



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 382 OF 2016**

**DEBORAH MUNYKENYE.....CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....RESPONDENT**

**JUDGMENT**

1. Deborah Munyekenye (the Claimant) was offered employment as a Clerk through a letter dated 27 May 1996 by Barclays Bank of Kenya Ltd (the Respondent).
2. The Claimant rose through the ranks to the position of Branch Manager.
3. On or about 31 August 2015, the Respondent issued to the Claimant a *Notification of Interview Arrangements*.
4. The notification indicated that the Claimant's performance was below expectations. The Claimant was advised to attend the hearing on 8 September 2015, accompanied by a colleague if she wished. The notification also put the Claimant on notice of disciplinary action, depending on the outcome of the hearing.
5. The Claimant attended the hearing.
6. The hearing determined that the Claimant be given 2 months to improve on her performance and be given a final warning letter.
7. On 30 September 2015, the Respondent wrote to the Claimant notifying her of the termination of her contract.
8. The Claimant appealed against the termination of employment on 8 October 2015, and she was invited to attend an appeal hearing on 16 October 2015. The Claimant attended the hearing.
9. On 26 October 2015, the Respondent notified the Claimant of the rejection of the appeal, and she moved to the Court on 29 December 2016, alleging unfair termination of employment, discrimination and breach of contract.
10. The Respondent filed a Response and Counterclaim on 20 August 2018. The Claimant filed a Reply to the Response and Defence to the Counterclaim on 18 January 2019.
11. The Claimant's case was taken on 30 July 2019 and on 11 March 2020. The Respondent opted to close its case without leading any evidence.
12. The Court directed the parties to file and exchange submissions with judgment reserved to 16 June 2020.
13. Due to COVID19, the judgment was not prepared as the parties had not filed submissions within agreed timelines.
14. The Claimant filed her submissions on 23 September 2020, while the Respondent filed its submissions on 9 October 2020.
15. When the parties appeared before this Court on 20 January 2021, they confirmed that the Court could proceed to prepare and deliver judgment (the Judge who took the evidence was on transfer).
16. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

### **Procedural fairness**

17. Section 35(1) of the Employment Act, 2007 contemplates written notice of termination of employment unless it is a case of summary dismissal under section 44 of the Act.

18. In the instant case, the written notice of termination was not given, but the Respondent offered the Claimant 1-month salary in lieu of notice.

19. In addition to the written notice, the employer is required under section 41 of the Employment Act to afford the employee an opportunity to make representations before a decision to terminate the contract.

20. The question arising, therefore, in this case, is whether the Claimant was allowed to make representations before the decision to terminate was made.

21. The Notification of Interview Arrangements letter dated 31 August 2015 informed the Claimant:

The meeting will be chaired by Francis Obosi, Lilian Makasembo and Boniface Njenga, who will assess the material provided and your explanation and will make a decision. Mumbi Kahindo will facilitate the meeting and take notes. Depending on the outcome of the meeting, you may be subjected to disciplinary action, and you should therefore attend the meeting fully prepared to state your case.

22. The notification letter text leaves no doubt to any reasonable and informed person that the meeting on 8 September 2015 was not a disciplinary hearing as contemplated by section 41(1) of the Employment Act, 2007.

23. At the very most, the meeting was a performance evaluation meeting. The Court is not even convinced that the meeting was a performance evaluation or appraisal meeting.

24. If it was a performance evaluation or appraisal meeting, the relevant forms should have been produced with a clear statement of targets that had been agreed for the year 2014 and the first half of 2015.

25. A performance evaluation would also, of necessity, involve an employee's immediate superior. It was not disclosed whether the persons who attended the meeting were the Claimant's immediate supervisors.

26. The Court finds that the termination of the Claimant's employment was procedurally unfair.

### **Substantive fairness**

27. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of not only proving but proving as valid and fair the reasons for the termination of the Claimant's contract.

28. The Claimant testified that she had attained a balance score of 103% and further that she had raised her branch from ranking number 93 out of 101 to 78 out of 101 at the time of employment termination.

29. The Respondent did not lead any evidence in an attempt to disprove the Claimant's testimony or to discharge the burden imposed on it by the aforesaid provisions of the law. Performance evaluation records for the Claimant were not filed. The set targets for the period under consideration were also not filed.

30. The Court finds that the Respondent did not discharge the burden imposed on it and concludes that there were no valid or fair reasons to terminate the Claimant's employment.

### **Compensation**

31. The Claimant served the Respondent for 19 years. If it were normal separation, she would have at the bare minimum left with the equivalent of 15 days' pay for each completed year of service as *service pay* or gratuity.

32. Considering the length of the Claimant's service and circumstances of termination of the contract, the Court is satisfied that this is a suitable case to award maximum compensation of 12 months gross salary (the monthly gross salary was Kshs 243,141/-).

### **Salary in lieu of notice**

33. The Respondent offered the Claimant the equivalent of a 1-month salary in lieu of notice, and unless it was not paid, nothing turns on the head of the claim.

### **Breach of contract Leave**

34. Section 28 of the Employment Act, 2007 assures each employee of at least 21 days annual leave on full pay.

35. In terms of section 10(3) & (7) of the Employment Act, 2007, the least the Respondent should have produced were the particulars of the Claimant's leave records, and since the same was not produced, the Court will allow this head of the claim in the sum of Kshs 486,282/-.

36. The Court, however, gives the Respondent the liberty to compute the Claimant's commuted leave and pay the same within 21 days.

### **Discrimination**

37. Although alleging discrimination, the Claimant did not prove that there was any discrimination in the manner of the termination of her contract. She also did not disclose the grounds of discrimination.

### **Counterclaim**

38. The Respondent had counterclaimed for balances on 3 loans which had been advanced to the Claimant in the course of employment. The loan documents were not produced. Even the loan statements were not produced in Court.

39. Despite the failure by the Respondent to produce any documents on the loans, the Claimant produced documents to show that she had cleared the loans by 2016.

40. The Counterclaim is dismissed with costs.

### **Conclusion and Orders**

41. The Court finds and declares that the Claimant's employment termination was unfair and further that she is entitled to payment for outstanding leave.

42. The Claimant is awarded:

(i) Compensation      Kshs 2,917,692/-

(ii) Commuted leave      Kshs 486,282/-

TOTAL                      **Kshs 3,403,974/-**

43. The Respondent is at liberty to compute the leave entitlement if the computation by the Claimant was erroneous.

44. The decretal sum to attract interest at court rates from the date of judgment.

45. The Claimant to have costs on both the Cause and the Counterclaim.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 14<sup>th</sup> day of April 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant      Mr Shifwoka instructed by Nyikuli, Shifwoka & Co. Advocates

For Respondent      Mr Ouma, Advocate & Regional Manager, instructed by Federation of Kenya Employers

Court Assistant      Chrispo Aura