



**Waithaka v Barclays Bank Limited (Cause 1194 of 2017)
[2022] KEELRC 13222 (KLR) (11 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13222 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1194 OF 2017
SC RUTTO, J
NOVEMBER 11, 2022**

BETWEEN

WILSON WAITHAKA CLAIMANT

AND

BARCLAYS BANK LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed as a cashier in the year 2007 on permanent and pensionable terms. That he was later promoted to become a personal banker in October, 2014 and posted to Juja where he was working at the material time. That during his period of service, he was subjected to performance appraisals within specified periods and on the basis of updated, itemized performance reports known as a dashboard that would give a general indication of performance taking into account all aspects of his engagement. That he was not assessed in the year 2016 on the foregoing basis which meant that a substantial amount of work he had done and achievements made were not considered. That as a result, he was graded as below par and when he notified the respondent's managers of the anomaly, no action was taken.
2. That subsequently, he was terminated *vide* a letter dated March 7, 2017 on account of unsatisfactory performance. He has termed his termination as unlawful hence prays against the respondent the sum of Kshs 2,410,655.00 being compensatory damages and salary in lieu of notice.
3. The claim was opposed with the respondent stating that the claimant's performance declined in 2015 and 2016 hence was placed on performance accelerator plans. That his performance did not improve hence he was invited to a performance management plan. That due to persistent underperformance, he was issued with a show cause letter and thereafter invited to a disciplinary hearing which he attended and was given an opportunity to explain his incessant "improvement needed" rating. On this account, the respondent prays that the Court finds that the claimant's termination was fair and to dismiss the suit with costs.



4. The matter proceeded for hearing on May 11, 2022 and both parties called oral evidence in support of their respective cases.

Claimant's case

5. At the start of the hearing, the claimant adopted his witness statement and the bundle of documents filed together with his claim, to constitute his evidence in chief. The documents were also produced and marked as his exhibits before Court.
6. It was the claimant's testimony that during his employment with the respondent, he was subjected to performance appraisals to gauge whether or not he had met his targets. That the rating was done within specified periods and on the basis of updated, itemized performance reports, known as a dashboard, that would give a general indication of his performance taking into consideration all aspects of his employment engagement.
7. That in the year 2016, he was not assessed on the foregoing basis. That instead, he was assessed on the basis of unupdated performance reports which in effect meant that a substantial amount of work he had done and achievements made, were not considered. That his performance was therefore graded as below per and needing improvement.
8. The claimant stated that he notified the respondents' management of the said anomaly but no action was taken. That without a complete performance report there could not have been a fair and accurate assessment of his performance. He further termed the composition of the respondent's appeal body as biased as one of its members was his line manager and had shown bias in decisions that affected him prior to the hearing of his appeal.

Respondent's case

9. The respondent called oral evidence through Mr. Vaslas Odhiambo who testified as RW1. He identified himself as the respondent's Employee Relations and Wellness Manager. Similarly, he adopted his witness statement and bundle of documents filed on behalf of the respondent, to constitute his evidence in chief. The documents were also produced and marked as the respondent's exhibits before Court.
10. RW1 told Court that the respondent conducts biannual appraisals to gauge the performance of its employees. That each year is divided into two halves and the performance for the first half of the year is denoted as H1 and as H2 for the second half. The ratings of H1 and H2 determines the full year performance of its employees. That the best rating is "outstanding" and carries a score of 120%, followed by "very strong" with a score ranging between 110%-119.9%, then followed by a rating of "strong" which carries a score ranging between 100% -109.9%, then followed by a rating of "good" which carries a score ranging between 80%-99.9%. That as such, any performance above 80% is good while a score ranging between 70%-79.9% is needing improvement. That therefore a score below 80% is regarded as an underperformance.
11. That the claimant's final score is in regards to 2017 with his overall rating being 75.8%, hence was needing improvement as it was below expectations.
12. That before then, the claimant's appraisal for the full year in 2014, established that he needed improvement. That he appealed against the said decision and was accorded an appeal hearing whose panel upheld his performance ratings. That the panelists recommended upholding of the 'Improvement Needed' rating.



13. RW1 further stated that the claimant's performance did not improve, hence he was placed on a performance accelerator plan on June 8, 2016 to facilitate improvement. That the claimant's performance did not improve, hence he was invited to a performance management meeting where his performance for 2016 half year was discussed. That the claimant was given an opportunity to defend his performance. That his performance had not met the required threshold and he was issued with a warning letter on September 28, 2016. That upon appraisal of his performance for the 2016 full year by his line manager, his rating was yet again 'Improvement Needed'.
14. That the claimant appealed the performance rating, and he was invited to an appeal hearing vide a letter dated February 6, 2017. That during the appeal hearing held on February 14, 2017, the claimant alleged that the data concerning Customer Lifestyle Management (CLM) was not captured in his dashboard, which was the respondent's performance analysis tool, thus leading to his poor rating.
15. That the claimant was asked whether he had evidence of this data that had allegedly been left out, and he responded in the negative. That he was further asked whether CLM was a major focus in determining performance for the appraisal period and he responded in the negative. That he was further asked whether the dashboard ever lied, and he responded in the negative. That the rating appeal committee observed that the claimant lacked evidence to support his appeal hence recommended that his 'Improvement Needed' rating be upheld.
16. RW1 stated in further testimony that the claimant was notified that his rating appeal had failed vide a letter dated February 15, 2017 and thereafter, he was issued with a show cause letter seeking an explanation for the continued poor performance. That he responded to the show cause letter vide a letter dated February 17, 2017. That the respondent found the claimant's response unsatisfactory and proceeded to invite him to a capability hearing vide a letter dated February 17, 2017. That the claimant attended the meeting and was given an opportunity to explain his incessant 'Improvement Needed' rating.
17. That the panelists observed that the claimant had consistently underperformed and was not keen to improve his performance hence recommended his termination. That the claimant was terminated from the respondent's employment with effect from March 7, 2017.
18. That the claimant appealed his termination vide an appeal letter dated March 9, 2017 and was invited to an appeal hearing vide a letter dated March 23, 2017, which he attended on March 31, 2017 and was given an opportunity to present his appeal. That he made inconsistent representations at the said appeal hearing, for instance; he represented that it was impossible for the branch he worked in to be rated green whereas he had been rated red and when informed by one of the panelists by the name John Achoki, that indeed such was a possibility, he retracted his representation and agreed with that fact.
19. RW1 further stated that the claimant reiterated that the alleged missing CLM data had not been factored in his rating, but did not support the said allegation with evidence. That apart from the alleged missing CLM data not factored into his rating, which nevertheless contributed minimally to his improvement, the claimant did not offer any credible defence why his overall performance had not improved. That the panelists observed that the claimant had consistently underperformed and was not keen to improve his performance hence recommended that his termination from employment be upheld. That the claimant was notified as much vide a letter dated April 4, 2017. That following his termination, he was paid his terminal dues inclusive of pay in lieu of notice as per his last pay slip and was also issued with a certificate of service.



Submissions

20. At the close of the trial, each party filed written submissions with the claimant submitting that throughout the performance hearings held by the respondent, he complained that the dashboard was not updated properly on October 31, 2016 since the same never captured the CLM score. That as such, his termination was unlawful. It was further submitted on behalf of the claimant that he was terminated without being issued with a final warning letter and that the appeal body was illegally constituted as his line manager was part of the body he appeared before. In further submission, the claimant stated that his dismissal was unfair and unprocedural as it contradicted the respondent's code of conduct. In support of the claimant's submission, the cases of *Jane Nyandiko vs Kenya commercial Bank Limited* (2017) eKLR, *Jane Jerotich Sirma vs Postal Corporation of Kenya* (2017) eKLR and *Josephine Ngatia vs Executive Director of the Non-Governmental Organisation Coordination Board & another* (2018) eKLR were cited in support.
21. On the other hand, the respondent submitted that it has a very transparent system of appraisal which is unbiased. That the system has been in place and the culture of biannual appraisal has been with the respondent for a long period of time. That the reason for the separation with the claimant was extracted from a system that was monitoring his performance and that there was no human interface in terms of measuring his performance. The respondent further submitted that it had demonstrated that before separating with the claimant, a fair process was employed. The respondent asked the Court to consider the cases of *National Bank of Kenya vs Samul Mutonya* (2019) eKLR, *Nazareno Kariuki vs Feed the Children Kenya* (2013) eKLR and *Jane Samba Mukala vs Oltukai Lodge Limited* (2010) eKLR in support of its arguments.

Analysis and determination

22. Flowing from the pleadings, the documentary evidence on record, testimonies before court and the rival submissions, the following issues stand out for determination:
 - a. Whether the respondent had a valid and fair reason to terminate the employment of the claimant.
 - b. Whether the claimant's termination was in accordance with fair procedure.
 - c. Is the claimant is entitled to the reliefs sought?

Valid and fair reason?

23. In order to prove fair termination under the *Employment Act* (Act), an employer is required to prove that there was substantive justification to warrant termination of an employee. Substantive justification entails proof of reasons for termination of an employee and is provided for under sections 43 and 45 (2) (a) and (b) of the *Employment Act*. 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.



24. While 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; ...
25. These provisions essentially set the standard in determining whether an employee's termination was fair. Evidently, the burden of proof rests on the employer.

13. The reasons leading to the claimant's termination are related to his performance. His letter of termination reads in part:
"We refer to the Capability Hearing conducted on 22 February 2017; the Show Cause Letter dated 15 February 2017 and your response dated 17 February 2017.

Further, we have reasonable grounds to conclude as follows;

1. Your performance rating for full year 2015 was Improvement Needed (IN)
2. Your performance rating for Half One Year 2016 was Improvement Needed (IN)
3. Your performance rating for full year 2016 was Improvement Needed (IN)

The above therefore confirm that you have failed to meet the agreed performance targets and objectives contrary to the business expectations.

In view thereof, your services are hereby terminated on grounds of poor performance with effect from 07 March 2017 in accordance with your terms and conditions of employment by the payment of one month's salary in lieu of notice...."

26. The claimant was of a different view as regards his performance and contends that the assessment leading to his performance appraisal was on the basis of unupdated performance reports hence did not consider a substantial amount of work he had done and achieved. In particular, the claimant cited the scores in respect of CLM as not having been updated on the score card despite having onboarded several customers. That is where the dispute really is.
27. It is common ground that as at August 2, 2016, the claimant's performance had been under review for the past 24 months. Prior to the review in August, 2016 the claimant's performance was at 77.6%.
28. Revisiting the claimant's targets as per the performance accelerator Plan reviewed on 8th August, 2016, it is notable that he had five objectives with weights attached to the same. It is therefore apparent that there were more objectives and components that informed the claimant's overall performance appraisal beyond the CLM. Nonetheless, the claimant opted to focus on CLM which was just but one component.
29. The claimant's performance under CLM, was scored under two heads, with the first being, "involved" at 6.4 % while "engaged" was at 0%.



30. In the 2016 Year End consolidated review, the claimant's line manager commented, "Embrace CLM update daily all interactions you've heard with customers updating all products sold to them to improve your score from 6.5%". Ultimately, his annual review for the year 2016 reads "improvement needed".
31. It is notable that at the appeal hearing on February 14, 2017, the claimant raised the issue of the CLM scores and stated that he had only been receiving the sales dashboard. Be that as it may, he did not adduce evidence to prove that the dashboard had not captured his CLM data.
32. During cross examination the claimant admitted that the information contained in the dashboard and the score card was correct except for one. He further admitted that the dashboard generates the results as keyed in and that he did not have a problem interacting with the said dashboard. He further admitted that he was the one providing the information/data for the dashboard. It is therefore evident that if indeed, there was failure in updating the CLM data, then the same is attributable to him.
33. The claimant also admitted during cross examination that the dashboard information does not lie. If at all he had evidence to discount the CLM scores, then he did not avail the same to the respondent's appeal panel so as to allow for a review of his performance rating.
34. Further, it is notable that the claimant's contention in regards to the CLM scores only came up in the second half of 2016 while his performance had been needing improvement since 2015. As a matter of fact, the claimant admitted during the hearing that his performance in the three preceding reviews was wanting.
35. In light of the foregoing observations, the claimant's assertions that his performance was brought down by failure to update his CLM data is not strong enough.
36. In light of the foregoing, I cannot help but conclude that the respondent had justifiable cause to terminate the claimant's employment on account of poor performance.

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

37. 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.
38. 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."



39. In this case, it is common ground that following his rating, the claimant was given an opportunity to appear before an appeal panel to consider his appeal. The panelists were identified as Carol Rando, Peter Mucheru and Samuel Lasoi while Annette Otonda was to take down the minutes. He appeared before the panel and presented his appeal. The said panel upheld the claimant's rating hence he was issued with a notice to show cause why disciplinary action should not be taken against him on account of poor performance. He was given an opportunity to give an explanation, which he did through his letter of February 17, 2017.
40. He was then invited to appear in person for a capability hearing through a letter of February 17, 2017. He was also notified of the date, time and venue and the name of the panelists who were identified as, Grace Muamba, Sarah Muriuki and Edith Njoroge.
41. The claimant appeared for the capability hearing and presented his case. The said panel recommended his termination noting that the claimant was not applying himself hence was not able to deliver.
42. The claimant was given an opportunity to appeal the decision to terminate him. Subsequently, he appealed and a separate panel was constituted to consider his appeal. The panelists identified were, John Achoki and Jacob Otsyula while Tabitha Ndegwa was to take down the minutes. Once again, the claimant appeared in person for his appeal hearing. The appeal panel upheld his termination noting that his performance had not improved from 2015.
43. It is therefore evident that the claimant was heard in person, by three differently constituted panels, who considered his case. Further, he was allowed to appear with a colleague or management staff association representative in all the three instances.
44. In addition, the claimant's assertions that the appeal panel was illegally constituted as his line manager was part of the same, is not supported by evidence. To the contrary, the record does not show that the said line manager sat in any of the panels. Further the panelists were well identified in advance hence the claimant had an opportunity to lodge an objection in the event he was not comfortable with a member so identified.
45. In light of the foregoing, it is apparent that the claimant was accorded a fair hearing within the meaning and spirit of section 41 of the Act.
46. The total sum of the foregoing is that the respondent has proved to the requisite standard that it had a valid and fair reason to terminate the claimant's employment owing to poor performance and in so doing, observed the requirements of fair hearing.

Orders

47. In the final analysis, I find that the claimant has failed to prove his case on a balance of probability hence the claim is dismissed in its entirety, with an order that each party bears its own costs.

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

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Olendo

For the Respondent Mr. Masese



Court Assistant Abdimalik Hussein

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

