



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 34 OF 2017

KHADIJA ASMAN ADAMS.....CLAIMANT

VERSUS

NIC BANK LIMITED.....RESPONDENT

JUDGMENT

1. Khadija Asman Adams (the Claimant) was offered employment on a fixed-term contract by NIC Bank Ltd (the Respondent) sometime in 2008.
2. On 22 January 2014, the Respondent offered the Claimant permanent and pensionable contract as a Business Development Officer.
3. On 22 March 2016, the Respondent notified the Claimant of the termination of her employment.
4. The Claimant was not dissatisfied, and on 13 February 2017 sued the Respondent alleging unfair termination of employment and breach of contract.
5. The Respondent filed a Response and Counterclaim on 11 April 2017, and the Claimant filed a Response to the Counterclaim on 25 April 2018.
6. The Cause was heard on 15 July 2019 and 30 July 2019 when the Claimant testified and on 26 January 2021 when the Respondent's Legal Officer testified.
7. The Claimant filed her submissions on 1 March 2021 while the Respondent filed its submissions on 26 April 2021 (should have been filed/served before 26 March 2021).

Unfair termination of employment

Procedural fairness

8. On 22 July 2015, the Respondent's management met with the Claimant to discuss her performance.
9. The evaluation identified failure to meet targets, and as a follow-up, the Respondent wrote to the Claimant setting out what was expected to improve the performance. The Claimant was given up to 31 October 2015 to demonstrate improvement.
10. The Respondent met with the Claimant on 9 November 2015 to evaluate the performance improvement. The meeting minutes indicate that the managers recommended that the Claimant be released from the contract as she had failed to achieve the minimum performance standards.
11. The Claimant appealed against the recommendation on 18 December 2015, and an appeal hearing was held on 5 January 2016.
12. On 12 February 2016, the Respondent informed the Claimant that the recommendation for the termination of her contract stood.
13. The Claimant was formally notified of the termination of her contract through a letter dated 22 March 2016.
14. Section 41 of the Employment Act, 2007 contemplates the employer giving the employee an opportunity to make representations before making the decision to terminate employment on the grounds of misconduct, performance or physical incapacity. The Claimant is entitled to be accompanied by a colleague during the session.

15. The Claimant was taken through a performance evaluation and improvement programme. On 9 November 2015, the evaluation team recommended the termination of the contract. The Claimant did not sign the notes/minutes, but she appealed.
16. An appeal hearing was held on 5 January 2016 and on 22 March 2016. The appeal was not successful.
17. The question arising from the facts on record is whether a performance evaluation process by itself without more would satisfy the procedural fairness requirements of section 41 of the Employment Act, 2007.
18. The Court does not think so.
19. A performance evaluation process in itself is not a disciplinary process. It cannot substitute for a disciplinary process as the ordinary performance evaluation process does not have inbuilt the protections afforded employees by section 41 of the Employment Act, 2007, such as a hearing while accompanied by a colleague or trade union representative.
20. In the Court's view, the performance evaluation process will usually set the factual background to a disciplinary hearing and eventual termination of a contract, if appropriate, on the ground of poor performance.
21. The Court finds, on the basis of the evidence on record, that the Claimant was not taken through a disciplinary process as envisaged by law and if the Respondent had an internal human resource manual governing disciplinary action, the same was not disclosed or a copy filed in Court.

Substantive fairness

22. It was incumbent upon the Respondent to prove in terms of sections 43 and 45 of the Employment Act, 2007 that the Claimant's performance was wanting.
23. To discharge the burden, the Respondent produced copies of a performance review letter addressed to the Claimant dated 27 July 2015, minutes of a performance review meeting held on 9 November 2015 and minutes of the appeal hearing on 5 January 2016.
24. The Court has considered the documents and is satisfied that the Claimant's performance did not match the standards agreed with the Respondent.
25. The Court finds the Respondent had valid and fair reasons to terminate the Claimant's employment.

Compensation

26. The Claimant served the Respondent for about 7 years. The Respondent has established valid and fair reasons to terminate the contract, but it did not follow a fair process.
27. In light of these factors, the Court is of the view that the equivalent of 4-months' salary as compensation (gross salary was Kshs 75,000/- per month) would be fair.

Salary in lieu of notice

28. The Respondent offered the Claimant the equivalent of 1-month salary in lieu of notice, and nothing turns on the head of the claim.

Breach of contract

Accrued leave

29. The Respondent offered the Claimant the equivalent of 9 outstanding leave days, and since she did not lay an evidential foundation to the claim for accrued leave days for 2015 and 2016, the Court will defer to the offer by the Respondent.

Terminal benefits/service pay

30. The Claimant was a pension fund member, but she did not file a copy of the Fund rules or join the Fund to the litigation.
31. The Claimant should follow up with the Fund for her terminal benefits.

Counterclaim

32. The Respondent counterclaimed against the Claimant on the ground that she did not hand in her staff clearance form or surrender property that came into her possession due to her work.
33. The Respondent's witness did not disclose the properties which the Claimant had allegedly failed to surrender. A clearance form by itself cannot be tangible property. It is used to facilitate a smooth transition.

34. The Claimant had testified that she surrendered a mobile phone with a sim card, tag, business cards and health card, amongst other properties, to a Mr Mutua of the human resource department.

35. Mr Mutua was not called to testify. The failure was not explained.

36. The Court finds that the counterclaim was not proved.

Conclusion and Orders

37. From the foregoing, the Court finds that the termination of the Claimant's employment was not procedurally fair.

38. The Claimant is awarded:

(i) Compensation **Kshs 300,000/-**

39. The Claimant is also awarded the benefits set in the letter of termination if the same were not collected.

40. The Claimant has succeeded partially. She is awarded costs on a half-scale.

Delivered through Microsoft teams, dated and signed in Nairobi on this 28th day of April 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Ms Aron instructed by Okongo Wandago & Co. Advocates

For Respondent Mr Mungai instructed by Mohammed Muigai LLP Advocates

Court Assistant Chrispo Aura