



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2026 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**PENINNA MUTILE KITUA..... CLAIMANT**

**VERSUS**

**JAMII BORA BANK LIMITED..... RESPONDENT**

**JUDGMENT**

Vide a Statement of Claim filed on 12<sup>th</sup> November 2015, the Claimant avers that she was unlawfully dismissed by the Respondent. She seeks the following reliefs:

a. A declaratory order that the termination of the Claimant’s service by the Respondent was unlawful.

b. An order that the Respondent pays

i. 3 months’ salary in lieu of notice..... 159,900

ii. Severance pay 1 month’s pay for every year

worked 12<sup>1</sup>/<sub>2</sub> years..... 665,750

iii. Pay in lieu of leave (16.5 months)..... 879,450

iv. Unpaid overtime 48 hours every month

for 12.5 years..... 1,998,750

v. House allowance (12<sup>1</sup>/<sub>2</sub> years)..... 1,409,150

vi. General damages for unlawful dismissal from

employment – she would have worked for

20 years to retire at 60..... 12,972,000

**Total                    Kshs.17,905,000**

c. Pension benefits as provided for under staff pension scheme trust deed and rules.

d.Costs of this claim

e. Interest on a, b, c and d above until payment in full.

The Respondent filed a Defence and answer to the claim on 16<sup>th</sup> December 2015. It denies the averments in the claim and avers that the claimant was dismissed from employment in line with set guidelines due to non-performance and after being afforded ample opportunity to show cause why she should not be dismissed. That the claimant admitted that her work was below expectation and had no defence or other explanation.

### **Claimant's Case**

The Claimant testified that she was employed by the respondent from December 2002. That at the time of her employment the respondent was trading as Jamii Bora Trust.

She testified that she was initially employed as a loans officer at a salary of Kshs.10,000. She was promoted severally and at the time of termination her position was Small Enterprise Officer. Her last salary was Kshs.53,000. Her roles were loan applications, debt collection and accounts opening among others. Her station was at Ongata Rongai.

She testified that her employment was terminated on 15<sup>th</sup> May 2015. That she had taken leave to do exams and on the date she reported back to work she was directed to report to Headquarters where she was served with the letter of termination. That the reason for termination according to the letter was that she was not performing. She testified that she had been issued with several warning letters which had also been issued to all the other staff at the station because loan applications had declined. She testified that there were 2 loan officers and both of them were issued with the warning letters to improve performance.

She testified that her working hours were between 8 am and 5 pm but the whole office worked extended hours sometimes until 9 pm or 10 pm depending on the work load.

She testified that she was employed on permanent and pensionable terms and that at the time of her termination she had a loan which was to be paid within 5 years. She testified that as at the time termination, she had paid Kshs.132,332.

In cross-examination, she testified that she was not paid house allowance for the 2003 contract period but she never claimed the amount. That her salary of Kshs.40,000 was consolidated and she was a member of a pension scheme.

She admitted that she had been warned about her performance and that she had received a letter relating to her performance on 3<sup>rd</sup> March 2015. She stated that she did not have copies of letters issued to the other employees. She testified that according to her contract she was entitled to one month's termination notice.

She testified that she worked overtime for 48 hours per month but she did not have proof of the same. She testified that she was not paid her terminal dues. That the copy of the cheque issued by the Respondent on record was for her pension refund.

In re-examination she testified that there was a time report book at the office where the staff registered the reporting and the exit **time**.

### **Respondent's case**

JOHN WAMWATI, the Respondent's Head of Human Resource testified as RW1. He adopted his witness statement dated 27<sup>th</sup> July 2018 as his evidence in chief.

He stated that the Claimant neglected to meet her performance targets for 2013 and 2014. That the Claimant was warned by her supervisor in a show cause letter dated 28<sup>th</sup> June 2013 about her performance upon which she promised to bring her Portfolio at Risk (PAR) below the target of 6%. He testified that prior to her dismissal, the Claimant received her first warning letter and went through numerous performance improvement plans including one from 22<sup>nd</sup> July 2013 for 3 months. That the other performance improvement plan was conducted from 3<sup>rd</sup> March 2015 until 31<sup>st</sup> March 2015.

He testified that the Claimant was served with a notice prior to her termination. That the reason for termination was the Claimant's failure to achieve targets for 2013 to 2014.

He testified that the Claimant was paid notice pay and 14 days leave balance. It was his testimony that no amount was owed to **her by the respondent**

Upon cross-examination, he testified that the Claimant owed the bank Kshs.270,000 as indicated in her clearance form. That the amount had not been paid since 2014. He stated that the termination notice referred to one month's notice. That the claimant's salary at the time of termination was Kshs.46,875.

He testified that the respondent has a performance management tool under which they set targets and review performance. That there is correspondence from the claimant's supervisor that the Claimant was not able to meet her targets.

### **Claimant's Submissions**

The Claimant submits that the Respondent was in breach of section 45(2)(a), (b) and (c) and Section 41 of the Employment Act. She relies on the case of **Gilbert Mariera Makori v Equity Bank Limited [2016] eKLR** where the Court held that section 41 is categorical on the

procedure to be followed before dismissal or termination on grounds of poor performance and physical incapacity.

She submits that the Respondent did not give her a chance to call a person of her choice before giving her evidence and was not given an explanation before being terminated. She avers that the show cause letters dated 28<sup>th</sup> June 2013 and 22<sup>nd</sup> July 2013 were issued in a span of less than one month and that it would be unfair and unlawful to rely on these show cause letters.

She submits that during the period of the Performance Improvement Plan, from 3<sup>rd</sup> March 2015 to 31<sup>st</sup> March 2015, there was no report of her non-performance. She submits that she is entitled to the remedies sought and costs of the cause.

### **Respondent's Submissions**

The Respondent in addressing whether the Claimant's termination

was justified relies on the case of **Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR**. It submits that the Claimant was given numerous opportunities to improve her performance but she never met the set target despite promising to improve vide the letter dated 2<sup>nd</sup> July 2013. The respondent further submits that in spite of the claimant going through two performance improvement plans, she never met the agreed targets resulting in the termination of her employment.

It submits that the Claimant's employment contract dated 21<sup>st</sup> December 2013 provides for one month's termination notice or payment of one month's salary in lieu of notice. That her employment was terminated with one month's notice and all her terminal dues were paid to her.

With respect to severance pay, it submits that the Claimant was terminated due to poor performance and not redundancy under Section 40(g) of the Employment Act. It further relies on section 36(6)(a) of the Employment Act and submits that it contributed to the Claimant's NSSF contribution and Staff Pension Scheme.

It submits that from the leave application forms it demonstrates that the Claimant had indeed taken leave. It submits that the claimant did not adduce any evidence that she worked overtime.

It submits that the Claimant's employment contract dated 20<sup>th</sup> December 2002 provided for housing where the Respondent (formerly Jamii Bora Trust) was to pay her Kshs.2,500 as housing allowance until 2007 during the time when her salary was Kshs.10,000.

Relying on section 31(1) and (2) of the Employment Act, it submits that the Claimant's employment contract dated 31<sup>st</sup> December 2013 provided for a consolidated salary which was inclusive of house allowance. It therefore submits that the claim for house allowance should fail.

It submits that under Section 49(1)(c) of the Employment Act, this Court awards damages whose value is not more than the equivalent of the Claimant's 12 months' salary. It submits that the Claimant's claim for salary until retirement is misguided. In support of this it relies on the case of **Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR**. In conclusion, it urges the Court to dismiss the suit with costs.

### **Determination**

The issues for determination are whether the Claimant was unfairly terminated and whether she is entitled to the reliefs sought.

### **Whether the Claimant was unfairly terminated**

The Claimant avers that there was no justifiable reason for her termination. The letter of termination dated 13<sup>th</sup> May 2015 reads:

“ ...

*Dear Ms. Kitua,*

**RE: NOTICE OF TERMINATION**

*The management would like to inform you that your contract of employment with Jamii Bora Bank has been terminated due to non-performance.*

*Your last working day will therefore be on 15<sup>th</sup> May 2015. Meanwhile you will be required to hand over any Jamii Bora*

*Bank's property your custody.*

*Your final dues will be prepared in accordance with the terms of your employment contract and this will include:*

- *Salary for days worked in the month of termination and a month's notice, net of all statutory deductions and taxes, paid by way of banker's cheque.*

- Any leave accrued and not taken and any allowance accruing as approved by your line manager.

Your final dues, which take into account recovery of any money owed to the bank will be prepared and ready for collection 14 days after your clearance. This will be paid out from payroll section in Finance. All payments and final documentation will be subject to you returning any bank property that you may have in your possession. A separation checklist for clearance is enclosed to facilitate the clearance process.

Should you wish to appeal, you may write to the Chief Executive Officer within 10 days of receipt of this letter.

We wish you well in your future endeavours.

Yours sincerely,

WANGARI MUCHOKI-GATHU

CHIEF MANAGER HUMAN RESOURCE”

It is evident from the letter that the reason for termination was non-performance.

Section 43 of the Employment Act provides:

**(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”**

It is clear from the evidence of both the claimant and the respondent that there was a long standing issue about the claimant’s performance that resulted in her being warned severally and being put on a performance in improvement program twice (2) in July 2013 and March 2015. Section 41(1) of the Employment Act provides that an employee may be terminated on grounds of misconduct, poor performance or physical incapacity. There was thus valid reason for termination of the claimant’s employment.

There was however an issue with the process by which she was terminated. The claimant’s testimony which was not controverted by the respondent was that she had taken leave to do exams and on the day she reported back, she was summoned to Headquarters where she was issued with the letter of termination. Section 41(2) provides for the procedure for termination as follows –

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations 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.**

In **Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR** the Court held:

*“This is important to note as where poor performance is shown to be a reasons for termination, the employer is placed at a high level of proof as outlined under section 8 of the Employment Act to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5 (8) (c ) further outline the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.*

*Therefore it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse.”*

The claimant was clearly not given an opportunity to defend herself in the manner envisaged under Section 41. The fact that she had been placed on a performance improvement plan did not mean that she was not entitled to be given a hearing.

The Respondent avers that it accorded her a hearing where she acknowledged her underperformance. However, the Respondent did not provide any minutes of the disciplinary hearing or the outcome of such a disciplinary hearing. Section 41(2) of the Employment Act provides that an employee must be heard before termination on grounds of misconduct, poor performance or physical incapacity.

The Court of Appeal in **Kenfreight (E.A.) Limited v Benson K.**

**Nguti [2016] eKLR** held:

*“Based on the international best practice, the Employment Act was modeled along the International Labour Organization Termination of Employment Convention No. 158 of 1982. In particular, like section 46 of the Act, Article 7 of the Convention requires, in mandatory terms, that no decision to terminate the services of a worker for reasons relating to the worker’s conduct or performance can be taken without providing him with an opportunity to defend himself on the allegations. So that, although there is freedom to contract, under the present regime, the terms of the contract must be in consonance with the irreducible minimum terms and conditions in the Act.”*

From the foregoing, I find that the termination of the claimant’s employment was unfair for failure to comply with the provisions of Section 41 of the Employment Act on procedure.

### **Whether the Claimant is entitled to the reliefs sought**

The respondent submitted that it had paid the claimant relying on the deposit slip dated 29<sup>th</sup> August 2015. However the Claimant testified that the deposit slip dated 29<sup>th</sup> August 2015 for Kshs.63,419.00, produced by the Respondent, was for the payment of her pension refund. This was not rebutted by the respondent. Indeed, the evidence of RW1 was that the claimant was paid only for days worked, notice and leave days not taken as stated in the letter of termination.

### **3 months’ salary in lieu of notice**

The Claimant sought 3 months’ salary in lieu of notice. RW1 testified that the claimant was entitled to one month’s notice. At paragraph 14 of his Witness Statement he avers that the Claimant was paid one month’s salary in lieu of notice. Clause 8 of the Claimant’s letter of Offer dated 31<sup>st</sup> December 2013, provided the employment would be terminated by one month’s notice. The termination letter dated 13<sup>th</sup> May 2015 also provided that the claimant was entitled to one month’s notice. The Claimant is therefore entitled to only one month’s salary in lieu of notice being

**Kshs.46,875.**

### **Severance Pay for every year worked**

As rightly submitted by the Respondent, this claim fails as the Claimant was not terminated on account of redundancy and is thus not entitled to severance pay

### **Pay in lieu of leave**

The Claimant sought pay in lieu of leave for 16.5 months. She did not indicate the period for which she sought the payment taking into account that she testified that she was terminated, in 2015, while on leave. The Respondent filed several leave application forms for the period between the year 2003 to 2014 as proof that the claimant did proceed on leave over the years. RW1 submitted that the Claimant was paid for the 14 pending leave days. However, he did not state when the payment was made or demonstrate that it was actually made. The claimant is thus entitled to the equivalent of 14 days leave pay as per clearance form which she signed.

### **Unpaid Overtime**

The Claimant testified that she used to work overtime for 48 hours every month but stated that she did not have proof of the hours worked. The Letter of Offer dated 31<sup>st</sup> December 2013 provided under Clause 2, that the office hours were between 8.00 am and 5.00 pm and that the hours of work would be dependent on the extent of the workload. I find that this claim was not proved. It thus fails for want of proof.

### **House allowance**

This claim fails as the Claimant’s Letter of Employment provided that she was to be paid a consolidated salary.

### **General damages for unlawful dismissal for the 20 years**

Section 49 of the Employment Act does not provide for compensation until age of retirement. The Section caps compensation for summary dismissal or unfair termination at a salary not exceeding 12 months.

Having found the termination of the claimant’s employment unfair and taking into account all the factors set out under Section 49(4) of the Employment Act, especially the circumstances and reasons for the termination and the length of service, I award her 10 months’ salary as compensation in the sum of **Kshs.468,750.**

### **Pension benefits**

The claimant confirmed having received the refund of her contributions to the Pension Scheme. The balance is subject to the provisions of the Retirement Benefits Act and Rules of the Scheme. The respondent is not liable for the same. The prayer is thus dismissed.

### **Conclusion**

In the final analysis, I declare the termination of the claimant’s employment unfair and award her the following –

1. Pay in lieu of notice (one month's salary)..... Kshs.46,875
2. Pay in lieu of 14 days leave..... Kshs.25,240
3. Compensation 10 months' salary..... Kshs.468,750

**Total                    Kshs.540,865**

The respondent will pay the claimant's costs and interest shall accrue from date of judgment at court rates.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**