



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1774 OF 2015

JARED OTIENO OPIATA.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGEMENT

By letter dated 20th November, 1991 the respondent employed the claimant as management trainee officer on probation for a period of two (2) years and upon successful completion was appointed to the position of Junior Management Officer, Grade 1 from 1st April, 1993. The wage paid was Ksh.17, 510 per month and with benefits under the respondent's Terms of Service for Officers and which included loans at concessionary interest rates, housing loans, bonuses and medical benefits.

The claimant was promoted through the ranks based on his good work performance.

On 22nd December, 2011 the claimant was promoted to the position of Manager – Credit Administration and from 1st April, 2014 his salary increased to Ksh.439, 219 per month.

On 16th May, 2014 following the resignation of the Head of Credit Administration, the claimant was elevated to the position of Head of Credit Administration in an acting capacity and despite the position attracting a salary of ksh.650, 000 the claimant's salary was not adjusted and he retained his salary this being an underpayment of Ksh.210, 781 for a period of 7 months he held such position all being ksh.1, 475,467.

The respondent appointed the Chief Risk Officer and within two months he wrote to the claimant on 22nd October, 2014 falsely accusing him of gross negligence. The claimant replied on 23rd October, 2014 a denied the claims made against him. There was no response and the claimant continued to work as the acting head of credit administration.

While the claimant was on his annual leave, the director of human resource summoned him back to work for a meeting on 11th December, 2014. The claimant was verbally informed that the respondent had made a decision to terminate his employment and there was a demand for him to resign or his employment is terminated. Due to shock and knowledge that he had done no wrong and there was no prior notice to these events, the claimant requested the director of human resource to give him reasons for such decision and or compensation so as to exit the respondent's service. The claimant was directed to give his proposal in writing and which he did on 16th December, 2014.

On 17th December, 2014 the director of human resource summoned the claimant to the office and handed him letter dated 16th December, 2014 informing him that his contract of employment had been terminated with immediate effect and was paid one month notice pay.

The claimant was aggrieved and he filed an appeal with the managing director without any response.

Until then the claimant was servicing a house purchase loan of ksh.19 million which had been advanced 6 months earlier. The loan as to be serviced at an interest of 3% per centum per annum as part of his employment benefits with the respondent and hence be repaid within a period of 13 years. Such benefit conferred upon the claimant a legitimate expectation that he would be allowed to serve his contract of employment until the end provided he complied with the terms of his employment, which he did.

The claim is that following the wrongful termination of employment, the claimants rights were infringed particularly article 41 and 28 of the constitution; his loan facility repayment rates were converted to commercial rates of 15.45 per centum per annum yet his employment was lost unfairly and has no other source of income and is on the verge of losing his property in Apartment No.A1 on L.R. No.330/426 Kilimani Estate Nairobi due to inability to service the loan which the respondent had advanced him as an employee and also stands to suffer further damage by being listed by the Credit Reference Bureau as a loan defaulter.

The claim is also that termination of employment was procedurally and constitutionally wrong and unfair for the reasons that the respondent failed to adhere to fair labour practices, his appeal was never addressed, there were no reasons given for the termination of employment, the claimant had a good work record and he was discriminated against as he was not paid terminal benefits or given an exit package like other employees of the respondent who were allowed to exit with a package and his rights to dignity were violated when his loan facility was changed to commercial rates.

The claimant is seeking the following;

a) Ksh.1,475,476 being salary underpayment;

b) Damages equivalent to salary for a period of 13 years being the unexpired period of his contract of employment had he been allowed to retire at 60 years ksh.68,518,164;

c) An injunction restraining the respondent from changing interest on the claimant's house loan account at a rate higher than the contractual rate of 3% or any other rate and an order suspending repayment of the house loan until the hearing and determination of this claim;

d) In the alternative, and without prejudice to payer (b) above, damages in the sum of Ksh.25 million for violating the claimant's constitutional rights;

e) Without prejudice to payers (a) and (c) above, damages equivalent to 12 months gross salary, i.e. ksh.5,270,628 for unfair termination;

f) Ksh.68,700 being unpaid leave days;

g) Ksh.878, 438 being two months' salary in lieu of notice.

h) Costs of this suit and interest on the damages awarded.

The claimant testified in support of his claims that upon employment by the respondent he served diligently until 11th December, 2014 while on annual leave the director human resource called him for a meeting and informed him that the respondent had decided he should exit his employment. He asked for reasons but there were none. He asked for an exit package as the practice and employees who had left before him had negotiated a package.

The claimant also testified that the director of human resource asked him to make his written request for an exit package or to resign from his employment and get the package. It was a friendly talk under the impression that the managing director would approve an exit package.

The claimant did not agree on the direction to tender a resignation and after the meeting he went home and did a letter for an exit package dated 15th December, 2014 and upon submitting it to the human resource director was not happy as he had wanted a resignation letter.

On 17th December, 2014 the claimant was called back to the office where he met the human resource director Mr Dismas Omondi and Ms Joan Moraa in the same department who gave him two letters, one a resignation letter and the other a letter terminating his employment and he was directed to pick one option. He asked for time to think through both options but was not allowed.

The claimant refused to resign.

The claimant was issued with letter terminating his employment with the respondent. The reasons given were that he was of poor work performance and failed in his duties. But there were no details given.

The claimant had been the head of his department; he had been promoted upon an appraisal and had received good commendations from the managing director for his outstanding work performance. There had been no prior case of poor work performance.

The claimant also testified that on 22nd October, 2014 he had been issued with a notice to show cause on alleged gross negligence of duty and he replied. There was no further response.

The allegations of negligence arose after employment of the new Risk Officer and who was not comfortable working with the claimant and the allegations were on pure malice.

Despite filing an appeal to challenge the termination of employment, there was no response save an acknowledgement in January, 2015. Other employees of the respondent who were allowed to exit the bank were given an exit package but his request for similar treatment was not allowed resulting in discriminatory treatment.

The position the claimant held was abolished leaving the claimant without a placement. In September, 2014 the claimant participated in the recruitment of the person who took over his duties. He had done so in good faith and before his employment was terminated in December, 2014.

Despite the claimant holding the position of Credit manager in an acting capacity, he was not paid for the position and thus claims the

underpayment in compensation.

At the time employment terminated the claimant had a loan facility and was to service it for 13 years until retirement at age 60 which he was not allowed to following the wrongful and unfair termination of employment and risk losing his house. He worked for the respondent for 23 years, spent the best years of his life and is unable to secure new employment to be able to repay the due loan and hence risk a life of destitution. Other staff got loan rebates. He proposed an exit package taking into account his loan repayment plan but this was not accepted.

For the position the claimant held he was entitled to 3 months' notice of payment in lieu thereof but was only paid for one month less two months. There were leave days not taken and for the unfair labour practices visited against him he is seeking payment of damages and compensation.

Defence

The defence is that the claimant was an employee under the terms and conditions applicable to all employees of the respondent. The claimant's salary was reviewed based on practice and policy and informed on factors such as position and grade held and adjustment on cost of living looked at across the cadres of staff.

The claimant assumed the position of head of credit administration in an acting capacity but did not attract a salary of ksh.650, 000 per month as alleged. There was no underpayment of salaries.

The defence is also that the Chief Risk officer and the supervisor of the claimant wrote to the claimant letter dated 22nd October, 2014 to show cause why disciplinary action should not be taken against him on account of various matters stated therein to which the claimant responded on 23rd October, 2014 and claimed the allegations against him were false.

The claimant was also informed of matters relating to his unsatisfactory work performance on the basis of which disciplinary action and termination of employment was being contemplated by the respondent. The claimant as therefore notified of his misconduct and work performance and given an opportunity to reply.

The claim that notice pay was for 3 months was not part of the employment contract. This was governed by section 35(1) (c) of the Employment Act, 2007 (the Act) at one month pay.

The defence is also that the claimant had a loan facility granted by the respondent. Such facility was not to be serviced at 3% per annum as alleged and the claim that there was a legitimate expectation that employment would not end until the loan was repaid is wrong. The claimant had requested for the loan facility. It was granted on written terms and conditions contained in letter dated 17th April, 2013. The accepted terms and conditions of the loan facility although pegged at 3% per annum was variable to the extent that the respondent as the lender reserved the right to vary the said rate of interest only to giving the claimant a 30 days written notice prior to variation. The respondent had the discretion to vary terms and condition of the loan facility.

The defence is also that the claimant as the manager in credit administration had his tasks and responsibilities outlined but he failed to diligently perform his duties and neglected to carry out his duties or performed them carelessly as a result of which the matters were raised in the notice to show cause dated 22nd October, 2014. In reply the claimant did not challenge the allegation made against him. Such amounted to gross misconduct which justified termination of employment. Such was not wrongful, unfair or unconstitutional as alleged.

The claimant had the obligation to repay his house loan granted by the respondent. Any breach of the terms and conditions therefrom should not form a cause of action herein.

The claims made should be dismissed with costs.

Stephine Opiyo Obong'o the head of employee relations within the respondent's human resource division testified that by letter dated 16th December, 2014 the respondent terminated the claimant's employment on the grounds of improper, poor and unsatisfactory performance of work which was his duty to carefully and properly perform. The specific matters which led to such decision were set out in the letter and notice to show cause why employment should not be terminated and dated 22nd October, 2014

Ms Obong'o also testified that the claimant accepted the notice to show cause and in reply did not challenge the same as being invalid and related to his functions and roles with the respondent. He failed to maintain a quality loan book and the scrupulous observance of appropriate guidelines as required by the regulator in matters generally concerning the credit administration.

The claimant's reply having failed to dispute the allegations made against him, such matters were factual and not malicious. The respondent had the right to issue the sanction against such gross misconduct and hence terminated employment. The claimant was taken through the due process and allowed his written response and his case that there was unfair wrongful and unconstitutional termination of employment should be dismissed with costs.

The witness also testified that in the payment statement for December, 2014 the claimant was paid for days worked, accrued leave days, one month notice pay and the allegations that he was entitled to 3 months' notice pay, underpayment, compensation and damages does not arise.

The claimant had a house loan facility under terms and conditions and variable at the discretion of the respondent and should not comprise a cause of action herein.

At the close of the hearing both parties filed written submissions.

The claimant submitted that the claimant was terminated in his employment by the respondent on the grounds of gross misconduct on account of improper and careless performance of duty which was ambiguous because gross misconduct cannot be equated to improper performance of duty. The claimant was issued with a notice to show cause why his employment should not be terminated dated 22nd October, 2014 to which he replied and denied all the allegations made against him. This was followed by a meeting with the human resource and direction to resign from his employment or be issued with letter terminating his employment and since he had done no wrong, the claimant refused to resign and hence was issued with letter terminating his employment leading to unfair labour practice and is entitled to the claims made.

The claimant also submitted that at the time his employment was terminated he had a house loan facility with the respondent and based on legitimate expectation on his employment with the respondent had hoped to repay the same for 13 years at 3% per annum until retirement at age 60. Following the unfair and wrongful termination of employment he is unable to repay the loan and seek payment of damages, compensation and his terminal dues.

Section 41 of the Act requires the employer to hear the employee in his defence with regard to allegations of poor performance of work as held in **Fredrick Odongo Owegi versus CFC Life Assurance Limited [2014] eKLR**. In this case, upon the claimant's response to the show cause notice, he was issued with letter terminating his employment and before he was allowed a hearing.

The respondent failed to follow its own terms and conditions of service where an employee should be allowed a hearing before employment is terminated. There is also the appeals procedure which was not applied in his case. In **Laban Wahome Matiru versus the AG [2013] eKLR** the court held that where internal procedures require and provide for an appeal process, this should be allowed as part of the disciplinary process.

The respondent was in breach of the constitution. The respondent did lay off several employees and allowed payment of an exit package. The claimant pleaded for similar treatment which was declined. To lay off employee(s) is defined under the Act as redundancy and in this case where there was no agreed exit package the claimant's position having been abolished he should be paid damages and benefits under section 40 of the Act. To terminate employment over other reasons cited as unsatisfactory work performance was to engage in unfair labour practice outlawed by the constitution under Article 41.

The act of the respondent was also discriminatory against the claimant contrary to Article 27 of the constitution and section 5 of the Act. Whereas the respondent had just laid off several employees on an exit package, the claimant was denied the same benefit. The claimant cited the case of Jacob Ochango Makaga who was paid;

- 1) One month's notice pay;
- 2) Ex-gratia payment of half month's salary for every year of service;
- 3) Outstanding leave;
- 4) 40% rebate on the outstanding loans.

To treat the claimant differently in circumstances similar to other employees is discriminatory.

The claimant also submitted that from 16th May to 17th December, 2014 he was acting head of credit administration but his salary remained the same instead of Ksh.560, 000 for the position held. There was underpayment and the difference is due as held in the case of **Erastus K Gitonga versus National Environmental Management Authority & another [2019] eKLR**.

On this basis the claimant is entitled to damages for discrimination; underpayment of his salaries, notice pay paid less by two months and unpaid leave days. Such dues should be paid with interests and costs.

The respondent submitted that by letter and notice to show cause dated 22nd October, 2014 the claimant was required to show cause why his employment should not be terminated and which related to the performance of his duties. He replied thereto in writing and did not challenge the allegations in any material way. The claimant was availed an opportunity for a hearing through his letter dated 23rd October, 2014.

Section 44(4) (c) of the Act allows the employer to dismiss an employee for improper performance of duty. By the claimant admitting in his reply on 23rd October, 2014 and pointing to the fact that of improper and careless performance of his assigned duties and the respondent was justified to terminate his employment as held in **Agnes Kavata Mbiti versus Housing Finance Company Limited [2017] eKLR**.

The respondent had a genuine and valid reason to terminate employment by virtue of the reply the claimant gave on 23rd October, 2014 as held in **Catherine wanja Njeru versus Kenya Post Office Savings Bank [2015] eKLR**.

There were both substantive grounds leading to termination of employment and procedural fairness with regard to addressing the gross misconduct of the claimant. In the case of **Joseph D Barasa versus United (EA) Warehouse Limited [2014] eKLR** the court held that an oral hearing is not mandatory and that the process contemplated by section 41 of the Act could be conducted through correspondence. A similar position is taken in the case of **Edwin Nyamanga versus Silver Holdings Limited [2014] eKLR**. The claimant was given a hearing by his response to the show cause notice.

The respondent also submitted that there is no material evidence that there was discrimination against the claimant and the matters relied upon does not apply to him. He had no right or claim for salary payments as alleged and to claim underpayment is without foundation. There is no case set out how constitutional and legal rights were violated to justify a claim for damages, compensation or notice pay.

The claimant has a house loan facility under an agreement with terms and conditions that he accepted voluntarily. Employment could be terminated by either party upon notice and on this basis; the respondent upon notice of 30 days was entitled to recover the loan advanced at changed rates applicable to non-employees.

On the pleadings, evidence and written submissions the issues which emerge for determination can be summarised as follows;

Whether there was constitutional rights violations and if so whether there was discrimination against the claimant;

Whether there wrongful and unfair termination of employment;

Whether the remedies sought should issue;

Who should pay costs.

By letter and notice dated 22nd October, 2014 the respondent charged the claimant with allegation that he was of *gross negligence* and that he had failed to review the computation of provisions for losses and on loans he had prepared as a result of which the respondent bank had incorrectly estimated the provisions for losses on loans in the month of August, 2014; that he failed to follow up for renewal of all insurance policies covering securities pledged to the bank for credit facilities granted to customers and thus exposed the respondent to losses; that he failed to record securities held to secure the bank lending by not diarising and following up for expire valuation report; and that he failed to submit the KBRR return to Central bank of Kenya on a weekly basis and such reasons he was required to show cause why disciplinary action should not be taken against him by the next day, the 23rd October, 2014.

These were serious matters addressed to the claimant with regard to his duties.

In his response and on the first charge he noted that the department was faced with various challenges and upon taking over he had taken various measures by doubling up as the manager credit administration and head of credit administration and that following various department meetings and discussions;

...in the month of August, 2014 I as specifically told by the manager previous handling reports that the provisions would be handled by Mr Musa (Head, Remedial & Collections Unit). This was followed by an electronic mail communication and copied to the various units. This communication is attached [appendix 1] for reference. I tried to enquire about this but this was indicated a decision had been made. The communication was well in advance before the report submissions date.

To the second charge, the claimant also replied to this charge and noted the various contacts he had made with banks and branches in arranging insurance policy for these branches and particularly the unit which was custodian to the policies to ensure control as there was no sufficient data. There was a unit project which was to end on 31st November, 2014 with period updates to management. Before his annual leave was approved, there were comments with regard to the *Islamic product insurance ... evidence were progressively closing on this issue. We have developed a process to handle new/renewal cases to avoid such occurrence.*

On the third charge, the claimant replied that the respondent had collected collateral from the branches with a view to have a register under the Manager, Securities & Documentation but the team opted for an exit in April, 2014 before the matter was concluded. The matter was revived in June, 2014 and a progress report shared with the supervisor.

On the fourth charge the claimant replied that he had done his returns weekly as required.

On these responses, I take it the claimant proceeded on his annual leave as evidenced by annexure "2a" which is approved by the supervisor and with comments. This is well noted in his response to the show cause notice.

What followed was letter dated 16th December, 2014 on termination of employment. The letter noted that;

This letter serves to confirm the Bank's decision to terminate your employment on account of improper performance of duty and fundamental breach of obligation as a person placed in a supervisory position. ...

The respondent has relied on the provisions of section 44(4)(c) of the Act to justify termination of employment. That the claimant did not challenge the allegations made against him in any material way and the sanction of termination of employment was lawful and procedural as his written responses were sufficient defence and in accordance with section 41 of the Act.

Under Section 7 of the Respondent's Human Resources Manual (The Manual) provides for the *Disciplinary Procedure* there is the procedure to be followed with regard to employees who are in breach of various disciplinary processes and the resulting penalties.

Part 7.1.3 of the manual provides that no employee should be condemned unheard and that for fair hearing and that an employee should be heard through oral supplications or written explanations of defence. For gross misconduct, several matters are listed and including an employee who commits the offence of *wilfully neglects to perform any work which it was his/her duty to perform, or if he/she carelessly and*

improperly performs any work which from its nature it was his/her duty under his/her contract to have performed carefully and properly.

The policy manual also allow at section 7 for the disciplinary procedures and ultimately upon taking a decision for an appeal process.

Did the claimant then commit such charges as alleged?

The charge against the claimant and leading to termination of employment was that he was of *improper performance of duty and fundamental breach of obligation* as a person placed in a supervisory position.

On the one part, section 44(3) of the Act allow for summary dismissal from employment where an employee is found to be in breach of a fundamental provision in his employment contract. The breach must be distinct, explicit and identifiable. It must relate to a stated term or condition of the employment contract.

The other part is that an employee found to be of improper performance of duty, though addressed under section 44(4)(c) of the Act as a serious case of gross misconduct where there is the component of *wilful, neglect and carelessness*, the substantive elements for improper and poor performance of duty is regulated under section 41 of the Act read in whole.

In both cases of fundamental breach of the employment contract and improper and or poor performance of duty/work, an employee is entitled to a pre-dismissal hearing where that right is conferred by statute under section 41 of the Act and Article 41 of the Constitution, 2010 and which must be read with the employment contract. The right arises contractually where the contract provides for it either expressly or tacitly and where not provided for, by operation of the law, it applies automatically. This is what is entailed in the right to fair labour practices into employment contracts by operation of Article 41 of the Constitution.

In this regard therefore, the court in **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR**, held that;

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.

An employer's internal policies, policy or manual cannot surpass the express provisions of the law. This is aptly captured in the case of **Samson Owili versus Kenya Ports Authority industrial cause number 131 of 2012** that;

A disciplinary procedure in the employer's disciplinary handbook cannot surpass the express provisions of the Employment Act, 2007. Sections 3, 7 and 8 of the Employment Act provide that all employment contracts in Kenya shall comply with the Employment Act, 2007. It follows that any employment contract made in contravention of the Act is invalid and cannot be allowed to take away any statutory right or obligation.

Whatever misconduct or gross misconduct the employee has committed, the mandatory due process demands adherence to the provisions of section 41 of the Act. See **John Wafula Simiyu v Star Publications Limited [2016] eKLR**. This extends to serious cases where summary dismissal may issue; section 41(2) requires that;

*(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) hears and considers 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. [Emphasis added].*

The respondent has sought to rely on the cases of **Edwin Nyamanga** and **Joseph Baraza**, that an oral hearing is not a requirement and by submitting his written responses to the notice to show cause the claimant was allowed his defence. My humble view in reading these two judgements is that there was no outlier of the mandatory provisions of section 41 of the Act. Upon a show cause notice why employment should not be terminated, the employee retains the right to be heard and unless there is unequivocal consent to the contrary to give up the same. The right to a hearing and to be heard is secured in law and this comprises what is fair labour practice for the employer to secure.

In this regard, the Court of Appeal sums up the provisions of section 41 of the Act in the following manner in the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** that;

There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules. Finally the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

"..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.."

*Those provisions are a mirror image of their constitutional underpinning in **Article 41** which governs rights and fairness in labour relations.*

upon the issuance of a notice to show cause, the employee remains innocent until the motions of section 41 of the Act are followed. The purpose of a show cause notice to bring to the attention of the subject employee the matters which may constitute grounds for termination of employment and upon the response, the employee may be found innocent or be required to attend before a disciplinary hearing.

To ensure procedural fairness the employer should ensure that the employee is informed of the charges the employer is contemplating as grounds for dismissal and the employee is given a fair chance to urge his defence. in the case of **Anthony Mkala Chitavi versus Malindi Water & Sewerage Co. Ltd, Industrial Court Cause No. 66 of 2012** where the court observed as follows;

(i) That the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

(ii) Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defense/state his case in person, writing or through a representative or shop floor union representative if possible.

(iii) Thirdly, if it is a case of termination, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

A hearing of the employee is imperative. This right cannot be countermanded by the employer. It must be made clear to the employee at all material times that section 41 of the Act gives him a right to a hearing and prepare for his defence at the shop floor in the presence of a representative of his choice.

In this case, by failing to accord the claimant a hearing upon his response to the show cause notice, his responses on 23rd October, 2014 having denied any wrongdoing, to proceed and terminate employment without adhering to the mandatory provisions of section 41 of the Act, rendered the decision to terminate employment both substantively and procedurally unfair.

As at 16th December, 2014 there were no reasonable grounds established through a due process to ascertain the claimant was guilty of the allegations made against him. it was not sufficient to suspect him of wrongdoing, section 43 requires the employer to have both genuine and valid reasons for termination of employment. Even where the employer enjoys the right to terminate employment and pay in lieu of notice, the mandatory provisions of section 43 of the Act dictate that termination of employment should be valid, fair and in accordance with fair procedure. The employee must be accorded justice and equity. Where there exists an appeals procedure, such must be allowed.

In this case, the court finds there was unfair termination of employment contrary to the provisions of section 45 of the Act. under the provisions of section 49 of the Act the claimant is entitled to compensation.

The claimant has made a case that he was discriminated against by the respondent. that his constitutional rights under article 27, 28 and 41 of the Constitution, 2010 with regard to non-discrimination, right to dignity when his house loan was recalled and made payable at commercial rates as against the rate allowed under his employment and thus became exposed to a life of destitution and his right to fair labour practices was comprised.

The claimant's case is that while other employees of the respondent were allowed to exit the respondent's employment were offered an exit package, he made effort to negotiate over the same and enjoy a similar package but this was declined when he refused to resign from his employment.

Whereas the claimant may have had several colleagues exit their employment before him, the details with regard to their exit is not stated. The claimant was unfair terminated in his employment as set out above. His case is distinct and different from other employee and hence not similarly situated to claim similar and or negotiated exit packages.

For the unfair termination of the claimant's employment, section 49 of the Act allow for a redress by compensation. The court finds no matter for discrimination against him to award damages.

On the remedies sought, the claimant is seeking notice pay for 2 months on the basis he was entitled to 3 months' notice pay but was only paid for one (1) month only.

By letter dated 10th November, 2009 the respondent communicated it decision on new management grading structure and the claimant designated Branch Operations Manager effective 1st November, 2009. Various matters were reviewed and clause 7 thereof on *Notice of Termination of Employment* was at 3 months' notice or payment of 3 months in lieu thereof.

To therefor unfair terminate employment and fail to adhere to the terms and conditions of employment are wrongful. Notice pay should be for 3 months and the claimant is entitled to the balance due at his last salary due at ksh.437,219 x 2 all at ksh.874,438.

The claim for underpayment is on the basis that the claimant worked in an acting capacity for 7 months but was not paid for such position. section 13 of the Act requires that any change to the employment particulars be in writing. The averments by the claimant that he was in an acting capacity after the office holder suddenly left employment are not in writing.

The employment terms and conditions remained the same per letter dated 10th November, 2009. To therefore claim there was underpayment is without foundation.

On the claim for pay for annual leave, the claimant was on his annual leave when he was recalled and his employment terminated. The annual leave had been approved by his supervisor and in essence the respondent. the taking of annual leave is a right under section 28 of the Act. where not taken upon approval, payment in lieu thereof is due.

In the payment statement of December, 2014 the respondent paid to the claimant his due basic salary at ksh.245,481.30;

Pay in lieu of taking leave ksh.57,760.30; and

Notice pay ksh.439,219.

These payments were the final dues to the claimant. There is evidence the claimant was paid for untaken leave days.

On the claim for an injunction restraining the respondent from charging interest on the house loan account at a higher rate than 3% per annum, the claimant filed a Notice of Motion with his Memorandum of Claim to secure this right save that despite hearing directions being issued he did not pursue the application. There are no written submissions in this regard.

As this is a claim outlined for the court consideration and on the finding that there was unfair termination of employment, had the claimant remained in his employment,

he would have had a fair chance to repay his house loan on the agreed upon terms at 3% within a period of 13 years to his retirement. He was denied this chance. in **Christopher Onyango & Others versus Heritage Insurance Co. Ltd, Cause No.781 of 2015** the court held that;

...the employment relationship generates rights and obligations. Such are to be found in the employment contract, human resource policy, and the law. The common denominator is – employment. Within such employment, the Claimant enjoyed the benefits of various loans. Such cannot be separated to create a different set of rights outside the employment relationship.

In the case of **BIFU versus Consolidated Bank of Kenya Limited, Cause No. 900 of 2012** the Court held;

...The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over the charge created to secure the staff loan, is a matter of employment.

In **Esther Mbinya Musau versus National Bank of Kenya Limited [2015] eKLR** held that;

...the Claimant while in the employment of the Respondent obtained a loan through the Staff Loan Policy such loan was lawfully granted under terms and conditions agreed upon by the parties and by virtue of the claimant's employment with the respondent. Such employment has since been terminated and the fairness or the unfairness of the same is under challenge.

The claimant was denied the opportunity to offer his labours and to enjoy the work benefits that flowed from it. As the benefits of a loan facility were compromised, where there is full repayment, the matter is settled. Where not repaid, the same is due and owing at similar terms and rates as agreed upon as at the time employment terminated on 16th December, 2014. The respondent shall assess what is due and the claimant shall commence repayments as of the date of this judgement and until payment in full.

Taking the above into account, the findings on the unfair termination of employment without substantive and procedural justice, compensation is hereby assessed at ten (10) months as an appropriate remedy. Based on the last wage earned at Kshs. 439,219 total compensation is ksh. 4,392,190.

With regard to costs, section 12(4) of the Employment and Labour Relations Court Act, 2011 makes it discretionary to award costs where it is just. The claimant having succeeded in the substantive claims made, justice demands that costs be awarded. The awards made for notice pay shall be paid with interests from the date due, 16th December, 2014 until paid in full as such ought to have been paid instantly.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

a) Declaration that the claimants employment was terminated by the respondent unfairly;

b) Compensation awarded at ksh.4,392,190;

c) Notice pay ksh.874,439;

d) The respondent is hereby restrained from charging interest on the claimant's house loan account at a higher rate than 3% per annum; the Claimant shall repay all outstanding house loan facility account owing to the Respondent to date at 3%; and the dues owing shall be computed and an advice given to the Claimant as of this date and time extended for repayment at 3% until payment in full;

e) dues (d) above shall be paid with interest from 16th December, 2014 and until paid in full at court rates;

f) the claimant is awarded costs of the suit.

Dated and delivered electronically this 7th May, 2020 at 0900 hours

M. MBARU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship the Chief Justice on 15th March, 2020 the Order herein shall be delivered to the parties via emails. this 7th May, 2020 at 0900 hours

M. MBARU JUDGE