



**Kipkirui v Rafiki Microfinance Bank Ltd (Cause 42 of 2019)
[2022] KEELRC 12839 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12839 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 42 OF 2019
NJ ABUODHA, J
OCTOBER 14, 2022**

BETWEEN

RONO HILLARY KIPKIRUI CLAIMANT

AND

RAFIKI MICROFINANCE BANK LTD RESPONDENT

JUDGMENT

1. By memorandum of claim filed on 17th September, 2019, the claimant herein averred that he was employed by the respondent as a relationship manager on 15th June, 2015. He diligently executed his duties for four years without any disciplinary issues until 14th June, 2019 when he wrote his resignation letter indicating that the effective date of his termination was one month from the date of his resignation letter and was to pay two months' salary in lieu of notice.
2. According to the claimant, in blatant breach of the terms of his employment, the respondent upon receiving the resignation letter effected the termination on the same day and the respondent by the said letter compelled the claimant to immediately clear with the Bank and was ordered out of the premises causing him great humiliation, psychological toucher and embarrassment in the presence of colleagues and clients.
3. As a result of the respondent's actions the claimant suffered since he had not made arrangements on the repayment of his loan as he knew he had three months' notice that ought to have been honoured and followed by both parties.
4. The claimant further averred that the respondent's actions were clothed with malice and breach of contract in fact the respondent had introduced performance notice on 17th May, 2019 which plan was tailor made to trap the claimant on unachievable targets with predetermined decision to flush out the claimant from employment.



5. The claimant further alleged that the Performance Notice had unrealistic parameters such as the claimant was expected to bring a minimum of three new loan accounts totaling to at least Ksh.8,500,000/= and further that the claimant mobilises new deposits of Ksh.3,000,000/=. The targets were to be achieved within one month, which period the claimant contended was unrealistically short and that in default he would stand dismissed as at 17th June, 2019.
6. The claimant therefore sought general damages for wrongful dismissal or unfair termination, damages for psychological trauma and general damages for discrimination.
7. The respondent on its part pleaded that the claimant had since July, 2017 been in persistent breach of his obligations to the respondent necessitating the issuance of performance notices on 15th December, 2017, 15th May, 2018 and 17th May, 2019. The respondent therefore denied that the claimant was diligent and dutiful.
8. The respondent further averred that the claimant only gave one months' notice in his letter dated 14th June, 2019. The allegation that the claimant would pay his month's salary in lieu of notice was never communicated to the respondent in writing.
9. The respondent further stated that clause 21 of the claimants' contract of employment allows the respondent to terminate the claimants contract immediately without notice. Further that the claimant's notice of resignation was invalid and unacceptable as the respondent had already placed the claimant on notice that it would terminate the claimant's service owing to persistent breach to meet his obligations as a Relationship Manager.
10. At the oral hearing the claimant stated that he adopted his witness statement filed on 19th September, 2019 as evidence in chief and also relied on the documents filed in support of the claim. According to the claimant, he was hired on permanent and pensionable basis and that he resigned due to pressure but the resignation was declined. He was issued with a performance notice instead.
11. In cross examination he stated that his retention was on condition that there was satisfactory performance. The issue of performance had been a continuous discussion with the respondent. It was his evidence that he participated in the performance review with his supervisor and they set together the performance targets and signed performance improvement plan. The targets were within his job description. The claimant further stated that the performance notice dated 17th May, 2019 informed him of intention to terminate his service if he did not perform. He resigned on 14th June, 2019 but his termination became effective on 17th June, 2019, and that he resigned three days before the termination. The claimant further stated that he asked for extra support in the performance improvement plan and was given and that by the time he left his targets had not been achieved and further that all staff were subject to performance reviews.
12. The respondent's witness Ms. Judith Ndunge informed the Court that she worked for the respondent as Head of Talent and Organizational Development. She recorded a statement on 8th February, 2022 which she relied on as her evidence in chief. She also relied on the documents filed with the response on 8th August, 2019.
13. According to Ms. Ndunge, the claimant's output was poor generally. He never met his obligations as per the contract.
14. The respondent engaged him to improve his performance and that his key result areas were pointed to him. The claimant agreed to improve on his weaknesses and that he understood that his employment would continue only if his performance improved and was aware he could be terminated if he did not meet expectation.



15. In cross-examination Ms. Ndunge stated that she was employed on 4th October, 2021 and was not the claimant's supervisor. The respondent had conversation with the claimant over his performance she however did not personally interact with the claimant but the respondent kept records which she interacted with.
16. According to the witness, there was an email where the claimant admitted to his poor performance and signing of a PIP was acknowledgment that performance was not up to par. The claimant failed to meet all the three areas in the PIP dated 28th July, 2017.
17. Ms. Ndunge further stated that poor performance was a ground for termination and a discipline issue. The consultative meetings formed opportunity to be heard and that the claimant was not issued with a specific notice to show cause. According to her PIPs were disciplinary hearing as well.
18. The claimant alleged that the respondent summarily dismissed him from employment under circumstances that were malicious, unlawful, unfair and unprocedural and fundamentally violated the rights of the claimant.
19. The claimant stated that by a letter dated 14th June, 2019 he gave a notice of resignation from the respondent's employment. This letter was not attached among the claimants' list of documents nor was it produced by the respondent. The claimant however alleged that in the letter of resignation he gave one month's notice and offered to pay two months' salary in lieu of notice to cover for the rest of notice period which as per the contract of employment required that either party finishes three months' notice or pay in lieu.
20. The respondent while acknowledging the receipt of the resignation letter denied that the claimant in the said letter offered to pay two months' salary in lieu of notice. The respondent further stated that in their letter to the claimant dated 14th June, 2019 in response to the claimant's resignation, they informed him about their earlier letter dated 17th May, 2019 in which the Bank had formally placed him on notice as per clause 21 of his contract of employment dated 18th June, 2015.
21. The letter of 17th May, 2019 referred to above and which was attached to claimant's bundle of documents stated in part as follows:

“As per clause 21 of your contract of service dated 18th June, 2015 the bank formally places you on notice that if your performance does not improve to the levels highlighted on your PIP by 17th June, 2019, managements will be left with no alternative but to terminate your employment effective that date...”
22. During the trial the claimant conceded that he received the above letter and that he asked for support over his PIP and that he received such support. The claimant further stated that by the time he resigned, he had not achieved his targets.
23. It is curious to note that the claimant gave notice of resignation some three days to the expiry of the notice issued to him by the respondent. The effect of the notice of resignation if accepted would have been to allow the claimant to continue in employment beyond the notice issued to him by the respondent. The respondent did not agree with him and issued him with a notice of immediate termination.
24. Under section 47(5) of the *Employment Act*, the burden of proof that an unfair termination has occurred is on the employee while the burden of proving reasons for termination is on the employer. The claimant herein conceded that he was put on PIP and that by the time he purported to give a notice of resignation he had not achieved the targets set. The claimant further admitted that during



the period of PIP he asked for and was accorded the necessary support. The claimant further conceded that failure to meet targets set in the PIP was ground for termination of service.

25. From the foregoing facts the claimant could not be heard to say he was unfairly terminated. First of all, the claimant had evinced intention to resign hence a disciplinary hearing could not have served any purpose. Second, it was conceded by him that he was provided with support during PIP and involved in all discussions with his supervisors. A disciplinary hearing if at all was possible would have been superfluous and repetitive of the processes the claimant had been involved in throughout.
26. From the foregoing summary and analysis of evidence, the Court is not persuaded that the claimant's service was unfairly terminated. The Court on the other hand finds and holds that there existed valid reasons for the termination of the claimant's service and in doing so, the respondent followed a fair procedure.
27. The claim is therefore found without merit and is hereby dismissed with costs.
28. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF OCTOBER, 2022.

ABUODHA NELSON JORUM

JUDGE ELRC

