



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 656 OF 2017

NUGI KAHIGA.....CLAIMANT

VERSUS

ACCESS KENYA GROUP LTD.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent with effect from 3rd August 2015, as a Business Development Manager. It was not long before the employment relationship hit headwinds and his employment was terminated on 22nd March, 2017. He has termed the termination as unfair and an ambush. As a result, he seeks the following orders;

- a) a declaration that the respondent breached his employment contract;**
- b) a declaration that the respondent unlawfully and unfairly terminated his employment;**
- c) one-month salary in lieu of notice being the sum of Kshs 350,000/=;**
- d) accumulated leave days earned being the sum of Kshs 214,035.17;**
- e) compensatory damages in the sum of Kshs 4,200,000.00; and**
- f) loss of income for the unexpired contract period until retirement being the sum of Kshs 105,000,000.00.**

2. The respondent opposed the claim vide its Response dated 23rd May 2017 and through which it avers that the claimant's termination was lawful and procedural. It states that the claimant's performance was wanting as he was unable to meet his performance targets and hence was offered a chance to redeem himself through a Performance Enhancement Plan but he declined to execute the same without any valid basis. The respondent prays that the claim be dismissed with costs.

3. The matter proceeded for hearing on 19th October, 2021 and both parties called oral evidence in support of their respective cases.

Claimant's case

4. The claimant adopted his witness statement and the bundle of documents filed together with his claim, to constitute part of his evidence in chief. The documents were also produced and marked as exhibits before court.

5. It was the claimant's testimony that he was employed by the respondent with effect from 3rd August 2015 as a Business Development Manager and that he served in the position with diligence, dedication and utmost loyalty. That he only worked for the respondent for a period of 1 year 7 months and a few days. That on 11th January, 2017, there were two meetings between himself, the respondent's Human Resource Manager and the Sales and Marketing Manager who was his immediate supervisor (line manager). That the objective of both meetings was to discuss and review his Cloud sales performance. That subsequently, on 20th January, 2017, his supervisor issued him with a letter, which indicated that he would be placed on Performance Enhanced Plan (PEP) on account of his underperformance in the cloud sales.

6. That the PEP process was to take place between 23rd January, 2017 to 22nd March, 2017 with assessments from time to time. That he had challenged the process through various emails exchanged between himself and his supervisor on the basis that he had not been issued with a job description. That vide an email of 20th January, 2017, the respondent's Human Resource Manager, advised him that he did not require a

job description as the same was similar to his key performance targets (KPIs). He stated that the said KPIs were not specified in his contract of employment. That subsequently, on 15th March, 2017, he was invited to a disciplinary committee hearing where he appeared with a fellow colleague as he had been advised. That at the disciplinary hearing, he faced charges of insubordination, failure to follow through with the PEP process and negligence in the performance of his duties. That thereafter, he was served with a letter terminating his services.

Respondent's case

7. The respondent called oral evidence through its group Human Resource Manager, Ms. Ruth Wanjugu, who testified as RW1. She also adopted her witness statement and bundle of documents filed on behalf of the respondent, to constitute part of her evidence in chief. The documents were also produced and marked as exhibits before court.

8. Ms. Wanjugu told court that the claimant was hired to drive the cloud portfolio and that though his contract of employment did not indicate so, the job advert through which he was recruited, clearly stipulated the same. It was her testimony that the claimant adamantly failed to sign the PEP document despite instructions from his line manager to do so. That the claimant declined to sign the PEP despite being advised that the same was not to his detriment, but rather to enhance his performance. That there was therefore no valid basis for the claimant's refusal to execute the PEP. That subsequently, he was invited for a disciplinary hearing which was convened on 17th March, 2017, and which he attended in the company of Ms. Clara Kamunyu, a fellow colleague. That the claimant's responses during the disciplinary hearing were not satisfactory hence the committee arrived at a unanimous decision to terminate his employment.

Submissions

9. At the close of the trial, each party filed written submissions with the claimant submitting that the respondent had failed to meet the statutory threshold by proving the reasons for his termination. That no evidence was provided to prove the validity of the reasons brought forward in support of the termination of his contract. The case of **Idris Omar Abdi vs Garissa Water and Sewerage Company Limited (20121) eKLR and Carolyn L. Musonye vs Panari Hotel Ltd [2017] eKLR** was cited in support of the claimant's submissions.

10. On the other hand, the respondent submitted that the claimant was lawfully terminated for gross misconduct as he failed to participate in the PEP process and to execute the PEP document. To buttress its submissions, it invited the court to consider the determination in the case of **Kennedy Maina Mirera vs Barclays Bank of Kenya Limited [2018] eKLR**. The respondent further submitted that the claimant was not entitled to the reliefs sought.

Analysis and determination

11. Upon consideration of the issues arising from the pleadings, the evidence on record, testimonies before court and the rival submissions, it is definite that this court is being called upon to resolve the following questions;

i. Whether the respondent had a valid and fair reason to terminate the employment of the claimant?

ii. Whether the claimant's termination was in accordance with fair procedure?

iii. Whether the claimant is entitled to the reliefs sought?

Whether the respondent had a valid and fair reason to terminate the employment of the claimant?

12. In order to prove fair termination under the Employment Act (Act), an employer must satisfy that there was substantive justification to warrant termination of an employee. Substantive justification entails prove of *reasons for termination* of an employee and is provided for under *Sections 43 and 45 (2) (a) and (b) of the Employment Act*. *The onus of proving that there exists a substantive justification for termination lies with the employer. In this regard, Section 43 provides as follows: -*

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

13. On its part, **section 45 (2) (a) and (b)** provides that a termination of employment is unfair if the employer fails to prove-

a) that the reason for the termination is valid;

b) that the reason for the termination is a fair reason-

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; ...

14. The aforesaid provisions are the guiding light towards proving existence of substantive justification in a case of termination of

employment.

15. The reasons for the claimant's termination are aptly captured in his letter of termination which reads in part: -

“The DC reviewed all the communication shared by your line manager as well as the emails in regard to the aforementioned issues subsequently submitted by you on the same date; and although as alleged by you there may have been challenges that hindered your performance, there were no supporting documentation submitted by you to show the measures and steps you undertook to mitigate or address the challenges hence inference that there was lack of proactivity on your part which is a prerequisite to the performance of the nature of the role you hold. Further, in regard to the issues raised on the PEP process, upon escalation of the same by your line manager to HR, the same were clearly addressed and responded as per the letter dated 20th February, 2017 from HR to you and despite communication by email that you lacked a job description, as you have KPIs, which are synonymous to what would be contained in a job description and the former was developed by you and reviewed and agreed upon together with your line manager, the lack of the former is not sufficient defense for your failure to undertake the tasks assigned, meet your deliverable, respond to communication and or undertake further action where the nature of support you required was not received. In light of the above issues raised and considering the importance of the role you hold within the organisation, which requires somebody who portrays a proactive attitude and is willing to see through issues to their closure or escalate matters where required, it is no longer tenable of the organisation to retain you in such role...”

16. The genesis of the dispute stems from the email of 17th January, 2017 and the internal memo dated 20th January, 2017, to the claimant by his line manager (the respondent's Sales and Marketing Director), to the effect that he was to be placed on a two months Performance Enhancement Plan. The memo reads in part: -

“This is further to the meetings held between Group HR Manager, Sales & Marketing Director and yourself on 11th January, and one between Sales & Marketing Director and yourself on 12th January, 2017 on the said subject matter. In both meetings, we reviewed cloud performance standing at 45% of Q1 targets which is below expected standards and notified you that a performance management process shall be undertaken to assist you improve your performance. As a result, of this underperformance, as notified you shall be put on a Performance Enhancement Plan (PEP) for a period of 60 days and work closely with your immediate supervisor to improve performance. The said PEP shall commence on the 23rd January, 2017. During the meeting held on 12th January, 2017, the following were identified and mentioned as the gaps in your performance:

- Low cloud YTD performance at 45% in Q1.*
- Lack of regular pipeline review and development of a recovery plan.*
- Lack of strategy on growing cloud sales per team.*
- Lack of flawless and full execution of board paper and sharing of progress report.*
- Failure to respect timelines.*

This letter serves to notify you that upon commencement of your PEP on 23rd January, 2017, the following shall be the KPI's. The same shall be captured in detail in your PEP report. your immediate supervisor shall provide the following support during the process.

- Coaching and mentoring.*
- Timely provision of sales forecast by the revenue managers every Monday.*
- Timely flow through of (sic) escalated cases.*
- Timely approvals of any submitted requests.*

Review sessions shall be held weekly on Tuesdays at 11:00 am starting on 30th January, 2017.

Looking forward to working together towards achieving the desired outcomes. Your sincerely Maina Kio.”

17. The claimant responded vide his email of 9th February, 2017 stating as follows; *“Maina, further to my email below and subsequent meetings and discussion we've had, I wish to state as follows. I am not at all comfortable going through the PEP process indicated in your email below as well as the attachment shared. I have reservations around the process you have highlighted as a result, I will not be in a position to sign the letter given to me indicating my acceptance. Kindly advise what the way forward should be. Many thanks”*

18. The claimant's supervisor responded to his email advising as follows;

- i. that the PEP was an internal performance management process;*
- ii. there was a review of the cloud sales which fell below target plus critical deliverables that had not been delivered satisfactorily;*

- iii. that he had failed to provide factual and substantive grounds as to why he was not in agreement with contents of the PEP; and*
- iv. that the PEP process will proceed as stipulated.*

19. The email further reiterated certain action items that had been agreed upon with the claimant.

20. Vide an email of 12th February 2017, the claimant responded substantively, explaining why he was opposed to being placed on the PEP and requested that the same be stopped unconditionally for the following reasons;

- i. his employment contract did not provide for his exact roles and responsibilities;*
- ii. his employment contract did not have any indication of revenue tagged to him or his role thus making it difficult to state that his performance was below par;*
- iii. he had never had any discussion with his supervisors to clearly define his specific KPI roles and responsibilities and agree to them;*
- iv. he did not have any agreed territory agreement or sales KPIs set out since his employment and none had been presented to him for discussions and/agreement;*
- v. he did not have a documented performance appraisal since he joined employment;*
- vi. his role was shrouded in greyness with regards to deliverables; and*
- vii. he did not feel the tremendous support coming from management with regards to ensuring the success of his role and cloud business in general.*

21. It would seem that following the exchange of email between the claimant and his line manager, the matter was escalated to the Group Human Resource Manager who addressed him vide a detailed internal memo dated 20th February, 2017 as follows;

- i. The performance management process was uniformly applied to all staff so as to help improve their performance;*
- ii. Where a staff underperforms, he or she is placed on PEP and which process was timebound and clearly indicates the deliverables and areas of improvement during such period;*
- iii. His performance was below par and he had no provided evidence to the contrary. That he had over a year to adjust and acclimatize to the work environment which was more than sufficient time to improve his performance;*
- iv. He had in place KPIs which enumerate his performance target as well as his timelines. That the KPIs were synonymous to his job description;*
- v. He was clearly aware of the role he was engaged at the point of employment and the expectations of the company from him;*
- vi. He had been with the company for over a year, which was sufficient time to allow him understand his role and where he did not, he could seek clarity as to what expectations and deliverables the company required of him;*
- vii. The sales report and the MTG, which he was a recipient of, included cloud and enumerated performance and the targets;*
- viii. The company performance review was biannual and he had been taken through probationary performance review in August, 2016;*
- ix. A formal performance appraisal was not the only mode of gauging performance and the company did not have to wait for the same so as to take measures to address underperformance;*
- x. As the staff in charge of cloud business within the company, he was expected to bring his wealth of experience to the role. Hence if at all there were any gaps that he opined as needing to be addressed or support, he had the onus to bring the same to his line manager's attention and if he failed to do so, he could escalate the same through the organization's hierarchy; and*
- xi. The PEP was to continue as stipulated.*

22. The foregoing is the chronology of events that led to the claimant's termination, as he ended up not going through the PEP process.

23. The main line of defence advanced by the claimant in refusing to undergo the PEP process, was that he was never issued with a job description hence his role and responsibilities within the respondent organisation remained unknown to him. That as a result, he was not aware of his performance targets.

24. It is common ground that the claimant was employed as a Business Development Manager and was to drive the respondent's cloud portfolio.

25. In this respect, several things are notable from the record;

26. Firstly, the claimant was taken through a performance appraisal for the period running from August, 2015 till August 2016 upon completion of his probation. The appraisal form contains *specific objectives to be met, specific actions required, comments/ assessment on performance against objectives and performance rating*. The specific objectives as indicated are; *Business Development, Opportunities Creation and Product Development*.

27. The appraisal form indicates one of the specific actions under Business Development as being;

“(i) Ensuring 80% of forecasted cloud business is always and achieved per month by tracking individual cloud pipelines from the members on a weekly basis.

(ii) Ensure that business cloud sales are at Kshs 600,000 and above on month to month. Maintain solid pipeline that is always 3-4 times the target amount.”

28. Secondly, on 2nd December, 2016, the claimant shared a draft of his Key Performance Indicators (KPIs) with his line manager. The same were updated on 7th December, 2016. The said KPI's covered the following areas; *Business Development, Opportunities Creation, Product Development and Partner Engagement*. Each KPI contained a column of description and the measure of performance as well as the attendant weight.

29. It is notable that the KPIs are similar to the specific objectives set out in the probationary appraisal form. In particular, the following is identified as a measure under Business Development;

“(i) Ensuring 80% of forecasted cloud business is always and achieved per month by tracking individual cloud pipelines from the members on a weekly basis.

(ii) Ensuring that business cloud sales are at Kshs 800,000 and above month to month. Maintain solid pipeline from the teams that is always 3-4 times the target amount.”

30. Thirdly, the job advert through which the claimant was recruited provided the job summary as follows; *“responsible for ensuring that internet solutions cloud services and solutions are successfully marketed and sold to targeted markets”*. It went ahead to provide the following as some of his duties and responsibilities;

i. Non IS and non-cloud customer acquisition;

ii. Participating in developing go to market plan for cloud product set;

iii. Assisting in defining sales approach for market conditions;

iv. Assisting the IS sales force in concluding cloud deals on existing and new IS accounts and ensuing customers are installed and billed quickly;

v. Assisting the Solutions Architects team in designing cloud solutions for customers;

vi. Facilitating and conducting training and assisting in development of training material for various channels to market;

vii. Ensuring retention and growth of existing cloud revenue; and

viii. Managing and reporting on a regular basis around pipeline management; customer target initiatives; trends in the market.

31. The above roles, when critically considered, broadly fall within the areas of *Business Development, Opportunities Creation and Product Development*. Indeed, they constitute the very duties, for which the claimant was recruited to perform within the respondent organisation. It cannot be that the same changed once he was recruited. As a matter of fact, the same appear to correlate with the objectives of the claimant as contained in his performance appraisal and in his KPIs, save for the targets which ordinarily, are revised from time to time if not annually, taking into account various factors.

32. From the foregoing it is apparent that the claimant's specific objectives revolved around the same broad areas. As such, it can be inferred that the same were not strange to him.

33. It is instructive to note that the claimant has not disputed the performance gaps. His main contention appears to have been the fact that he needed to be issued with a job description and targets. This was notwithstanding the fact that he had developed his own KPIs and the same resonated with the specific objectives stipulated in his performance appraisal report. It is therefore not clear what other job description the claimant required save for what was already within his knowledge.

34. In as much as the claimant stated that he did not have the job description for the role he was employed to perform, on what basis was he appraised following his probation and on what basis did he use to develop his KPIs?

35. Above and beyond, as at the time, the claimant was to be placed on the PEP process, he had been in the respondent's employment for approximately one and a half years. He cannot therefore hang on to the fact that he did not comprehend what was expected of him in the position he held. Aside from the clarification he sought one month into his employment, there is no evidence that he sought further clarification in the event the initial request yielded no feedback.

36. Coupled with the foregoing, the claimant was no ordinary employee. He was holding a managerial position hence had a team answerable to him. How then was it possible for him to operate and lead a team for all that period without properly comprehending his roles and targets? If indeed, true, then the same was tantamount to setting up the entire team for failure. It would therefore seem absurd if not impossible, that the claimant was working for such a long period of time, without a proper comprehension of his roles and responsibilities.

37. In the event, the claimant had any challenges comprehending his roles and responsibilities, why did he not indicate as much to his line manager or to one of his superiors, higher up within the reporting structure?

38. Further, the claimant's supervisor noted in his performance appraisal report, the following area as needing improvement; "*the extent to which the employee responds to supervisory directions and comments. The extent to which the employee seeks counsel from supervisor on ways to improve performance and follows the same*". Since the claimant did not dispute the contents of the said performance appraisal report, it is presumed that its contents are accurate.

39. Judging from the supervisor's comment, it is apparent that the claimant did not act as expected when it came to seeking clarification on his roles or counsel from his supervisor as regards his performance. This therefore lends credence to the respondent's assertions that the claimant was not proactive when it came to his performance and meeting his targets.

40. From the record, the other reason for which the claimant was to undergo the PEP process and which was listed as part of the allegations facing him at the disciplinary was failure to meet deadlines. The following are some of the instances which are apparent from the evidence before court;

i. The claimant's line manager noted vide an email of 20th September, 2016 that he was yet to submit certain reports despite the same arising during the probation review session. It states in part; "you need to respect deadlines and instructions forthwith. I need this report asap. Take this as the last reminder on you meeting deadlines and/or communicating delays proactively failure to which I will have no option but proceed with necessary HR measures".

ii. Vide another email of 27th February, 2017, the claimant's line manager noted that he was yet to deliver on certain actions yet he had not given any feedback on any challenges he may be facing.

iii. In yet another email of 13th March, 2017, the claimant's line manager noted that he was yet to receive a breakdown of the qualified deals.

41. Notably, the claimant did not dispute these instances, hence he did not cast doubt on the respondent's assertions.

42. The provisions of Clause 9.9 of respondent's disciplinary policy formed the basis for which the claimant was taken through the PEP process. It provides as follows;

- **Where an employee continuously underperforms, the employee's line manager shall reserve the right to place the employee on PEP for a period of 6 months. During this period the organisation shall take measures to improve the employee's performance, which measures shall include but are not limited to coaching, mentoring and training.**
- **The employee's performance shall be assessed after every 3 months and feedback given to the employees and copied to HR. The employee shall also be expected to make an initiative and improve their performance.**
- **After the 6 months period on continuous PEP, should the employee not have improved their performance or shown notable progress, their employment shall be terminated.**

43. From the foregoing provision, it would seem that the PEP process was not an end in itself and did not signify that the claimant's employment was being terminated. As a matter of fact, the PEP process could run for a maximum period of 6 months and within which period the claimant had the opportunity to turn around his performance and meet the targets set out under the PEP.

44. Indeed, the internal memo from the Group HR Manager advised him as follows in this regard;

"Be advised that as HR we are here to support staff and to ensure that there is exemplary performance by staff of their duties as assigned by their line managers and as expected within the role they perform for the organisation. Hence performance management should be viewed by you as a process meant to assist you better yourself and not vilify you... "

45. Either way, the claimant refused to go through the PEP process hence the ensuing disciplinary action against him.

46. **From the evidence on record, the claimant's line manager and the respondent's Human Resource Manager attempted to**

convince him to go through the PEP process and allay his fears in regard thereto but he did not oblige. He was offered an opportunity to improve his performance through the PEP which assigned him specific targets, but he declined to take up that opportunity.

47. In the circumstances, the claimant appears to have left the respondent with almost no option but to take the next step which was to commence disciplinary action against him. He did not leave the employer with much choice.

48. The upshot of the foregoing is that the court finds that the claimant's own conduct availed the respondent valid grounds to commence disciplinary action against him.

Whether the claimant's termination was in accordance with fair procedure?

49. The requirements of fair procedure are generally provided for under **Section 45(2) (c)** of the Act. The details of the specific requirements are well articulated under **section 41**. These requirements are in respect to notification and hearing. Specifically, an employer is required to notify the employee of the allegations he or she is required to respond to and thereafter grant him or her the opportunity to make representations in response to the said allegations, in the presence of a fellow employee or shop floor union representative of his own choice.

50. This provision was echoed by the Court of Appeal in the case of **National Bank of Kenya vs Anthony Njue John [2019] eKLR**, as follows: -

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.”

51. In the case at hand, the claimant was notified vide a letter dated 15th March, 2017, of the allegations against him. Through the same letter, he was invited for a disciplinary hearing and advised of the date, time and venue. The claimant was further advised of his right to be accompanied by a work colleague not acting in legal capacity. From the record, the disciplinary hearing took place on the date scheduled and the claimant was accompanied by a colleague who participated actively and made submissions before the discipline panel in his support.

52. In light of the foregoing, it is apparent that the claimant was accorded a fair hearing within the terms of section 41 of the Act.

53. The total sum of the foregoing is that the respondent has proved to the requisite standard that it had a valid reason to commence disciplinary action against the claimant and in so doing, observed the requirements of fair hearing.

Orders

54. In the final analysis, I find that the claimant is not entitled to the prayers sought hence I dismiss the claim in its entirety and make no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of March, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Majani

For the Respondent Mr. Kimani

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE