



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT NAIROBI

PETITION NUMBER 22 OF 2017

BETWEEN

NAOMI CONNIE LUSICHE.....PETITIONER

VERSUS

BARCLAYS BANK OF KENYA..... RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Muma & Kanjama Advocates for the Petitioner

Oraro & Company Advocates for the Respondent

JUDGMENT

1. The Petition herein was filed on 17th March 2017.
2. On 30th September 2019, the Court ordered that the Petition shall be deemed to be a Claim.
3. The Respondent subsequently filed what is described as a Memorandum of Defence and *Counter-Petition*.
4. The Petitioner did not file any Amendment to the Petition. She continued to be referred to as the Petitioner.
5. The orders of 30th September 2019 have not been acted upon by the Parties, and the Petition remains as it were from the inception, Petition Number 22 of 2017. The Court shall therefore review and set aside the orders of 30th September 2019, and treat the dispute herein as a Petition.
6. The Court had directed that the Petition is heard in Open Court, on 25th March 2021. On 9th April 2021, in view of spike in Covid-19 infections, the Court redirected that the Petition is considered on the basis of the Pleadings, Affidavits, Documents and Submissions.

Petitioner's Case.

7. The Petitioner states she worked for the Respondent Bank for 26 years. She worked hard, and rose gradually from a Clerk, to the Head of Agency Banking [Vice-President Cadre] by the time she left in 2017.
8. She earned a gross monthly salary of Kshs. 700,000; annual car allowance of Kshs. 130,000; and medical insurance cover of Kshs. 2,250,000 annually.
9. She started to experience difficulties in discharging her role as the Head of Sales, with a lot of blame coming from her Line Manager. She

persevered and was able, with her team, to deliver up to 83% of her overall target.

10. The Petitioner was nonetheless rated as underperforming. From 2016 to 2017, she attended several appeals and capability hearings with her Superiors. She raised certain issues which were not taken into account by the Respondent. She requested for certain documents to assist her cause, which were not availed. She was subjected to verbal and non-verbal harassment by the Respondent. She was ridiculed. At some point, she was asked to resign by the Employee Relations Manager, Vitalis Odhiambo.

11. She was eventually called to a capability hearing on underperformance on 8th March 2017. This went on without information the Petitioner had asked for. The Petitioner was advised she would receive a feedback from the Respondent.

12. She received a letter of termination on 9th March 2017, a day after the hearing, and despite the fact that she was unwell and receiving medical attention, a fact known by the Respondent.

13. The Petitioner holds that termination was malicious, based on falsehoods and injurious to the Petitioner's reputation.

14. She particularizes malice to include: false accusation that the Petitioner neglected her duty; overstating of transactional numbers, which were unattainable; constructive dismissal of the Petitioner, by taking away her functions for 4 months; failing to supply her requisite documents to be able to answer allegations made against her; and by calculating that it would be financially convenient to the Bank, to pay damages for unfair termination, despite the grave harm of loss of career suffered by the Petitioner.

15. The Petitioner argues further that the letter of termination was defamatory. The defamatory words are stated to include: your performance rating for the full year 2015 was underperforming; your performance rating for the full year 2016 was underperforming; and, the above confirms that you have failed to meet agreed performance targets contrary to the business expectation.

16. The above words in their material and ordinary meaning were understood to mean that: the Petitioner is ignorant of her professional duties and obligations; she is irresponsible; and she is negligent. Considering the high position, she held, the falsehoods occasioned her ridicule and injured reputation.

17. The Petitioner avers that she suffered loss of bonus increment of 2 years; loss of future earnings; loss of reputation; loss of career; loss of future employment; and emotional distress. She suffered discrimination and her Constitutional Fundamental Rights and Freedoms, violated.

18. She prays for Judgment against the Respondent as follows: -

a. An order of certiorari, quashing the decision of the Respondent pursuant to a letter dated 9th March 2017 terminating the Applicant's services with the Respondent.

b. An order of injunction restraining the Respondent, whether by itself, or its servants or agents, or any other person acting for and on their behalf from charging any bank charges or interest on the staff housing loan at 16% or any other rate of interest save the allowed charges for staff accounts and the staff interest rate of 6%, and further be restrained from issuing threats of listing the Applicant with the Credit Reference Bureau and/ or repossession, offering for sale, selling, transferring, disposing of or in any other way alienating or encumbering her family home on King'ong'o Block 21/1793 Eldoret Municipality.

FURTHER AND IN THE ALTERNATIVE: -

c. 12 months' salary in compensation for unfair termination at Kshs. 9,960,000.

d. 3 months' salary in notice pay.

e. Damages for loss of career.

f. Interest at court rates from the date of termination.

g. Staff loan to continue at staff rates until full payment, in the alternative the Petitioner be given 40% discount on early repayment.

h. Medical cover until the end of the year.

i. General damages including exemplary damages for discrimination, breach of human dignity and right to fair administrative action, unfair treatment and libel.

j. Costs to the Petitioner.

19. The Respondent answers that, the Petitioner was employed by the Respondent as a Clerk, on the 1st February 1991. She climbed through the ranks, holding the position of Head of Agency Banking, as of 9th March 2017, when the Respondent terminated her contract.

20. The Respondent assesses the performance of its Employees twice a year- mid-year and end-year. There are 6 levels of rating. Any

Employee rated below 'good' is subjected to capability hearing.

21. Performance targets are agreed upon between the Employee and the Line Manager. The Line Manager carries out performance assessment.

22. In 2015 and 2016, the Petitioner consistently performed below per. She was rated as underperforming.

23. She unsuccessfully appealed against the poor rating for mid-year 2016. She was invited to a capability hearing, on 8th March 2016 which she attended without a representative of her choice. Instead of responding to the concerns raised by the Respondent, she referred the Respondent to her appeals in 2015 and 2016, which had already been dealt with. She did not offer proposal on performance improvement.

24. The panel recommended termination, as she had already received final warning letter dated 4th May 2016. Her services were terminated vide a letter dated 9th March 2016.

25. The Petitioner filed an Appeal against termination on 17th March 2017. She did not pursue the Appeal, but instead filed this Petition. The Court stayed proceedings on 21st September 2018 to allow the Petitioner pursue her Appeal within 60 days. She did not do so.

26. She was paid all her terminal dues, as shown in her pay slip of March 2017. She was issued her Certificate of Service.

27. The Respondent denies allegations of malice; loss; discrimination; and breach of fundamental rights and freedoms.

28. It is submitted that termination was fair in substance and procedure, under Section 41, 44 [3] and 45 [2]. The Petitioner indicated by her conduct, that she had fundamentally breached her obligations arising under the contract of service. Capability hearing conformed to Section 41 of the Employment Act. The Petitioner was advised of her right to be accompanied to the hearing by a colleague of her choice. She failed to exhaust her Internal Appeal.

29. The Respondent counterclaims a sum of Kshs. 9,956,043, which was the balance on termination, of staff loan advanced to the Petitioner. She agreed to the terms of the loan, which included conversion of the interest rate to commercial rates. Once termination took place, the Petitioner ceased to be an Employee, eligible to staff interest rates. She is bound by the terms of the security documentation. Medical Cover too, extends to Employees alone, not to ex-Employees.

30. The Respondent prays the Court to dismiss the Petition, and allow the Counter-Petition with costs.

31. The issues as understood by the Court are: -

§ Substantive justification.

§ Procedural fairness.

§ Counterclaim.

§ Remedies.

§ Costs and Interest.

The Court Finds: -

32. The issues above suggest to the Court that the dispute indeed is a crystallized employment dispute, which could be dealt with, entirely under the Employment Act, without the aid of the Constitution. This is a standard employment dispute.

33. There is nothing however, to be gained, or lost by either Party, because one, the Court has agreed to deal with the dispute in the manner it was presented; and two, Rule 7 of the E&LRC [Procedure] Rules, 2016, allows the Court to avail remedies to Parties, such as are pursued by the Petitioner herein, regardless of the mode of approach to this Court.

Substantive Justification.

34. It must be noted from the outset, that the Petitioner was a long-serving Employee of the Respondent Bank. She had worked for 26 years. She had risen through the ranks, from a Clerk to Head of Agency Banking. Parties state the position is equivalent of the cadre of Vice-President. Although there is no elaborate evidence on record, concerning the Respondent's organogram, the Petitioner no doubt rose close to the apogee, in the organogram, through decades of service. Then, she came tumbling down, faster than she had ascended.

35. When it is said that she was consistently underperforming in the last couple of years of service, justifying capability hearings, warnings and termination, there ought to be an explanation on the sudden loss of form, in a player who had spent most of her 26 years of service, perched at the top of the performance ladder.

36. Performance Management System, ought to investigate and give plausible evidence that indeed there is dip in performance. Employees with long service do not change overnight. It would not be wrong to presume that they become better with experience. Unless there is some

major distraction experienced by the Employee in or out of work, it is hardly believable that there is good or acceptable performance over a period of about 23 years, and a sudden fall in the last 3 years of service.

37. Having made this general observation, a closer scrutiny of the Performance Management System, how it was applied to the Petitioner, resulting in termination. In particular, it is important to review what was said by the Reviewers, in their assessment of the Petitioner's performance.

38. The Performance Management System put in place by the Respondent required Employees are assessed mid-year and end-year. Targets were arrived at between the Employee and the Line Manager. There were 6 levels of ratings, the highest being Outstanding, the lowest being Underperformance.

39. The Petitioner was rated Underperforming in the full assessment of 2015, Underperforming in mid-year assessment of 2016, and underperforming in end-year 2016.

40. This resulted in capability hearing and termination.

41. The 2015 Performance Year-End Consolidated Summary on record, are not conclusive on underperformance attributed to the Petitioner. Her Primary Reviewer, Zahid Mustafa, commented that the Petitioner struggled with overall implementation of DST strategy. He also commented that she had been trying hard to increase sales momentum.

42. Her other Reviewer James Muchiri observed that by the time the Petitioner transferred to agency banking, there was not sufficient time to make a difference.

43. Mid-year review comment from Mustafa was that the Petitioner had tried to drive the business with a passion and aggression with mixed results.

44. Most comments by Muchiri, when he made some, were curt, generalized, and not disclosing facts on which the comments were based. They include comments such as: -

§ A difficult year for Connie.

§ Improvement needed.

§ Under-performing.

45. On most occasions, the Reviewers in 2015 are recorded to say: no response. The last remarks Muchiri made for 2015 end-year assessment, were again to the effect that, the Petitioner did not have adequate time with agency banking to make significant contribution, but enjoyed working on the project and was ready to take it to the next level.

46. For the Performance Period 2016, the Respondent appears to have introduced Feedback Providers to the performance evaluation. Reviewers continued to have no response in most cases, to comments made by the Petitioner at different stages of the exercise. Muchiri observed that the Petitioner spent most of the year 2016, on Performance Improvement Plan, [known at the Barclays' Bank as Performance Accelerator Plan], arising from her failures in 2015. It was his view that the Petitioner was able to make some progress, but that the business case benefits were not achieved. For most part however, it was a no response, from Muchiri.

47. Feedback Providers were impressed by the Petitioner's performance. John Achoki commented that the Petitioner was mature and demonstrated passion for agency banking. She was active and impressively so, in the field. Kabandla Lilanda was of the view that the Petitioner was instrumental in pushing for adoption of agency banking. They termed her as an Employee who respected other Employees' space, who pursued service excellence, polite and approachable, but who should nonetheless address her time-management.

48. It is not clear if the Respondent took the comments by these Feedback Providers, in its overall review of the Petitioner's performance.

49. The last comments attributed to Muchiri for 2016, were much like in the assessment of 2015- improvement needed and underperforming. And like in the previous period, the comments were not founded on clear statistical data, indicating targets achieved and missed. It cannot be concluded that the Respondent adhered to its Performance Management Policy which proclaims that as a minimum, a clear, concise summary of the Employee's performance during the review period, must be documented, and that evaluation should be fair and equitable against a consistent set of standards.

50. The assessments are not supported by clear data, and the comments from various persons cannot be conclusive that the Petitioner, assessed objectively, was underperforming.

51. The assessments disclose, going by the comments of the Reviewers and Feedback Providers, that the Petitioner may have been hampered by her transfer into agency banking. She does not seem to have been provided sufficient time and support to settle there, and be significantly productive. She was appointed Head of Agency Banking on 18th February 2016, and advised she would be provided with a separate job description. Her dip in form, if indeed it existed, appears to have coincided with the restructuring carried out by the Respondent, in 2015-2017. Did the Respondent give her clear and separate job description, offered re-orientation and time to settle down?

52. It was also a common view that she loved what she was doing, had passion and was willing to improve, with the support of the

Employer. The Performance Accelerator Plan original date, is indicated as 24th June 2016. The Petitioner was not on the Plan, in the past 24 months. The Plan indicates she needed improvement. She was not underperforming, as consistently stated by Muchiri in his reviews. The Plan also supports the position that the Petitioner was willing to improve. On 16th August 2016, her Manager stated that she had made effort to ramp up transactional performance, visiting locations in the Rift Valley and Western Region. On 19th October 2016, the Manager indicated that the Claimant had put in a lot of effort, but transaction volumes expectations, had not been attained.

53. By the time of termination, the Petitioner had been relieved of the role of Head of Agency Banking. She asked to be advised on her new job description, but none was provided. She complained to the Barclays' Bank honchos based in South Africa about her treatment, detailing her performance ratings over the past 14 years. It is worth repeating here: -

§ 2003 as Retail Manager – HIGH.

§ 2004 as Retail Manager – HIGH.

§ 2005 as Retail Manager- HIGH.

§ 2006 as Retail Manager – TOP

§ 2007 as Retail Manager – A

§ 2008- as Regional Manager – B

§ 2009- as Regional Manager- A.

§ 2010- as Regional Manager- A

§ 2011- as Regional Manager – Meets all expectation, exceeds some expectations.

§ 2012- as Regional Manager- Fully meets expectations.

§ 2013- as Regional Manager- Fully meets expectations.

§ 2014- partly as Regional Manager and Head of Sales- Strong.

§ 2015- partly as Head of Sales and Head of Agency Banking – Underperforming.

§ 2016- as Head of Agency Banking- underperforming.

54. Historically, the Petitioner was a Top Performer, so what led to her becoming a bottom performer, in the last 2 years? The Respondent Bank should have been concerned that after investing in the Petitioner, and lifting her to the top in 24 years, she should have been allowed to drift so drastically, in the last 2 years, resulting in the forcible end to her banking career, in 2017.

55. In the respectful view of the Court, termination was not based on fair and valid reason, as required under Sections 43 and 45 of the Employment Act. It is illogical that an Employee with 26 creditable years of service, would suddenly become a consistent underperformer, groping her way around like an Employee who was freshly on probation. An Objective Performance Management System, would first establish that indeed underperformance has taken place, and second, seek to unravel why its long-serving Employee has suddenly turned into an underperformer, and lastly seek to rectify the work environment that has probably triggered underperformance.

56. This Court dealt with another instance of a long-serving Barclays' Bank Employee, **Kassim Nyongesa Barasa v. Barclays Bank of Kenya Limited [2020] e-KLR**, who coincidentally was taken through capability hearings in the same period as the Petitioner herein, and had his contract terminated in the end, for alleged underperformance. Barasa had served the Respondent for about 23 years, before allegations of sudden underperformance, brought his banking career down. His position was that his contract was terminated through an unlawful redundancy.

57. The Court was of the view then and now, that Performance Management should aim at correcting perceived employment failures, not a diversification of modes of termination of employment contracts, available to Employers.

Procedural Fairness.

58. The record shows that the Petitioner was issued a letter to show cause on the allegation of underperformance. She gave a response. She was issued a notification of the capability hearing. She attended hearing, but did not do so in the company of a colleague of her choice. The minutes of the hearing, show she was given an opportunity to express her position. A decision was made to terminate her contract. She made an Appeal, which she did not pursue. Even when the Court adjourned its proceedings for a period of 60 months, to allow her exhaust the appellate process, she did not pursue her Appeal. She did not explain to the Court why she declined to do so.

59. The Court pointed out that there should be a distinction between capability hearing and disciplinary hearing, in the case of **Kassim Nyongesa Barasa**. The Petitioner's contract states at paragraph 14 that disciplinary, capability and grievance procedures are not incorporated

in the Employee's contract of employment, which raises doubt on how binding these procedures would be on the Employee, if not incorporated in his/her contract. How would a policy which is not incorporated in the Employee's contract, be enforceable against the Employee? The Respondent makes little distinction between capability hearing and disciplinary hearing, suggesting that there could be areas of overlap.

60. The Petitioner however accepted the capability hearing process, submitted to it, and had her contract terminated at the end of that process. She was given an opportunity to challenge the outcome on Appeal, which she did not pursue to the end.

61. After performance assessment, she was allowed to appeal against adverse rating, before the capability hearing, which in the view of the Court, enhanced procedural fairness.

62. Procedure was largely in conformity with the minimum standards of fairness, prescribed under Section 41 of the Employment Act.

Counterclaim.

63. The Respondent countersues for the sum of Kshs. 9,956,043 in staff loan balance. This is based on staff loan extended to the Petitioner during employment. Documents in support of the staff loan are exhibited as appendix 10 of the Respondent's Bundle.

64. The Petitioner also seeks certain reliefs, related to the staff loan transaction.

65. The Loan Agreement contains an arbitration clause worded as follows: -

[I] *' Any dispute arising out of, or in connection with this agreement shall in the first instance be referred to arbitration by a single arbitrator to be appointed by agreement between the parties, or in default of such agreement within 14 days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom.*

[ii] *Such arbitration shall be conducted in Nairobi, in accordance with the rules of arbitration of the said Institute and subject to and in accordance with the provisions of the United Kingdom's Arbitration Act 1996, or modification thereof.*

[iii] *To the extent permissible by law, the determination of the Arbitrators shall be final and binding upon the Parties.'*

66. The Parties have, by this clause, positively rejected the jurisdiction of the Court, with regard to disputes arising out of the Loan Agreement. They have expressly conferred jurisdiction on an arbitrator. They should pursue disputes arising under the Loan Agreement, through arbitration.

67. ***The Countersuit on recovery of loan balance is declined for want of jurisdiction.***

68. ***For the same reason the order of injunction sought by the Petitioner barring the Respondent from converting the staff rates of interest to commercial rates, and from alienating the Petitioner's encumbered property, is declined.***

69. ***Similarly, the Court does not have jurisdiction to order that the Petitioner continues to pay the loan at staff rates of interest, or is given the option of 40% discount on early payment. These are matters for the arbitrator to determine. The prayer is declined.***

Rest of the Remedies.

70. The Petitioner seeks 12 months' salary in compensation for unfair termination. She had worked for 26 years. She was consistently rated highly, except for the last 2 years, when something seems to have gone awry with the Respondent's Performance Management System. She cannot be blamed for the circumstances leading to termination. Although termination was not based on valid reason, procedure was largely fair. Her monthly gross salary was Kshs. 700,000. She appears to add the car allowance of Kshs. 130,000 to the gross salary, giving her a gross salary of Kshs. 830,000, and resulting in the prayer for Kshs. 9,960,000 as 12 months' salary in compensation for unfair termination. This approach is wrong, because the car allowance of Kshs. 130,000 is pleaded as annual allowance. Once she stated in her Petition, that her remuneration package included a gross monthly salary of Kshs. 700,000, she ought to have stuck with this in computation of compensation. ***She is allowed the prayer for compensation, equivalent of 8 ½ months' gross salary, at the rate of Kshs. 700,000 per month, in compensation for unfair termination at Kshs. 5,950,000.***

71. Her contract in its original form and through subsequent variations, gave a notice period of 1 month, or salary on 1 month in lieu thereof. It is not shown that the Petitioner was entitled to 3 months' notice of termination, or 3 months' salary in lieu thereof. ***The Petitioner is allowed 1-month salary as notice pay, at Kshs. 700,000.***

72. There is no evidence to justify the prayers for aggravated and exemplary damages for discrimination and loss of human dignity. There is no evidence to show that the Petitioner was libelled. Medical Cover ended at the time it was shown to expire. The Court has no role in determining when that was. It has no power to order extension for 1 year as prayed. The 1 year from the date of filing the Petition has in any event lapsed. Damages for loss of career have no support in evidence. She did not lead evidence on loss of employability. There is no evidence that she applied for alternative job, and was unsuccessful, on account of any adverse reference from the Respondent. The Petitioner has been adequately compensated for loss of employment.

73. An order of certiorari quashing termination decision is not reasonable, the Court having found that termination was unfair on account of

lack of fair and valid reasons, but fair on procedure. The letter of termination must be left to lie in the Petitioner's employment record. It is a record of the Petitioner's exit from the service of the Respondent Bank. The decision to terminate has been faulted, which is not the same thing as to say, it ought to be quashed.

74. *Costs to the Petitioner.*

In sum, it is ordered: -

- a. *It is declared that termination was unfair for want of valid reason or reasons.*
- b. *The Respondent shall pay to the Petitioner: equivalent of 8 ½ months' gross salary in compensation for unfair termination at Kshs. 5,950,000, and notice pay at Kshs. 700,000, total –Kshs. 6,650,000.*
- c. *Costs to the Petitioner.*

DATED, SIGNED AND RELEASED TO THE PARTIES, AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 23RD DAY OF JULY 2021.

JAMES RIKA

JUDGE