



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2187 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BERNARD KIIRU MWANGI.....CLAIMANT

VERSUS

FAULU MICROFINANCE BANK LIMITED.....RESPONDENT

JUDGMENT

Vide his Statement of Claim filed in Court on 9th December, 2014, the Claimant avers that his employment was unfairly and unlawfully terminated by the Respondent on account of poor performance. He prays for orders against the Respondent as follows:

- i. An Order for reinstatement of the Claimant to his former employment and position without any loss of benefit and/or seniority and continuity of service.
- ii. In the alternative, the payment to the Claimant of his actual pecuniary loss suffered since his date of termination including payment of salary/wages as would have been earned, housing allowance together with all accruing allowances.
- iii. Payment of the sum of Kshs.31,520,240 being salary he was to earn for the remainder of the years before his retirement at the age of 60 years as a consequence of the respondent's unlawful termination of his employment.
- iv. Payment of Kshs.15,000,000 being allowances the Claimant was meant to earn for the remainder of the years before his retirement at the age of 60 years.
- v. A declaration that the Claimant has suffered unfair wrongful termination in the first instance.
- vi. A declaration that the respondent intentionally breached the provisions of the Employment Act, 2007, Articles 2, 10, 20, 26, 27, 28, 41, 43, 47 and 50 of the Constitution, 2010.
- vii. Maximum compensation for loss of employment
- viii. General damages
- ix. Aggravated and Exemplary damages
- x. Any other relief the Court may deem fit and grant.
- xi. Costs of this suit with interest

The Respondent in its Memorandum of Defence filed in Court on 10th March 2015 and amended on 14th July 2015, admits engaging the Claimant in various positions from 1st May 1999 to 12th November 2014, when it terminated his employment for poor performance.

The Respondent contends that the termination of the Claimant's employment on account of poor performance was lawful and procedural as it followed due process as set out in the Employment Act and its Human Resource manual.

The Respondent further contended that the Claimant was paid all his terminal dues at the time of separation and therefore has no claim against it.

It is on the basis of the foregoing that the Respondent avers that the instant Claim is devoid of merit and urges this Court to dismiss the same in its entirety with costs to the Respondent.

Evidence

Both parties agreed to adopt witness statements and documents to proceed by way of written submissions. The Claimant's statement was filed on 29th March, 2019 and that by the Respondent's witness, PETER IHA, the Acting head of Human Resource was filed on 28th July 2015.

Claimant's Case

The Claimant in his statement reiterated the averments made in his Statement of Claim. He avers that on or about September 2012 while he serving as Manager Central Operations based at the respondent's head office, he was re-assigned to the role of Branch Manager. That his main role as Branch Manager was to steer Business Growth and development.

The claimant states that this new role was a challenge to him but he took up the role positively with a desire of grow as a banker. He states that he was posted to Kiambu branch where he worked for a duration of one year before being transferred to Kayole branch in the same role where he served for a period of 9 months.

The claimant states that he failed to meet the targets in the two branches and as a result was issued with the first and second warning letters cautioning him against failure to meet set targets.

That he was later re-assigned to the role of Manager-Administration and Archiving, a role that was given to him following agreement between his supervisors and the respondent's Human Resource Department. That he was to sign a new job description with a new balanced score card clearly stipulating his deliverables for this new role but this was not done. That as a result he was attached to the archives along Mombasa Road without clear terms of reference.

He states that he was on 12th November 2014 called to the Respondent's Human Resource Office by one Mr. David Kariuki, Senior HR Manager – Business Support Centre, who asked him to collect the letter terminating his services with immediate effect on grounds of poor performance.

The Claimant maintains that the termination was unprocedural, discriminatory and unprofessional as there were no clear terms of reference for his performance reviews. He further maintains that he was treated unfairly and without due regard to the Constitution of Kenya, the Employment Laws and the Respondent's Human Resource Manual.

Respondent's Case

In his Statement, Mr. Peter Iha (RW1) reiterated the averments made in the Amended Memorandum of Defence.

He maintained that the termination of the Claimant's employment on account of poor performance was warranted and that the Respondent followed due process as set out in the Employment Act and its Human Resource Manual.

He further maintained that the Claimant was actively engaged through several meetings with his supervisors to evaluate his poor performance and that his continued poor performance prompted the Respondent to issue him with warning letters on 12th February 2014 and 17th April 2014.

Mr. Iha further states that on 3rd July, 2014 following the Claimant's consistent poor performance and failure to improve as branch manager he was transferred to the position of Manager – Administration and Archives.

That in his new role the Claimant continued to perform dismally as evidenced by the performance reports, correspondences and minutes of meetings discussing the Claimant's performance (Exhibit M and U in the Amended Memorandum of Defence).

Mr. Iha further stated that the Claimant was paid all his terminal dues at the time of separation. He maintains that the Claimant has no Claim against the Respondent and urges this Court to dismiss the Claim with costs to the Respondent.

Claimant's Submissions

The Claimant submitted that his employment was unfairly terminated without notice, justification or following procedure as provided under the Constitution of Kenya, 2010, the Employment Act and the Respondent's Human Resource Manual and that the termination was unfair and unlawful. The Claimant relied on the Court of Appeal decision in the case of **Kenfreight (E.A) Limited v Benson K. Nguti (2016) eKLR** where the Court held that a termination is considered to be unfair if the employer fails to demonstrate the reason for such a termination.

He further submitted that the reasons advanced for his termination were not valid and fair and that he was not accorded a fair hearing in

accordance with the mandatory provisions of Section 41 of the Employment Act, 2007. For emphasis the Claimant cited and relied on the provisions of Articles 41 and 50(1), Section 41 of the Employment Act, 2007 and the cases of **Benedict Mtoto Mwabili v County Public Service Board Taita Taveta County (2018) eKLR**, **Judicial Service Commission v Gladys Boss Shollei & Another (2014) eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the Courts re-affirmed the need of compliance with the provisions of Section 41 of the Employment Act, 2007.

The Claimant urged this Court to find in his favour and allow his Claim in terms of the reliefs sought therein. The Claimant relied on the case of **Benson K. Nguti v Kenfreight (EA) Limited (2014) eKLR** and **Grace Bosibori Nyamongo v Kenya Institute of Administration (2014) eKLR**.

The respondent did not file written submissions.

Analysis and Determination

Having considered the facts of this cause, evidence adduced by the parties hereto, submissions and authorities cited by the Claimant, the issues arising for determination are:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

Fair Termination

Section 41 of the Employment Act provides for the procedure for termination while Section 43 provides that the employer must prove valid reason. Section 45(2) provides that where the employer fails to prove either procedural fairness or validity of reason the termination of employment is unfair. Section 47(5) further provides for burden of proof as follows –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Section 41 specifically recognizes termination on grounds of misconduct, poor performance or physical incapacity. There is no contest that the claimant's employment was terminated on grounds of poor performance. There is however no evidence that the claimant was subjected to a disciplinary hearing as provided in Section 41 of the Employment Act before the termination. The claimant was not even issued with a notice to show cause why his employment should not be terminated on account of poor performance.

In the case of **Alex Wainaina Mbugua v Kenya Airways Limited (2017) eKLR** it was held that before an employee is terminated for poor performance should be given a fair and reasonable chance to address his work performance.

Further in the case of **Liz Ayany v Leisure Lodges Limited (2018) eKLR** the Court held that Section 41 of the Employment Act, 2007 provides that in the event of a dismissal on account of poor performance or misconduct, the employee shall be given a notice and a hearing.

In light of the foregoing I find that the termination of the Claimant's employment was unprocedural hence unfair.

Reason for termination

The reason cited for the termination of the Claimant's employment was poor performance. Section 43(1) of the Employment Act requires an employer to prove the reason(s) for termination, and where it fails to do so such a termination shall be deemed to have been unfair within the meaning of Section 45 of the Employment Act, 2007.

The Court of Appeal in **National Bank of Kenya v Anthony Njue John (2017) eKLR** held as follows on the issue of termination on account of poor performance-

*“The reason advanced by the Bank for terminating the respondent's employment was poor performance. In **Jane Samba Mukala v OI Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK)** (September, 2013) the court observed as follows;*

- a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the 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.*
- b. 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 put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.*
- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee*

must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to

address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

The fact that the claimant was placed on a Performance Improvement Plan and issued with two warning letters on his performance does not mean replace or disentitle him to a hearing. I therefore find that the Respondent has failed to justify the reasons for terminating the Claimant's employment as the reasons it relied on were never tested through any disciplinary hearing. The termination was therefore unfair.

Whether the Claimant is entitled to the reliefs sought

The Claimant is not entitled to an order for reinstatement as the same is only available within 3 years from the date of an employee's termination as provided under Section 12(3)(vii) of the Employment and Labour Relations Court Act.

The claimant is further not entitled to payment of salary and benefits to date of retirement. The Claimant cannot be awarded remuneration for the unserved period as he cannot enjoy remuneration which he did not work for. Awarding such a relief would amount to unjust enrichment. In the cases of **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** and **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR**, the court declined to award such prayers on grounds that they would not be commensurate with the loss suffered by the claimant as a consequence of termination of his employment.

a) Maximum compensation for loss of employment

The Claimant is entitled to compensation for loss of employment. **I award him compensation equivalent to 10 months' gross salary in the sum of Kshs.872,000.** In arriving at this I have considered the length of the Claimant's service and the circumstances leading to the termination.

The prayers for general damages, aggravated and exemplary damages fail as the claimant's case does not meet the criteria for grant of the same.

The respondent shall pay the claimant's costs for this suit and the decretal sum shall accrue interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JUNE 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st 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