



**Mwilo v Absa Bank (K) PLC (Cause 31 of 2020)  
[2022] KEELRC 53 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 53 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 31 OF 2020**

**AK NZEI, J  
MAY 5, 2022**

**BETWEEN**

**LENNOX HODARI MWILO ..... CLAIMANT**

**AND**

**ABSA BANK (K) PLC ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent vide a Memorandum of Claim dated 9<sup>th</sup> July 2020 and pleaded:-
  - a. that the Claimant was employed by the Respondent vide a contract of employment dated May 22, 2019, which employment took effect from June 12, 2019 until his services were unlawfully and unfairly terminated on March 28, 2020.
  - b. that on March 28, 2020, the Claimant was shown a letter dated March 27, 2020 which effectively terminated his employment with the Respondent on ground of underperformance.
  - c. that at the time of termination, the Claimant was earning a monthly salary of ksh.165,000 which did not include house allowance, and hence contravened Section 31 of the [Employment Act](#).
  - d. that the Claimant's employment was subject to six months probationary period which came to an end on 12<sup>th</sup> December 2019.
  - e. that after completion of the six months probationary period, the Claimant continued to work for a further period of three months, only to be summarily dismissed on March 28, 2020.
  - f. that the allegation of underperformance was made in bad faith as the Claimant's score card records for the months of January, February and March 2020 showed excellent performance and the Claimant was ranked number 15 in the whole county.



- g. that termination of the Claimant's employment was unfair and unlawful and expressly contravened Sections 41 and 44 of the Employment Act.
  - h. that appropriate procedure was not followed as the Claimant was not afforded an opportunity to defend himself, thus contravening the procedure provided for under the Employment Act 2007.
2. The Claimant sought the following reliefs:-
- a. maximum compensation for unlawful and unfair termination (12x189,750) .....ksh.2,277,000
  - b. unpaid house allowance (9x24,750).....ksh.222,750
  - c. cost of the suit.
  - d. interest on (a) (b) and (c) above at prevailing Court rates.
  - e. any other or further relief the Court deems fit and just in the circumstances.
3. The Claimant also filed a witness statement by himself dated 9<sup>th</sup> July 2020 and a list of documents dated the same date, both of which accompanied the Memorandum of Claim filed on July 13, 2020. The seven documents listed by the Claimant included a letter of employment (and contract of employment) dated May 22, 2019, term sheet, email dated 20<sup>th</sup> April 2022 showing scorecard for various employees, letter dated 27<sup>th</sup> January 2020, demand letter dated April 20, 2020 and letter by the Respondent dated April 22, 2020.
4. The Respondent entered appearance on July 21, 2020 and filed Response to the Claim on August 27, 2020. The Respondent pleaded, inter-alia:-
- a. that the Claimant's contract of employment with the Respondent, signed by the Claimant on May 29, 2019, was subject to completion of probation as per clause 23 of the employment contract, and that the employment was lawfully terminated vide a letter dated March 27, 2020 on probationary terms.
  - b. that the clamant commenced work with the Respondent on July 8, 2019.
  - c. that the Claimant's performance record was not satisfactory, and his probationary period was extended vide a letter dated January 29, 2020.
  - d. that the Claimant never got confirmation of completion of probation until he was lawfully terminated on probationary terms as provided in Sections 41 and 42 of the Employment Act 2007 as read together with Article 41 of the Constitution of Kenya.
  - e. that under clause 24 of the employment contract and the term sheet thereto attached, the Claimant's salary was negotiated inclusive of house allowance, and that allowances were provided at the discretion of the Respondent which could amend or withdraw the same.
  - f. that the Claimant's employment was subject to confirmation in January 2020 upon satisfactory completion of probationary period as set out in the Term Sheet, but vide a letter dated 27<sup>th</sup> January 2020, the Claimant's probation was extended for three months from January 9, 2020 to April 8, 2020 due to poor performance.



- g. that under Clause 31.3 of the employment contract, the Respondent could, with or without notice, terminate the Claimant's employment if he committed gross misconduct or was incapable of performing his duties for a sustained period of time.
5. On September 17, 2020, the Claimant filed Reply to the Respondent's Response and denied the allegations made in the Response to the claim.
6. Further, the Respondent filed a recorded witness statement by one Vaslas Odhiambo dated September 4, 2020 and a list and bundle of documents. The documents listed and filed by the Respondent included the Respondent's letter to the Claimant dated May 22, 2019, the employment contract and term sheet, the Claimant's scorecards, 2020 objective letter to the Claimant dated February 25, 2020, extension of probation letter dated January 27, 2020, termination letter dated March 27, 2020, the Claimant's payslip and the Respondent's letter in response to the demand letter.
7. When the trial opened on May 26, 2021, the Claimant adopted his witness statement dated July 9, 2020 as his testimony, and produced the documents referred to in paragraph 3 of this judgment as exhibits.
8. The Claimant testified that he started working on June 12, 2019 and got a salary for that month. That he was on probation for six months and the probation was not extended, but the Claimant received a letter dated January 27, 2020 stating that probation had been extended from January 8, 2020 to April 8, 2020. That this was followed by a termination letter dated March 27, 2020 which the Claimant received on March 28, 2020.
9. The Claimant further testified:-
- a. that his March 2020 scorecard showed outstanding performance of 115% growth in portfolio as he scored 149.8% against a benchmark of 700%. That he (the Claimant) received his March 2020 scorecard from a colleague after termination.
- b. that the Claimant's salary of ksh.165,000 was not inclusive of house allowance.
- c. that the Claimant had no prior notice of termination.
10. Cross-examined, the Claimant testified:
- a. that he started working on June 12, 2019 and according to the letter of offer of employment, the six months probationary period ended in December 2019.
- b. that the Claimant did not received a letter of confirmation.
- c. that a letter dated January 27, 2020 stated that the probationary period had been extended from January 9, 2020 to 8<sup>th</sup> April 2020.
- d. that he received payment in lieu of notice and leave pay.
11. The Respondent's case was heard on November 10, 2021. The Respondent's witness, Vaslas Odhiambo (RW-1), adopted his witness statement dated August 12, 2020 as his testimony and produced as exhibits the documents listed on the Respondent's list of documents dated September 4, 2020 and referred to in paragraph 6 of this Judgment.
12. The Respondent (RW-1) testified that the Claimant joined the Respondent back on June 12, 2019 and his employment was subject to six months probationary period. That under the probation clause in the Term Sheet as read together with Clause 23 of the employment contract, the probationary period could be extended at the bank's discretion in accordance with the local laws, which in this case was Section 42(2) of the *Employment Act*.



13. RW-1 further testified that during probation period, the Claimant's performance was below business expectation. That the best score would have been an outstanding score of 120% and above, followed by 110% and above, 100% and above and 80% and above. That performance falling between 70% and 79% falls in the category requiring improvement, whereas anything below 70% falls within the category of underperforming and is below business expectation.
14. It was RW-1's further evidence that the Claimant was under performing during the entire period of employment upto February 2020, and that on February 25, 2020, he wrote a letter to the Claimant encouraging him to improve. That under paragraph 31.3 of the employment contract, the Claimant's employment could be terminated with or without notice if the Claimant was incapable of performing for a sustained period of time; and that the Respondent bank elected to terminate the Claimant on probationary terms vide a termination letter dated March 27, 2020.
15. The Respondent (RW-1) further testified that the Claimant's termination was lawful and procedural and his terminal dues were tabulated and paid. That the Claimant's salary was consolidated and was inclusive of house allowance as the word "salary package" is used in the contract documents / the term sheet; and the Claimant never objected to the salary during his period of employment. The Respondent prayed that the Claimant's claim be dismissed in its entirety.
16. Cross-examined, RW-1 testified:-
  - a. that the date of the Claimant's employment was 12<sup>th</sup> June 2019, this being the date stated in the contract documents and that the date of July 8, 2019 stated in RW-1's witness statement was an error.
  - b. that under the term-sheet/contract, the probation period was six months and from the date of employment, six months ended on December 12, 2019.
  - c. that under clause 23.1 of the contract, the probationary period could be extended at the bank's discretion in accordance with the law.
  - d. that the probationary period was extended vide a letter dated January 27, 2020.
  - e. that the Claimant worked for one month after the end of the probation period, and before he was given the letter extending his probationary period.
  - f. that there were oral negotiations on extension of the probationary period and that the Claimant requested for the extension.
  - g. that the Claimant signed for the extension letter.
  - h. that the Claimant's scorecard for March 2020 was released on April 20, 2020, after the Claimant had left on March 27, 2020, and that the Claimant's performance for the month of March was outstanding. That this improved performance was after RW-1 had served the Claimant with the letter dated 25<sup>th</sup> February 2020.
  - i. that RW-1, the Head of Employment at the Respondent Bank, did not wait for the March 2020 performance because the extended probationary period was coming to an end.
  - j. that when an employee is under performing, he is encouraged by the Manager, though RW-1 may also come in by way of a letter, and the employee may also undergo training. That other than RW-1's letter (dated February 25, 2020), there was no other business support given to the Claimant.



- k. that the termination letter is dated 27<sup>th</sup> March 2020 and was given to the Claimant on March 28, 2020 at 9.00 am. And he refused to sign for it.
- l. that there was no disciplinary hearing because a probationary contract is terminable on one month notice or payment in lieu.
17. Parties herein did not file a joint statement of agreed issues. Based on my consideration of the pleadings filed and evidence presented by the parties, issues that emerge for determination are as follows:-
- a. whether the Claimant was serving probationary period when his employment was terminated vide a letter dated 27<sup>th</sup> March 2020.
- b. whether termination of the Claimant's employment was unlawful and unfair.
- c. whether the Claimant is entitled to the reliefs sought.
18. On the first issue, clause 23.1 of the Claimant's contract of employment, signed by the Claimant on May 29, 2019, states:-
- “your employment is subject to confirmation following the completion of a satisfactory probationary period. Your probationary period is set out in the Term Sheet. This may be extended at Barclays' discretion, in compliance with local law.”
19. The Term Sheet states in part:-
- “your salary package will be ksh.1,980,000.00 per annum, made up as follows:
- Base salary ksh.165,000 per month
- Probation period: six months.”
20. Clause 18 of the Claimant's employment contract states:-
- “You will be appointed as SME Banker at BA3 reporting to the Branch Manager. Your appointment will commence on 12<sup>th</sup> June 2019 (“Start Date”) or such later date as agreed to in writing by the parties.”
21. There was not shown to have been any variation of the “Start Date” by agreement of the parties in writing. Both parties testified that the Claimant's employment commenced on June 12, 2019. The contractual six months probationary period thus ended on December 12, 2019. Both parties testified as much.
22. Section 42 (2) of the *Employment Act* 2007 (“the local law”) provides:-
- “A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee” (emphasis added)”
23. In the present case, the Claimant's probationary period terminated on December 12, 2019, and with or without formal confirmation to his employment by the Respondent, the Claimant stood confirmed to his employment by operation of the afore stated statute upon the lapse of his probationary period on December 12, 2019.



24. The Claimant continued working for over a month from 12<sup>th</sup> December 2019 before the Respondent wrote the letter dated January 27, 2020 purporting to “extend the Claimant’s probationary period” for another three months with effect from January 9, 2020 to April 8, 2020; and to change the date of commencement of employment from 12<sup>th</sup> June 2019 to 8<sup>th</sup> July 2019. The letter reads:-

“reference is made to your employment contract, which commenced in Barclays on July 8, 2019.

We would like to advise that we are extending your probation period for another three months with effect from 9<sup>th</sup> January 2020 to 8<sup>th</sup> April 2020. Your employment is subject to confirmation following the completion of satisfactory probationary period.

We would like to take this opportunity to wish you a successful career in Barclays.”

25. The foregoing letter purported to arbitrary “extend” in retrospect an already lapsed and/or terminated probationary period and to “change” in retrospect, the date of commencement of the Claimant’s employment. This was an outright illegality on the part of the Respondent.

26. It matters not whether or not the Claimant signed on the said in acknowledgment of receipt of the same. Signing in receipt of the said letter did not validate the contents of the letter. The said letter does not state that the Claimant had agreed to its contents. The letter simply purported to advise the Claimant on the Respondent’s apparent illegal decision.

27. I reject RW-1’s allegation that there had been oral discussion on extension of the probationary period, and that the Claimant had requested for the same. The letter dated January 27, 2020 does not refer to any such oral discussions. In any case, a written contract of employment, or of whatever nature, cannot be said to have been varied and/or supplemented by an oral agreement, and in particular where one of the parties denies the alleged oral agreement. In the present case, the Claimant did not admit having been party to any oral discussion on the purported extension of his lapsed probationary period.

28. I find and hold that the Claimant was not serving probationary period when his employment was terminated by the Respondent without notice vide a letter dated March 27, 2020.

29. On the second issue, in determining whether or not termination of an employee’s employment was fair, the termination in issue must be looked at against the mandatory procedural provisions of Section 41 of the Employment Act 2007 which provides:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

30. The Respondent was not shown to have in any way complied with the foregoing mandatory statutory procedural requirements. The Claimant was not, prior to termination of his employment on March



27, 2020, notified of the intended termination, and was not given an opportunity to be heard on the allegations and/or reasons on the basis of which the Respondent was contemplating termination in line with Section 41 of the Employment Act.

31. Section 45(1) of the Employment Act 2007 provides that no employer shall terminate the employment of an employee unfairly. Section 45(2) (c) and 45 (4) (b) provide that termination of employment shall be unfair if the employer fails to prove that termination of employment was in accordance with fair procedure, and if in all circumstances, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
32. I find and hold that termination of the Claimant's employment by the Respondent was unfair. Further, in view of the circumstances of the case herein, which I have substantially set out in this judgment, the Respondent did not act in accordance with justice and equity in terminating he Claimant's employment.
33. The Court of Appeal held as follows in the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR:-

“Section 45 of the Act makes provision, inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment is deemed to be unfair if the employer fails to prove that the reason for the termination was valid, that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer acted in accordance with justice and equity. The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to terminate the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee upto the date of termination, the extent to which the employer has complied with Section 41. Section 41 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 representation which the employee may advance in response to the allegations levelled against him by the employer....”

34. Having found that termination of the Claimant's employment was procedurally unfair, I will not go into the validity or otherwise of the reasons for termination as set out in the letter of termination, dated 27<sup>th</sup> March 2020, vide which the Respondent purported to terminate a non-existent probationary contract.
35. I must, however, for recorded purposes, state that where an employer seeks to terminate an employee's employment on account of poor performance, the employer must, as held in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Court Case No. 823 of 2010 [2013] eKLR, demonstrate how the decision was arrived at. The Court observed as follows:-

“(a) Where poor performance is shown to be the reason for termination, the employer is placed at 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 put in place to enable them assess the performance of each employee and further, what measures they have undertaken 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 weakness.
- (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.”

These observations were cited with approval by the Court of Appeal in the case of National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR.

- 36. In the present case, the Respondent (RW-1) testified that they wrote a letter of encouragement to the Claimant on February 25, 2020, and followed it with a letter of termination on March 27, 2020, even without waiting to see and to review the Claimant’s performance for the month of March 2020. It would later turn out that the Claimant had attained outstanding performance during the month of March 2020. The Claimant was not given an opportunity to defend himself against the allegations of poor performance as set out in the Janet Nyandiko Case (supra) and to demonstrate his outstanding performance during the month of March 2020.
- 37. On the third issue, it is my finding that the Claimant is entitled to compensation for unfair termination of employment. Taking into account the circumstances in which the Claimant’s employment was terminated, I award the Claimant eight months’ salary being compensation for unfair termination of employment.
- 38. On the claim for house allowance, the term sheet, which forms part of the Claimant’s employment contract, and which I have partly set out at paragraphs 18 and 19 of this Judgment, states that the Claimant’s salary package was ksh.1,980,000 per annum and that his base salary was ksh.165,000 per month. The contract of employment did not state that the Claimant’s salary was consolidated. Section 31(2) of the Employment Act 2007 provides that the Section does not apply to an employee whose contract of service:-
  - “(a) contains a provision which consolidates a part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which otherwise is intended to enable the employee to provide himself with housing accommodation; or
  - b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).”



39. The word used in the *Employment Act* is “consolidate.” *The Black’s Law Dictionary* defines the word “consolidate” as follows;

“to combine or unify (separate items) into oneness or body, especially in order to make them more effective or easier to deal with.”

The words “consolidated salary” and “salary package” are not synonymous. Otherwise both words would have been used in the statute.

40. None of the parties exhibited the Claimant’s pay statement itemizing or unpacking the Claimant’s monthly salary of ksh.165,000. The pay statement (payslip) exhibited by the Respondent on payment in lieu of notice and leave pay does not reflect payment of house allowance. It is my finding that the Claimant is entitled to house allowance at 15% of his monthly salary for the nine months that he was in employment. That is  $9 \times 24,750 = 222,750$ .

41. Ultimately, and having considered rival written submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-

a. Eight months salary, inclusive of house allowance, for unfair termination of employment (8x189,750).....ksh.1,518,000

b. Unpaid house allowance (9 x24,750) .....ksh.222,750

**Total ksh.1,740,750**

42. The sum awarded herein is subject to the applicable statutory deductions to which the Claimant was subject, under Section 49(2) of the *Employment Act*. The Respondent shall remit such deductions to the relevant statutory bodies within thirty days of making the deductions.

43. The Claimant is awarded costs of the claim and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY OF MAY 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

Mr. Ajigo. for Claimant

Miss Kaguri for Respondent

