



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1643 OF 2016

PAUL KATUKU MUTHENGI.....CLAIMANT

VERSUS

SMEP MICRO FINANCE BANK LTD.....RESPONDENT

JUDGMENT

I. INTRODUCTION

1. The claimant was in the respondent's employment from 16th September 2013 to 28th APRIL 2015, when the employment was terminated. At the time of the dismissal, he held the position of sub unit manager at the respondent's Kitui Branch. The claimant was terminated on account of poor performance according to the termination letter by the respondent dated 28th April, 2015.

2. Holding the termination to be unfair, the claimant lodged a claim against the respondent, through a statement of claim, dated 27th June 2016, wherein he claims:-

- a) Compensation for unfair termination in the sum of Kshs.840,000;
- b) A refund of money spent Kshs.8,050;
- c) Certificate of service;
- d) Costs and interest.

3. The statement of claim was contemptuously filed with the claimant's witness statement and list of documents.

4. The respondent did file a response to the statement of claim and a witness statement of the Collins Aluku which was later on substituted with that of Rose Bii (RW1).

5. The matter got ripe to proceed for hearing on merit.

The claimant's case

6. The facts forming basis of the claimant's case are straight forward. They are embodied in the statement of claim, the witness statement (which by consent of the parties was deemed his evidence in chief) and his testimony in Court.

7. By a letter of employment dated 4th September 2013, the claimant came into the employment of the respondent as a sub unit manager. The terms and conditions of the employment were contained in detail in the service contract that was executed by both the claimant and the respondent – exhibit 1.

8. His employment was on a contract basis. The contract was for a period of 3 years, commencing 16th September 2013. It was meant to end on the 16th September 2016. According to the claimant, the letter of employment provided that he had to serve a probation period of six months, and after a successful completion of this period, confirmation to the employment was to follow.

9. The claimant contended that there was no appraisal that was conducted on his performance during the probation period. After the period there was no formal confirmation of him to the employment. On the 22nd April 2014, he got constrained to write an email to the respondent's Regional manager, requesting him to follow up the issue.

10. On the 29th October 2014 a list by the respondent's Head of Human Resource on those employees whose confirmation had delayed came out, but the claimant's name was missing. This prompted the him to write an email to the regional manager and copied the correspondence to the Head of Retail and Human Resource manager. The email did not elicit any response from either of the two.
11. The claimant contended that on the 12th February 2015, a performance review was conducted in respect of his work. He was given a score card of 93% which indicated that he had met all the set targets. Thereafter there was no other appraisal until the time of his termination. He tendered as evidence a memo dated February 12, 2015 in regard to the appraisal – Exhibit 4, and the score card – Exhibit No. 5.
12. The claimant stated that between 23rd February 2015 to 7th March 2015, an audit was conducted on his unit, and the same revealed that the unit was not performing well. Most of the reasons related to happenings that were before he took over the leadership of the unit.
13. The unit was supposed to be closed on the 31st March, 2015, but it wasn't until 30th April 2015.
14. The claimant stated that on the 29th April 2015, he received a termination letter dated 28th April 2015. The letter indicated that he was supposed to leave office by 30th April 2015 due to his poor performance.
15. Before the decision to terminate his employment was made, the he was not given an opportunity to be heard, he asserted.
16. According to him, the reason for the termination was not really on an account of poor performance, but because the respondent had made a decision to close down the Kitui sub unit.
17. That he handed over the office to the regional manager on the 30th April 2015. Upon handing over, he made a float of Kshs.8,050 which the respondent has never refunded.
18. The claimant was earning a consolidated pay of Kshs.70,000 from the time of his employment until when his employment contract was terminated.
19. In his brief oral testimony in chief, the claimant testified that he never had any salary increment. However, he remembers that on the 1st February 2018, he was entitled to, but which was never effected. He was not given any reason for the failure.
20. At termination of his employment, he was not given a certificate of service.
21. Currently, he is doing consultancy work in matters finance.
22. Cross-examined by Ms. Karanu, the claimant confirmed that he started working with the respondent on the 16th September 2013. He was in charge of the operations of the respondent's Kitui unit.
23. The claimant reiterated that he was appraised in the month of February 2015, by his regional manager and he was awarded a performance result of 93%.
24. The performance targets were set by the regional manager. The claimant appreciated that score card was to weigh the performance of December 2014 against that of as at February 2015. According to the circular (Exhibit 4) that had been issued, the target was an improvement of 4%.
25. For his unit, and the Loitoktok one the targets were to be pegged on PAR (Portfolio at risk) only. According to him the target for February 2015, was to recover 42% of the loans. The recovered 45%. He had 55% no-performing loans.
26. Shown a letter from the regional manager, letter dated 13th February 2015, the claimant admitted that in content, the letter expressed the manager's view that the performance of 45% was below par. Further, according to the letter he is the one who set the targets.
27. Referred to his exhibit 7 – the internal audit report, the claimant admitted that the verdict therein was that the unit was non-performing and therefore was to be closed. At page 3 of the report there is an executive summary which gives the findings and reasons thereon.
28. The claimant stated that he inherited the unit when it was not performing. Several groups had been given loans and subsequently would not be traced for recoveries to be made. He explained these challenges to the regional manager.
29. Lack of proper business continuity was one of the challenges. The staff who left the unit did not do proper handing over or at all. However, he was quick to add that no member of staff was transferred during his tenure. The frauds that are mentioned in the report did not happen during his time.
30. He remembers there was an earlier audit that had been done on the unit, however he was not given a copy thereof. It is this audit that the last audit report referred to.
31. His correspondences to the regional manager would not be exhibited in court because he was corresponding using his official email account, which was immediately deactivated upon the termination.

32. Poor loan collection cannot wholly be attributed to him. There were lots of extrinsic factors, including the failure on the part of the Head office to initiate recoveries.
33. The termination letter cited poor performance as the account upon which the contract of employment was being terminated.
34. At his exit he was given salary for that month worked and on top, an amount equivalent to a one month's salary.
35. As regards the claim on the float refund, he stated that he handed over receipts thereof to the regional manager when he was handing over. He did not keep records of the receipts. It was his expectation that a refund would be made. When his terminal dues were paid without the refund, he was not given any reason.
36. The claimant maintained that his performance was good. At the time of closure of the unit, all the other staff were transferred except him, who was terminated.
37. In his evidence in re-examination the claimant took a position that the 93% was arrived at by the regional manager. The score card was subsequently given by him. Referring to exhibit 5 (the performance score card), he stated that the same was scoring the performance for January 2015, and that at the last paragraph thereof, there is an indication that an appraisal for the month of February 2015, was to follow. The appraisal was never done. Therefore, no other score card.
38. The claimant testifies that through the demand letter – exhibit 10, by his counsel asked for issuance of the certificate of service and a refund of the float money, there was no response. The respondent did not demand for receipts as pre-condition for settlement of the sum and or issuance of the certificate.
39. The response to the statement of claim does not advance the reason for the failure to pay the sum as lack of supporting receipts.

The respondents case

40. In its response to the statement of claim, the respondent averred that the claimant was appraised and his performance was found to be below the required standard, and on the 7th of November 2014 the claimant was put on a performance improvement plan with clear timelines for performance improvement.
41. The respondent further contended that according to a code of conduct of the respondent, which code the claimant executed, the latter was aware that he was bound to meet deadlines as set by the organization.
42. The respondent denied that the score card (claimant's exhibit 4) related to the claimant. According to the respondent, there is a disconnect between the audit report and the score card. The conclusion in the audit report was that the branch was non-performing, how then would the claimant score 93%?
43. In its pleading, the respondent maintained that the claimant's employment was terminated because of poor performance.
44. The respondent presented Ms Rose Bii (DW1) his Head of Human Resource and Administration to testify on his behalf. This witness adopted her witness statement as her evidence in chief, only clarifying areas thereof that need clarification during her brief testimony in court. She produced the document that had been annexed to the response – appendix A as the respondent's Exhibit 1.
45. According to this witness staff appraisals on the respondent's employees was a daily activity, but formally on a quarterly basis. The daily performance was weighed against specific targets. How the employees performed daily would be intimated to the respective members of staff by their team leaders.
46. The witness referred Court to the contents of the document – Performance Improvement Plan (Exhibit 1). She stated that the plan is normally one of the action points, where staff is not performing to the expectation of the bank. The plan indicates to the member of staff how performance is to be weighed and the timelines among other things.
47. The witness testifying to the document further stated, that there is a reflection therein that as at November 2013, the claimant was not performing, as per the trend analysis for the month of August 2013 – October 2013.
48. On the score card – the claimant's exhibit 5, the witness stated that targets are set globally at strategy level, and then cascaded to the branch level. The score card had targets that were set by the manager at the branch and it had only one parameter – PAR.
49. The percentage of achievement at 93% is unrealistic, she asserted. She held this view because the targets that were set by the individual were too low. He cannot claim therefore that he had achieved. A good score based on portfolio at risk would stand at almost 50%.
50. The claimant was underperforming having scored 45.7 which was way below expectations.
51. The witness testified on the audit report. The period in issue was February 2015 to March 2015. The main purpose for the audit was checking on the performance of the unit. The audit referred to the period when the claimant was at the helm of the unit. At page 5 of the report there is a table indicating the performance of each staff and top on the list is the name of the claimant.

52. According to her the termination was procedural and the termination letter is clear on the reason for the termination.
53. In the performance improvement plan for November 2014, there was encompassed a warning that a default in improvement would lead to disciplinary action.
54. To her mind as a Human Resource practitioner, the respondent was not supposed to call the claimant for a disciplinary hearing or give him of a show cause letter.
55. She stated that the claimant's certificate of service is ready for collection.
56. Under cross examination by counsel Muigai, the witness admitted that she was not in the employment of the respondent as at 28th April 2015. This notwithstanding, she is well appraised of the facts of this matter, having gone through the documents in regard thereto and the relevant policy.
57. The witness confirmed that there was a salary increment across board but the claimant's salary did not change however.
58. By referring to the management, the termination letter was meant the management team at the Head office of the respondent. The team is composed of the heads of departments, Human Resource manager and the C.E.O.
59. Prior to the termination, there were deliberations. The Claimant was not present in the final meeting. At the audit stage the claimant was involved. However, the audit was to gauge the performance of the branch.
60. The letter of termination does not refer to the audit report, it only refers to meetings with the regional team.
61. Questioned on the score card, she stated that the card was of a time when she had not joined the respondent. She was not involved in the generation of the same. She opined that the card was not complete in detail.
62. From the record, the performance was appraised in January 2015, the score card stemmed from this appraisal. She conceded that the scores should be taken the way they are.
63. The audit report was explicit. It concentrated on the exit strategy of the unit. At the time of the audit, a decision had been made to close down the unit.
64. The report did not wholly confine itself to the period the claimant was leading the unit. The report identified only one short coming on the part of the claimant – he failed to turn around the unit.
65. Though the contract letter stipulated the grounds for termination of the contract of employment and the procedure to be followed to terminate on the grounds, it is silent on termination on an account of poor performance. However, the situation is covered under the Human Resource policy of the respondent.
66. She is aware of section 41 of the Employment Act. The section applies to gross misconduct and summary dismissal. Payment in lieu of notice does not impede an employee laying a claim for unfair termination.
67. According to her, the performance of the claimant had been discussed severally, though she did not have any minutes to demonstrate this. It is only the termination letter that made reference to poor performance.
68. Exhibit 3, a transfer letter, acknowledged the hard work of the claimant, she acknowledged.
69. Lastly under cross examination, she stated that the claimant wasn't heard before the termination.
70. In re-examination, the witness stated that the transfer letter was standard in content. She further stated that the termination procedure that was followed was in conformity with clause 10.1 of the contract letter.
71. Court seeking clarification on the score card, the witness stated that the regional manager gave the claimant 45.7%, the card gave him 93%. The claimant is the one who computed. However, when referred to the card by counsel Mungai, the witness admits that the card has a content thereon, signifying that the card was being forwarded to the claimant.

The claimant's submissions

72. In his written submissions, counsel for the claimant has identified two issues as the issues for determination in this matter. First, whether the termination of the claimant's employment was fair in the circumstances of the matter. Second, whether the claimant was discriminated upon when he was denied a salary increment that was effected on 11th April 2014 across the board.
73. It was submitted that section 35 of the Employment Act, 2007, provides for termination of an employment contract by notice, where the contract is for payment of wages or salary periodically at intervals of one month or more, the period of notice should be at least 28 days. The fact that a notice has been issued pursuant to this provision, does not in any way disentitle an employee from laying a claim for unlawful and unfair termination. In fortification of this submission and the applicability of section 36 of the Employment Act, the claimant places reliance

on the Supreme Court decision in *Kenfreight (E.A.) Limited Vs. Benson K. Nguti [2019] eKLR*, paragraphs 29 and 30.

74. It was further submitted that unfair termination, according to section 45 of the Employment Act is where the employer fails to prove that the reason for termination is valid. A reason for termination is fair, where it relates to the employee's conduct, capacity or compatibility of the employer, and the employment is terminated in accordance with fair procedures.

75. Fortified by the Court of Appeal decision and that of the Supreme Court in the *Kenfreight* case, and the Court of Appeal decision in *National Bank of Kenya Vs. Samuel Nguru Mutonya [2019] eKLR*, a fair procedure is one which is compliant with the provisions of section 41 of the Employment Act, 2007. Counsel submits that this section is coached in mandatory terms and issuance of a notice or payment in lieu of notice does not remedy a deviation from it.

76. Pursuant to the provisions of section 43 of the Act the onus is on the employer to prove that the termination was fair.

77. In determining the fairness of termination, counsel submitted that the Court is empowered under section 45 of the Act to consider: -

- a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of the decision to the employee and the handling of any appeal against the decision.
- b) The extent to which the employer has complied with any statutory requirements connected with the termination including issuing of a certificate under section 51 and the procedural requirements under section 41.
- c) The previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- d) The existence of any previous warning letters issued to the employee.

78. It is contended that the respondent did not at all comply with the statutory procedural requirements set out in section 41 of the Act. The reason given for the termination was poor performance. The mandatory procedural requirements were applicable here. Contrary to the assertion by the respondent's witness, the payment in lieu of notice did not relieve the respondent of the burden to observe the mandatory procedural requirements. As in the *Kenfreight* case, the failure to do so alone is in itself enough to render the termination unfair.

79. The claimant's counsel submits that the manner in which the termination was communicated, was wanting. The letter is vague, it refers to a decision of the management. It does not state who the management is. The letter was handed over, a day before the date on which the claimant was required to exit.

80. On the reason for termination (poor performance), counsel started his submissions by referring to a letter [Exhibit 3] dated 17th September 2014, by the respondent, a letter which according to him was full of praises for the claimant. The score card (exhibit 5) came shortly after this. It gave him a score of 93%. The letter by the regional manager, which refers to the score card is difficult to understand, for it on the other hand, criticises this performance.

81. It was submitted further by counsel that the audit report did not place any specific blame on the claimant. In fact, unit's poor performance was blamed on factors beyond those that were under the claimant's control.

82. Counsel concluded that the respondent did not have a valid reason to terminate the claimant's employment. The real reason would seem to be the fact that the respondent had made a managerial decision to shut down the unit in which the claimant was working, rather than declare his employment redundant. The termination was not procedurally fair.

83. Discrimination may occur, where an employer decides to offer a pay rise but denies one employee a rise without any sufficient cause. The respondent's witness did admit that there was a pay rise, but this was not effected on the claimant's salary. She did not give any reason for this. Counsel placed reliance in the decision of Radido, J. in *Isabela Wayua Musau Vs. Copy Cat Limited [2013] eKLR*.

84. The claimant submitted that he did produce a float return form (Exhibit 9) which shows that he had spent Kshs.8,250 and the respondent failed to refund. He submitted that the reason that was given by the respondent for the failure to refund, only came up in testimony as an afterthought.

85. Counsel urges this Court to get guided by the parameters set out by the Supreme Court in the *Kenfreight* case, and award the claimant the maximum compensation of 12 months' gross salary.

The respondent's submissions

86. Counsel for the respondent has put forth in his written submissions the issues that he suggests should be issues for determination in this matter, namely: -

- (i) Whether the claimant was unfairly terminated?
- (ii) Whether the claimant is entitled to the prayers sought?

87. On the first issue, it is submitted that under section 45(2) of the Employment Act, termination of an employee's contract is unfair if the

employer fails to prove that it was grounded on a valid reason and a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements.

88. The claimant was terminated on account of poor performance.

89. It was submitted that section 36 of the Employment Act was in line with clause 10 of the service contract which provided that either party may terminate the agreement by giving the other party a one month's written notice or by paying the equivalent of one month's salary (inclusive allowances) in lieu of notice. The claimant was paid one month's salary in lieu of notice.

90. As regards fairness of the reason for termination, counsel submitted that according to the respondent's witness the claimant's performance was below par. This is exemplified by the performance improvement plan of 7th November 2014. The claimant did dispute receipt of the performance improvement plan.

91. Anchoring his argument on the memo dated 12th February 2015, the respondent's counsel argued that the card was to be filled by the claimant himself. The claimant filled the targets for January at 42.6% and the actual 45.7%. The achievement being 93%. He gave himself a March target of 37%. According to counsel the lower the figure the higher the achievement. Therefore, the witness was right when she asserted that 45.7% was not an achievement as purported by the claimant. He submits that the fact that the claimant gave himself a March target of 37% fortified this stand by the witness.

92. Citing the case of *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) Vs. Stanley Kinyanjui and Magnet Ventures Limited (Industrial Court Case No. 273 of 2010)*, where it was held: -

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time.”

It was his view that the claimant was given enough time to improve. He did not.

93. Counsel submits that the freedom of contract cannot be underscored. He submits that a contract of employment can be terminated at any time without the party terminating giving reason. That, it is enough for terminating party to give a notice or salary in lieu of notice. He submitted that this was the position taken by the Court of Appeal, and Justice Makau in *Kenya Revenue Authority Vs. Menginya Salim Murgani [2010] eKLR*, and *Manual Anidos Vs. Kinangop Wind Park Limited (In Receivership) [2019]eKLR*, respectively.

94. The contractual provision regarding termination was not breached. The respondent having issued the termination notice in accordance to the service contract there was no requirement for any further step.

95. The claimant is not entitled to any reliefs under the head unfair termination, he submitted. On the Kshs.42,000 counsel submits that it is payable, in view of the respondent's witness's testimony. The certificate of service is ready for collection.

96. The respondent submits that the Kshs.8,050 can only be paid upon production of supporting receipts.

97. The claimant failed to prove unfair termination. The claimant has not discharged his burden of proving that the termination of his contract of service was unfair. Consequently, the burden of proof has not shifted to the respondent so as to make a rebuttal by evidence justifying the reason for the termination.

DETERMINATION

98. Before I delve into the issues that I consider issues for determination in this matter, I consider it imperative to state the role of the Court in matters like the instant one, where parties have taken positions that are diametrically opposed, on principal issues. On this, this Court stated in *Lydia Moraa Obara Vs. Tusker Mattresses Limited[2021]eKLR* thus: -

“41 In determining the appropriateness of dismissal this Honourable Court is enjoined to take into account the totality of the circumstances of this matter and the fact that the burden of prove of fairness of the dismissal rests with the employer. In the persuasive decision, in *Theewaterskloof Municipality Vs. Salga [2010] 10 BLLR 1216 (LC) 1223, South Africa Labour Court, Tip AJ* aptly sums up this as follows: -

“The core inquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of employee challenge of it. That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer's decision was fair.”

99. Counsel for the respondent has submitted that the burden of prove lay on the claimant herein to prove that the termination was unfair. I am not in agreement with this line of thought. The employee must establish the fact of dismissal. Thereafter the employer must prove that the dismissal was fair in the sense that it was upon premise of a fair reason and that a fair procedure was followed. This is the general rule. However, onus on an employee will depend on the form of dismissal that is alleged. For example, where an employee alleges constructive dismissal, he must establish some conduct on the part of the employer that was “intolerable” and drove him/her to terminate the contract.

100. The following issues are the issues that present themselves as issues for determination in this matter, namely: -

- (i) Whether the dismissal of the claimant from employment was procedurally fair?
- (ii) Whether the dismissal was substantially fair?
- (iii) What remedies are available, if any, to the claimant in the circumstances of this matter?
- (iv) Who should bear the costs of this suit?

[i] Whether the dismissal of the Claimant from employment was procedurally fair.

101. Section 35 (1) (c) of the Employment Act, 2007, provides: -

“A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be: -

a)

b)

c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing;

and Section 35 (4) provides:

“Nothing in this section affects the right –

a) of an employee whose services have been terminated to dispute lawfulness or fairness of the termination in accordance with the provisions of section 46 or,

b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.” (emphasis mine).

102. Section 36 of the Act provides for payment in lieu of notice thus: -

“either of the parties to a contract of service of which section 35 (5) applies may terminate the contract without notice upon payment to the other party of the remuneration which would have been issued by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.”

103. Premised upon these provisions, the respondent’s witness in her evidence and its counsel in his submissions, took a position that the same went hand in hand with clause 10 of the service contract which states that either party may terminate the agreement by giving the other party a one month’s written notice or by paying the equivalent of one month’s salary (inclusive of allowances) in lieu of notice. The claimant was paid one month in lieu of notice upon termination of the employment and the reason was as poor performance.

104. That having paid the salary in lieu of notice, the respondent was not obligated to take any more step and the claimant was entitled to no more under the Act and the contract. He has no cause of action. Their position suggests.

105. I do not agree with the respondent’s position. The same appears to me a product of reading certain provisions of the Act in isolation from the others, consequently blurring their eyes from seeing the whole picture on the matter. The position is also as a result of a failure to appreciate the structure and texture of our current regime, on matters employment rights and duties and labour relations.

106. The provisions too cannot be read in isolation from those stipulations of the Constitution of Kenya more specifically those that relate to fair hearing and fair labour practices. The postulations of the Fair Administrative Actions Act, too.

107. To this Court, the provisions of Employment Act, 2007, on unfair dismissal displaced the ability of employers at common law to dismiss employees without cause. At common law, an employee would be dismissed without reasons if he or she was given reasonable notice or pay in lieu of notice.

108. One can confidently assert that the unfair dismissal outfit consists of expansive protection to employees.

109. Section 35 (4) (9) opens the way for employees to seek for and enjoy the full remedial package Parliament created for them.

110. In Wilson Vs. Atomic Energy of Canada Limited 2016 SCC 29 Abella J, aptly capture this point as follows:-

“..... The foundational premise of the common law scheme – that there is a right to dismiss on reasonable notice without cause of reason – has been completely replaced under the Code by a regime requiring reasons for dismissal. In addition,

the galaxy of discretionary remedies, including most notably, reinstatement, as well as the open-ended equitable relief available, is utterly inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the code without providing adequate severance pay, there is virtually no role for the plurality of remedies available to the adjudicator under the unjust dismissal scheme.”

111. Section 45 of the Employment Act, 2007, dictates that no employer shall terminate the employment of an employee unfairly. Section 45 (2) (c), provides the foundation for insistence on engagement of a fair procedure, if a termination of employment were to be considered fair - *Lydia Moraa Obara Vs. Tusker Mattresses Limited [2021] eKLR.*

112. The answer as to what fair procedure is, is found in the provisions of section 41 of the Employment Act, 2007 which provide: -

“(1) subject to section 42 (1), an employer shall, before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapability or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is preferring termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissal an employee under section 44 (3) or (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

113. To my mind, this provision is in line with the provisions of the Constitution of Kenya 2010, regarding the right to fair hearing, and those of the Fair Administrative Actions Act.

114. Buoyed up by line of thinking expressed by its witness, the respondent did not follow this procedure laid down in the above-stated provision. In cross-examination, the witness boldly asserted that the procedure was not applicable to situations where an employee is dismissed on an account of poor performance. She admitted that the procedure was not followed.

115. Section 45 (2) (c) places upon the employer an obligation to prove that, the employment was terminated in accordance with fair procedure. In the defaulting the employer’s termination is concluded to be unfair. This is what the Court of Appeal found in, *National Bank of Kenya Vs. Samuel Nguru Mutonyi [2019]eKLR.* where they stated:-

“we fully adopt the above position in law that the Bank ought to have invoked when contemplating termination of the claimant’s employment. None of the above procedures were outlined by DW1 as having been undertaken by the Banking before terminating the claimant’s employment. We therefore find no basis for interfering with the Judge’s finding that the procedure employed by the Bank to terminate the claimant’s employment was unprocedural.”

116. I conclude that the respondent failed to discharge its statutory obligation in demonstrating that the laid down procedure was followed. In fact, the witness (DW1) was very categorical. They did not follow the procedure. Consequently, I agree with the claimant, and find, that the termination was procedurally unfair.

Whether the termination was substantively fair

117. Section 45 of the Act stipulates: -

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination is unfair if the employer fails to prove:-

a) That the reason for 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.”

118. Section 45 (5) provides a platform for courts to determine whether an employer’s decision was just and equitable.

119. It is common cause that the claimant’s employment was terminated on what the respondent termed as poor performance. In situations where an employer is required to give the reason for termination, it is not enough to cite a reason from the catalogue under the foretasted provision and say that an employee was dismissed on one of the accounts contemplated therein. More is required of the employer.

120. In the capsule of validity, one should be able to see, candidness forthrightness, good faith, justifiability and reasonableness. As shall come out shortly hereunder, these were lacking totally.

121. The claimant in his evidence states that the reason for his dismissal was camouflaged. He does not believe it was due to poor

performance. His performance was above par at all material times. In support of this, the claimant produced a score card (EXH6). The score card found its roots in the correspondence dated 12th February 2015-EXH.4, by one Jane Mwangi. According to the claimant he scored 93% in the evaluation of performance for the period that was in issue. He was surprised by the contents of the letter by his regional team manager which in essence indicated that his performance was unacceptable.

122. In a bid to discharge its burden, the Respondent's witness stated in her evidence that the respondent had an elaborate performance evaluation and performance improvement scheme, for its employees. The respondent did not at all either through its witness or in any allowable form put before me any document from which this would be discerned. Yet it was really imperative that the same be tendered as evidence, in the circumstances of the matter.

123. The witness had serious reservations on the score card. She was of the view that it was incomplete in detail. However, she was not sufficient in her evidence as to what details were not catered for in the card, considering the fact that the evaluation was only limited to PAR. I have considered the contents of the correspondence dated 13th February 2015, under whose cover the score card was forwarded to the claimant, it totally does not mention that there was destituteness in detail on the score card. Indeed, if there was, it is here that it could have been mentioned for the first time.

124. Parties are bound by their pleadings, a cardinal rule procedural justice, it is. At paragraph 8 of the respondent's response to the statement of claim, the respondent pleaded;

“8. The Respondent denies that the score card attached as Appendix v was in relation to the claimant and puts the claimant to strict proof thereof.”

125. The Respondent did not seem to be having a problem with the score thereon, but the “owner” of the score card. Eventually, the course that was taken by the respondent in evidence, was a confirmation that the score card and the scores thereon were the claimant's a departure from the pleadings.

126. There is a dispute as to who filled the score card, put in another way, who awarded the score of 93% improvement. Had the Respondent placed, the document/Policy document, regarding performance of its employee and evaluation thereof before court, one could find it easy to agree or disagree with their position. They found it necessary not to tender it in evidence, while aware of the stand that the claimant had taken over the aspect, this being discernable from the statement of claim and the witness statement. I cannot avoid to draw an adverse inference.

127. The letter dated 13th February 2015 by the Regional Team Leader of the claimant read in part:

“Please note that the same score will be done at the end of February 2015, and a decision will be made based on the results then. Therefore a turn a round performance is expected henceforth. you are required to take action on the non-performing officers and with the urgency required.”

128. According to the claimant, there was no appraisal that was done at the end of February. The respondent's witness did not tender any evidence that there was. She under cross-examination admitted that there was none.

129. From the portion of the letter brought forth hereinabove, I see the Respondent making a call to the claimant and his team to improve on their performance. The letter seemed to fix a timeline on the improvement. Implicitly it was between the time of the letter and the end of that month-February 2015. The letter created a legitimate expectation that there was to be an appraisal and any action by the bank would be upon basis of the score therefrom. Having created the expectation and having committed itself to make a decision after the appraisal, to act in absence of the appraisal in a manner prejudicial to the claimant attracts an inescapable conclusion that the respondent's decision was not just and equitable in terms of section 45(5) of the Employment Act.

130. The Respondent's witness sketchily testified to a fact that the claimant perennially performed below expectation. She stated that this constrained the respondent to put him on a performance improvement program. She placed reliance on the document dated 7th November 2014. The claimant denied knowledge of the plan. The respondent was enjoined to prove that indeed the plan was with the knowledge of the claimant. That he was an active participant in the activities that are mentioned in the document-the respondent's EXH1.

131. The document in its content “committed” the claimant to a host of activities, among them, weekly reports. The reports if at all they were there, could prove the existence of the performance improvement plan and the claimant's participation in regard thereto. I agree with the claimant that there was no performance improvement plan as was alleged by the respondent.

132. The Respondent totally failed to put before court any documents indicative that appraisals were conducted on specific dates and for specific periods, prior to the alleged performance improvement plan. Obviously, one would expect to see score cards. One would expect the court to be explained to the appraisal parameters that were. This did not happen.

133. From a document put forth as proof of an existence of a performance improvement plan, one is expected to clearly see the specific efforts that the employer put in place to aid the employee improve his/her performance including but not limited to training and redeployment, and timelines within which improvement must be shown. The timelines must be reasonable, and reasonableness shall be weighed on a case-to-case basis.

134. The Respondent failed to demonstrate this. Its EXH1-The plan, is silent on this critical aspect.

135. I am not persuaded that the audit report could be a basis for adjudging the claimant a non-performer. It was not a performance appraisal document or a product of a performance appraisal on the respondent.

136. By reason of the premises a foregoing, and guided by the court of Appeal decision in *National Bank of Kenya vs Samuel Nguru Mutonya (2019)eKLR*, I come to a conclusion that the dismissal was not substantively fair.

Of the reliefs

137. The claimant sought for a figure of Kshs. 42,000/= being what he termed as an unfairly withheld pay increase. The respondent's witness's evidence was of a tone of admission of his entitlement to this claim. In its submissions the respondent stated that the sum should be allowed as payable. I consequently award the same.

138. Having found that the termination was procedurally and substantively unfair, I am inclined as I hereby do to award the claimant compensation pursuant to the provisions of section 49 of the Employment Act to an extent of 10 months' gross salary. Therefore Kshs. 700,000/= (Seven Hundred Thousand) In awarding this figure, I have taken into consideration the fact that there are all indications that the reason for termination was camouflaged, the fact that equity and fairness was absent in the decision to terminate the claimant's employment, and the substantial deviation from the provisions of the law regarding procedural and substantive fairness. It has not escaped my mind that the Claimant is doing some consultancy work as he testified.

139. The Respondent contends that the sought refund of Kshs. 8,050.00/= being a special damage ought to have been specifically proved. That the claimant did not produce any receipts. The claimant did explain the circumstances under which he has no receipts regarding the amounts. The receipts were handed over to the regional team manager during the handover. He did not foresee a situation where a dispute would arise on the refund. The team manager never testified. It is trite law that special damages should be specifically proved. Specific prove depends on the circumstances of each case. There is no hard and fast rule that it has to be by way of production of receipts only. Having these in mind, I find that the float returns template-CEXH IX, suffices as prove of the claimant's entitlement to the refund. I award him the KSHS. 8,050.00/=.

140. Pursuant to section 51 of the Employment Act, the claimant is entitled to a certificate of service.

141. Consequently, the judgment is entered in favour of the claimant for:

- a) Kshs. 42,000/=
- b) Compensation pursuant to section 49 of the Employment Act in the sum of Kshs 700,000/=
- c) Refund of Kshs. **8,050.00**
- d) A certificate of service to issue to the claimant within 14 days of this judgment
- e) Interest on (a) (b) and (e) at court rates w.e.f the date of filing this suit till full payment.
- f) Costs of the suit be in favour of the claimant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2021

.....

KEBIRA OCHARO

JUDGE

Delivered in the presence of

-----FOR THE CLAIMANT

-----FOR THE RESPONDENT