



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 216 OF 2018

BETWEEN

MIRIAM NDUKU MUSA.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kadima & Company Advocates for the Claimant

Federation of Kenya Employers for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 10th April 2018. She states, she was employed by the Respondent Bank, as a Commission Based Lead Generator (LG), within Business Banking. She was employed for 1 year, commencing 14th December 2015. She was based at Port Branch, Mombasa.
2. She was to receive a monthly retainer of Kshs. 25,000 for the first month; Kshs. 20,000 in the second month; and Kshs. 15,000 from the third month, to the end of her contract.
3. She worked well, earning at some point commission of up to Kshs. 87,000.
4. Through a letter dated 12th October 2016, the Respondent purported to terminate Claimant's contract effective 17th October 2016. The reason given was unsatisfactory performance.
5. She avers she was reinstated within the month, without any written communication. This was after she protested termination, and after her Manager interceded. She was given 1 month to achieve her targets. Later, she was granted a second contract of 1 year for the year 2017.
6. She states that the second contract was surprisingly terminated through a letter dated 30th November 2016. The Respondent told the Claimant it had decided to rationalize Lead Generator Team, and the Claimant's role had "since fallen off."
7. She understood this to mean her position had become redundant. This was not a genuine redundancy. In the previous month, the Claimant has been given a fresh, 1 – year contract, for the year 2017.
8. Termination was unfair. She was reinstated, issued a fresh contract, which was terminated 2 days later.
9. She prays for Judgment against the Respondent for:-

a) Declaration that termination was unfair.

b) 1 month salary in lieu of notice at Kshs. 15,000; unpaid leave prorated for 11 months at Kshs. 9,625; salary for the year 2017 at Kshs. 180,000; and 12 months' salary in compensation for unfair termination at Kshs. 180,000 – total Kshs. 384,625.

c) Costs.

d) Interest.

e) Exemplary damages.

f) Any other suitable remedy.

10. The Respondent filed its Statement of Response on 21st February 2019. Its position is that the Claimant was employed on a fixed term contract for a period of 1 year, from January to December 2016. Her consolidated monthly salary was Kshs. 15,000.

11. The Respondent rationalized its Lead Generator Team. The Claimant's position became superfluous. It became redundant on 30th November 2016, a month into the expiry of her fixed term contract.

12. She was paid salary up to 30th November 2016; 1 month salary in lieu of notice; and pending leave days. The Respondent denies giving her a fresh contract for 2017. Her contract was terminated on the ground of redundancy.

13. The Claimant gave evidence, and closed her case on 13th November 2019. The Respondent adopted its Pleadings and Documents, and did not call oral evidence. Hearing closed on 13th November 2019.

14. The Claimant told the Court she worked as a Business Banker. She worked from January to October 2016 when her first contract was terminated. She was recalled in November and issued a second contract, with fresh terms. The second contract was terminated. She was not given a valid reason.

15. Cross-examined, she testified that her initial contract was to expire in December 2016. The second was to expire in December 2017. She lost her copy of the second contract. She did not say this in her Witness Statement. Termination was based on redundancy. At paragraph 5 of her Witness Statement, Claimant states termination was on account of her unsatisfactory performance. She was paid terminal benefits shown in the letter of termination. Her salary was initially Kshs. 25,000 monthly, and Kshs. 15,000 monthly, under the second contract.

The Court Finds:-

16. Miriam was employed by the Respondent Bank, through a letter of employment dated 14th December 2015. She was designated Lead Generator (LG), within Business Banking.

17. The contract was for 1 year, starting 14th December 2015, expiring 31st December 2016. She was to be paid a monthly retainer of Kshs. 25,000 during the first month; Kshs. 20,000 during the second month; and Kshs. 15,000 from the third month to the end of her contract.

18. Other than the monthly retainer, she was entitled to a commission based on her performance. The remuneration structure was elaborated in an annexure to the contract, dated 11th January 2016.

19. On 12th October 2016, 2 months before expiry of the contract, the Respondent wrote to the Claimant, notifying her that her contract would be terminated with effect from 17th October 2016.

20. The reason justifying termination, was stated in the letter to be that there was no satisfactory improvement on Claimant's performance. She was advised, 17th October 2016, would be her last day of service.

21. Strangely, the Respondent issued a second letter dated 30th November 2016, advising the Claimant that in view of the Respondent's decision to rationalize Lead Generator Team headcount, her role as a Lead Generator "*has since fallen off.*"

22. The reason justifying termination in the second instance, though the letter is couched in obscure language, was redundancy.

23. The Claimant explained that there were 2 contracts. The first covering the period 14th December 2015 to 31st December 2016, a period of 1 year.

24. This was terminated through the letter dated 12th October 2016. It was approximately 2 months from the date of maturation.

25. The Respondent has not given evidence to explain why after termination on 17th October 2016, another letter issued on 30th November 2016, advising the Claimant that her contract would be terminated, effective end of November 2016, for a different reason – redundancy.

26. The contract of 14th December 2015 – 31st December 2016 was terminated by the Respondent on 17th October 2016. It was not in existence, to form part of any engagement with the Claimant, on 30th November 2016.

27. It can only be inferred, that the Claimant was offered a second contract, to cover the period 2017, as stated in her evidence. She was recalled, offered another contract, and immediately had the second contract terminated.
28. In either case, it was for the Respondent to justify termination, and demonstrate fairness in execution of termination.
29. She told the Court her monthly retainer under the second contract, was Kshs. 15,000. This is the same rate she earned as of 17th October 2016. It is believable that she continued to earn this rate, after termination of 17th October 2016. She was not able to exhibit the second contract, but the Court does not think this can be taken to mean it was not given. Other evidence seen above, leads to the conclusion that a second contract was given.
30. This second contract, according to Claimant, was for the year 2017. It was terminated on 30th November 2016, very close on the heels of the earlier termination.
31. In either case, there is no evidence to establish reason, or reasons justifying termination.
32. The Respondent did not present evidence of poor performance by the Claimant, to justify the first termination. The letter of 12th October 2016 refers to a notice on performance, said to have expired on 30th September 2016. The notice is not on record. There is no evidence at all, showing that the Respondent evaluated the Claimant, against specific performance targets, and found her wanting.
33. The reason stated in the second letter of termination, to justify termination, is similarly, not supported by evidence. The Respondent moves away from poor performance, to rationalizing “*Lead Generator Team*” where the Claimant’s role “*has since fallen off.*”
34. It was only in the last month, that the earlier contract had been terminated for poor performance.
35. The Respondent seems to have put in place certain mechanisms of extracting labour from the Claimant, while avoiding the legal burden of placing her on conventional employment.
36. Her salary was named ‘*monthly retainer.*’ The Employment Act only refers to wages and salaries. Part of her remuneration was in commission. While not illegal, such a contract risks clouding the distinction in law, between an Employee, and a Commission Agent. The risk of clouding, is to be seen against the fact also, that instead of being paid a salary in addition to commission, the Claimant was paid an unconventional ‘*monthly retainer.*’ Although the Respondent states there was only one contract, which was finally terminated through redundancy, clause 13 states that the Claimant would not be entitled to claim for any redundancy payment; or any severance payment. How do you have redundancy without redundancy payments or severance pay? This contract appears to the Court, not to conform to fair labour standards.
37. The Claimant was paid notice of 1 month, pending leave days, and her salary for November 2016, upon termination.
38. She merits compensation for unfair termination. It has been concluded that termination in either case was not based on valid reason and was not fairly executed. The contract given to the Claimant contained clauses which violated fair labour standards. She claims anticipatory salary for 2017, and separate compensation for unfair termination. In assessing compensation, the Court has taken into account that she could have worked another year and earned salary and commissions, as had been promised in the initial contract.
39. ***She is granted the prayer for compensation, equivalent of her 7 months’ salary at Kshs. 105,000.***
40. Award of exemplary damages is made, if compensatory damages are deemed inadequate, or in order to punish the defendant for outrageous conduct, or to deter the defendant and others from engaging in similarly abhorrent conduct. The Respondent, a leading player in the banking industry, should not have placed the Claimant on a contract which went against fair labour standards. The terms and conditions of service authored by the Respondent, made it possible for the Respondent to terminate Claimant’s contract whimsically, for a variety of vague reasons. The banking industry must be rid of such unfair labour practices.
41. ***An order for payment of exemplary damages is merited. The Respondent shall pay to the Claimant exemplary damages at Kshs. 150,000.***
42. ***Cost to the Claimant.***
43. ***Interest allowed at the rate of 16% per annum from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: compensation for unfair termination equivalent of 7 months’ salary at Kshs. 105,000; and exemplary damages at Kshs. 150,000 – total Kshs. 255,000.

c. Costs to the Claimant.

d. Interest granted at the rate of 16% per annum from the date of Judgment, till payment is made in full.

Dated and delivered at Mombasa this 12th day of March 2020.

James Rika

Judge