure another employment and has suffered loss and prays for compensation for a total of Kshs.24,650,000/=.

15. She also prays to be issued certificate of service.

16. The Claimant says if she had underperformed, she would have been subjected to performance improvement plan addressing areas of underperformance for 3 months and that was not done. She prays for damages and certificate of service.

## **RESPONDENT'S EVIDENCE**

17. The Respondent denies Claimant was entirely industrious and dedicated during her 20 years of employment and without performance issues and will put her to strict proof.

18. The Respondent says the Claimant had accepted to be transferred to any part in the country when she signed her employment contract.

He says the transfer to the Central Zone was to give Claimant a less challenging environment.

19. As for leave the Respondent avers he asked her to take her accrued annual leave as provided in Section 28 of Employment Act.

20. As for her appraisal the Respondent says the same is done when a staff is leaving on station to another and further he alleges that George Kinyanjui was qualified to carry out her appraisal.

21. As for allowances the Respondent says according to their policies and procedures there are some paid to the employee to enable them perform their duties and some can be withdrawn once she was transferred to head office. She no longer required some benefits like car allowance and telephone as she had those facilities. He says the rest of the allowances were withdrawn across board.

He says employee was informed of the same.

22. He further says that there was nothing to stop Respondent to send her notice to show cause when she was on leave. He also says there was no need to discuss appraisal with the Claimant in different zones.

23. The Respondent states the Claimant was subjected to several appraisals as was heading various zones.

Further he says that the appraisal was for Central and Eastern Zone and Claimant was part of those appraisals and there are minutes and also agreed targets are clarified.

24. The Respondent says there were genuine performance issues with the Claimant as per minutes dated 31<sup>st</sup> May, 2019 and she was asked to comment on them but said she had no comments. She also confirmed she had the necessary resources.

25. The Respondent states Claimant was aware of budget perimeters and expectations of her role.

The Respondent said George Kinyanjui was the Claimant's supervisor and there was every reason for him to be present in the disciplinary meeting.

The Respondent says he did everything in the process of disciplinary meeting in a valid way and so says the Claimant's prayers made in paragraph 38 are denied.

### **ISSUES FOR DETERMINATION**

26 (a) The issues which the court will consider are whether the Claimant's termination of employment was unlawful and unprocedural.

(b) Whether she is entitled to the remedies claimed.

### **DETERMINATION**

27. The reasons given by the Respondent for terminating the Claimant's employment was under performance. Claimant worked for the Respondent from 3<sup>rd</sup> May, 1999 and had risen over the years to the position she was at the time of termination of her employment.

28. She had received a revised contract for 5 years from 1<sup>st</sup> January, 2017 and the terms and benefits are well set out in that contract. Her appraisal for the years before 2018 were quite good as per the letters produced in court from 2013, and 2014 and 2016.

29. Claimant was transferred from Central Zone to Eastern zone from 1<sup>st</sup> August, 2018.

Shortly thereafter she was transferred to head office on 12<sup>th</sup> March, 2019.

She was also ordered to go on annual leave for 48 days from 12<sup>th</sup> March, 2019 to 21<sup>st</sup> May, 2019.

30. While on leave she received a letter of show cause dated 17<sup>th</sup> May, in relation to her poor performance.

She responded on 22<sup>nd</sup> May, 2019 but was invited for a disciplinary meeting on 31<sup>st</sup> May, 2019.

31. The court have considered the Claimant's history with Kenya Women Finance Trust. She had worked with the same employer from 1999 till the date of termination of her services. That she had risen over the rank where her initial salary was Kshs.17,240/= and had now risen to Kshs.544,500/= cannot be overlooked.

She had from the evidence on record performed successfully over the years otherwise she would not have survived in the bank all that period.

32. The series of transfers and disciplinary procedures that happened in 2018 – 2019 seem to raise eyebrows on the conduct of the Respondent toward the claimant.

The Claimant was transferred to Eastern Province from 1<sup>st</sup> August, 2018 to 11<sup>th</sup> March, 2019 when she was then moved to the head office. There was even no time to settle and show her performance process in the eastern province. On 11<sup>th</sup> March she was transferred to head office and was then sent on leave.

33. She did not apply for leave as required by Kenya Women Finance Trustee Microfinance Human Resource Manual paragraph 4.3.2.

This seems to be forced leave even though the Respondent is denying the same.

The Claimant even claims that the Respondent had asked her to resign or she would be terminated. Of course, there is no evidence that this happened.

34. But looking at the conduct of some of the management of the Respondent towards the Claimant at this period it would point to the fact that there was some form of intimidation.

35. The case of **ELIZABETH WASHERE VS AIRTEL K. LIMITED AND ANOTHER CAUSE NO.1972 OF 2012** the court stated “whether conduct is fair or not necessarily involves a degree of subjective judgment. However this is not to suggest that the assessment of fairness is undeterred or a matter of whim. Rather regard must be had to the residual unfair labour practice and if the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to the particular employee or employees can then be termed unfair labour practice.

36. This case before me seems to boulder on such because within a period of about five months the Claimant was transferred twice. She was then sent on leave and was then taken through disciplinary process and was finally terminated for poor performance.

37. She was appraised twice within one year even though the Kenya Women Finance Trust Microfinance manual provide for appraisal at the end of the year and be completed by 31<sup>st</sup> January of the following year.

In this case she was appraised on 22<sup>nd</sup> May, 2019 and appraiser was George Kinyanjui the Director Microfinance.

She says she was supposed to be appraised by operation Director and Managing Director. I am not sure what are the implications of not being appraised by the persons provided in their HR manual but I would surmise that since this was the structure contained in the aforesaid Human Resource Manual it should be followed in all fairness.

38. Further the Respondent should have specified to the Claimant the specific gaps in her performance. To refer to broad failure to meet budget expectations is not sufficient specifics. In the notice to show cause claimant attempted to respond to the issues raised but again the Respondent in generalities said they were not satisfied with her response. They then invited her to the disciplinary meeting and a few days later she got a termination letter.

39. In pursuance of fair labour practice the Claimant who had worked for the Respondent for over 20 years without any warning letters or other disciplinary issues should have been subjected to performance improvement plan as provided in their manual. That was only fair and human to give an employee who had served for that long period of time an opportunity to improve on her performance if at all it was that dismal.

According to performance improvement plan if staff member does not improve after this process which should take a maximum of three months then the staff can be referred for disciplinary action.

40. This process was overlooked by the Respondent and seems they were in a hurry to terminate the Claimant.

41. The court having considered critically all the evidence both in the pleadings and in the evidence adduced in court as well as the submissions the court finds that the Respondent did not have clear and specific reason for terminating the Claimant’s employment.

42. The Respondent may have attempted to follow the procedure partly as stipulated in Section 41 of the Employment Act in that they called the Claimant for the disciplinary meeting after giving her a notice to show cause. They also informed her to call a witness even though she did not call one. However the disciplinary meeting minutes were produced in court and Claimant even appended her signature.

As far as the procedure goes the Respondent complied.

What is in contention in my view is the reasons given for the termination and the process that proceeded the disciplinary meeting which amounted to intimidation of the Claimant.

This is in contravention of Section 45 of the Employment Act that stipulates:

“no employer shall terminate the employment of an employee unfairly”.

Further in subsection 2 it provides that “termination of employment by an employer is unfair if the employer fails to prove reasons for termination is valid: -

(1) That the reason for termination is fair reason.

(2) Related to the employee’s conduct capacity and compatibility based on operational requirements of the employer

(3) and that the employment was terminated in accordance to fair procedure.

43. As earlier said the Respondent should have given Claimant specifics for their termination and notice that he was considering terminating her on grounds of poor performance.

44. In the case of **ALOIS MALUVU VS CITRUS KENYA LIMITED AND ANOTHER (2018) eKLR** court held that there should be warning that should the Claimant’s performance not improve he would be terminated. The appraisal by his supervisor did not in any way

warn the Claimant of impending termination.

The Claimant should have been given specific time frame to improve failure of which he would be terminated. This is especially significant in a case where Claimant who for a period of 10 years was rated as a high performer and was not warned at the commencement of the performance appraisal. He was therefore ambushed by the disciplinary inquiry.

45. The case before me is quite similar to the above cause and also is supported by case of **NAUMY JEMUTAI VS UNILIVER TEA KENYA LIMITED (2020) eKLR** where court held that employee must be informed of poor performance and that it is the ground or the reason which employer is considering termination of employment and allow employee to give her defence in the presence of another employee of her choice.

46. In the final conclusion the Respondent reason for terminating the Claimant was unfair and is therefore unfair labour practice in the meaning of Article 41 of the Constitution of Kenya 2010 and Section 45 of the Employment Act 2007. In view of the foregoing I declare the termination of the claimant unfair as well as unlawful.

### **REMEDIES**

47 (a) Court did not have the benefits of the contract referred to and produced and so there is no provision to award salary for the remaining period of contract which is not served and in any case there are other sufficient remedies in Section 49 of the Employment Act 2007. This prayer is declined.

### **(b) GRATUITY**

The documents in court in Respondent's bundle (11) show gratuity paid Kshs.3,818,199/26 and as this court is not mandated to encourage unjust enrichment this prayer is declined.

Furthermore, there is no prove or particulars.

(c) I will award the Holiday allowance as provided in her contract of 2019/2021 Kshs.300,000/=.

(d) Car allowance April/May 2019 Kshs.80,000/=.

(e) Entertainment allowance April/May, 2019 Kshs.60000/=.

(f) Telephone allowance April/May 2019 Kshs.20,000/=.

(g) Transfer per diem Kshs.140,000/=.

(h) Transport allowance is declined as is covered in g above.

The above were granted because even if the Respondent had withdrawn the allowances the law provides that an employer needs to consult an employee before he can make changes to their terms of employment and the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing.

There was no evidence in court when the Respondent removed the allowances initially provided in the employment contract of the Claimant that there was consultation.

The same must be paid.

### **CONCLUSION**

The total award to the Claimant is Kshs.600,000/=.

Costs are awarded to the Claimant.

Also interest is given from date of judgement till final payment.

Certificate of service to be issued within 30 days of judgement.

It is so ordered.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 15<sup>TH</sup> DAY OF FEBRUARY 2022.**

**ANNA NGIBUINI MWAURE**

**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> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**