



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1777 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PETER MUTISYA MUSEMBI.....1ST CLAIMANT

THOMAS KIPLETING TENAL.....1ST CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimants herein were employed by the Respondents to serve in various positions until 30th April 2014 when their employment contracts were terminated on grounds of poor performance. That they were not given an opportunity to defend themselves.

They further aver that the respondent discriminated against them as they were not offered similar terms yet their termination was a continuation of a Voluntary Early Retirement Plan that the respondent floated to its employees which they did not opt for. They further aver that in December 2013 the Respondent unilaterally reviewed the applicable notice period from 3 months to 1 month.

They further aver that upon their termination, they were accorded different terms from those given to their colleagues who took up early retirement package despite their termination being a continuation of staff reductions under the voluntary early retirement (VER) Programme.

They therefore seek the following reliefs:

- a) A declaration that the Respondent's actions of terminating the Claimants from employment vide the Respondent's letter dated 30th April 2014 was unprocedural, unfair and unlawful.
- b) A declaration that the Respondent violated the Claimants' right to fair administrative action under Article 47, right to fair labour practices under Article 41 and freedom from discrimination under Article 27 of the Constitution of Kenya, 2010 as well as rules of natural justice.
- c) A declaration that the Claimants were entitled, on termination, to terms similar to those accorded by the Respondent to employees who left employment under the voluntary retirement plan.
- d) An order that the Respondent does implement for the Claimants exit terms similar to those enjoyed by the Respondent's employees who left employment under the voluntary early retirement plan.
- e) 12 months' compensation for wrongful and unfair termination.
- f) General damages for violation of fundamental rights and freedoms.
- g) Three months' salary in lieu of notice.
- h) Payment in lieu of accrued leave days.
- i) An order directing the Respondent to issue the Claimants with favourable recommendation letter

j) Any such other appropriate relief as the court may deem fit.

k) Costs of this claim plus interest thereon.

In its defence, the Respondent avers that the change in notice period was lawful and that the claimants were lawfully and procedurally terminated from employment. It avers that the termination of the employment of the Claimants on grounds of poor performance is evident in the Performance Reviews.

Claimants' Case

PETER MUTISYA MUSEMBI, the 1st Claimant herein testified as CW1. He testified that he was employed on 18th January 2010 as a clerical officer and on 3rd September 2013, he was appointed as Business Banking Consultant (BBC).

He testified that there were set performance targets in his new position and his performance was fair as he was in the process of familiarising himself with the new position. He testified that he was taken through the usual performance reviews and he was advised to improve. He however did not achieve the set targets. That in January 2014 he picked up well but was terminated in April.

He testified that no disciplinary hearing was conducted prior to the termination of this employment. That only a performance discussion was held with him in December 2013. He testified that he appealed against the termination and was given a hearing but the Respondent had not responded by the time he filed the instant suit. He testified that in his new position, his notice period was 3 months but this was arbitrarily changed to one month.

He testified that he was not consulted before the review. That he did not consent to the change in his terms. He testified that upon termination he was only offered payment in lieu of one month's notice.

In cross-examination, he testified that a score of "fair" was not very good and that there was room for improvement which he did. He testified that he was entitled to loans at staff terms and conditions but the terms were to revert to commercial rates upon termination of employment. He further testified that he was issued with a notice of change of terms but he did not respond to it. He testified that he is still in arrears in payment for his loans but was making arrangement to repay.

In re-examination, he testified that he had served in the new role for 4 months only. He testified that the letter dated September 2013 provided 3 months' notice upon confirmation. He testified that he did not apply for VER.

THOMAS KIPLETING TENAI, the 2nd Claimant herein testified as CW2. He testified that he was employed as a clerk. That in 2013 the Respondent introduced a new role of Business Banking Consultant which he was appointed to as a result of his previous role in marketing. He testified that the staff were given targets which they were to meet and were assessed during the 2nd quarter of the year.

He testified that the VER programme dated 19th February 2014 was applicable to persons who had reached the age of 50. That he did not apply for the package as he was 48 years at the time. He testified that he received his termination letter on 7th May 2014.

He testified that his performance was not bad but according to the rating his performance was not as per target because he was in a new branch where the bank was still building a customer base. He testified that he was issued with a PIP on 27th March 2014 which was due for review on 30th April 2014. He testified that according to the performance appraisal his score was 43% while his second score in the review dated 15th January 2014 was 48%.

He testified that he was not given a performance appraisal after the performance plan yet the termination letter gave the reason for termination as performance. He further testified that he was not taken through a disciplinary hearing before the termination. That he appealed but was not called for the hearing of his appeal, which was unsuccessful. He testified that he was neither paid service pay nor salary in lieu of notice. That he was a member of NSSF.

During cross-examination, he testified that he had been rated as 1 at the end of the year which was unacceptable performance. He testified that he was not issued with a Certificate of Service.

He testified that the application for VER was for those who were under 50 though he understood it to mean that it applied to those who had attained 50 years. He testified that he signed the review of key performance areas which were financial, business development and growth, operational risk control, customer service and branch initiatives.

He maintained that he did not receive a performance review letter dated 26th February 2014. That he only received the PIP. He testified that he could not recall if he was paid salary in May 2014.

On re-examination he testified that there was discrimination because what he was offered was different from the VER package which had better benefits.

Respondent's case

TABITHA MUNAI MUTWA, the Respondent's Employee Relations Officer testified as RW1. She testified that the notice period for both claimants was one month. That the performance management programme engages the employees to set their own objectives. Should they not achieve their objectives, they are put on a PIP.

She testified that the 1st Claimant signed performance objectives for the period September—December 2013 which was reviewed on 13th January 2014. His overall rating was 60% which is a rating of 2 meaning that he achieved moderate performance. It was her testimony that he did not meet the target set in the PIP. She testified that the Claimant was issued with a 2nd warning letter but there was no improvement thus he was terminated.

She testified that the 2nd Claimant signed a performance document on 28th August 2013 and scored 34% which is rated as below target. That the outcome of the PIP was that the claimant did not improve and was issued with a performance letter dated 26th February 2014 but his performance was still unacceptable. She testified that the bank had no option but to terminate his employment.

She testified that the bank did not receive any VER application from the Claimants. It was her testimony that they are not entitled to benefits under the VER as they were terminated for **poor performance**.

In cross-examination, she testified that the Claimants were subjected to performance appraisals every 6 months. She testified that an employee is put on PIP if they score less than 85%. She testified that the PIP is an interactive process that entails discussions. That she did not have proof that the Claimants were given a chance to defend themselves.

Parties' Submissions

The Claimants submitted that they were not subjected to a hearing contrary to Section 41 of the Employment Act. They further submitted that under Section 45 of the Employment Act, incapacity to perform ought to be proved. They submitted that the **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR** the Court held that even where the employer has a right and reason to terminate, the employee had the right to be accorded a hearing. He further relied on the decisions in **CMC Aviation Limited v Mohammed Noor [2015] eKLR** and **Elizabeth Osiche Apwora v National Bank of Kenya [2017] eKLR**.

They submitted that they are entitled to the reliefs sought. That the letter dated 10th November 2009 provided that they were entitled to 3 months' termination notice or salary in lieu of notice. They further submitted that they are entitled to 12 months' compensation for wrongful termination.

With respect to the prayer for discrimination, they submitted that they ought to be accorded better terms than those who exited under voluntary early retirement plan.

They submitted that they have greatly suffered as a result of the Respondent's actions thus they are entitled to damages for violation of fundamental rights and freedoms. They relied on the case of **Patrick Njuguna Kariuki v Del Monte Kenya Limited [2012] eKLR** where the Court granted Kshs.5,000,000 as exemplary damages. They submitted that as a result of the Respondents failure to pay terminal dues, judgment should be **entered in their favour**.

On its part, the Respondent submitted that the termination of the Claimants' employment met the requirements set out in Section 41 of the Employment Act. It argued that the Claimants had full knowledge of the ratings through their own admissions and that they did not improve leading to the termination.

The Respondent submitted that pursuant to section 45 of the Employment Act, its duty is to show that there was a valid reason for termination. It submitted that the Claimants failed in their roles due to poor performance, which was to the detriment of the Bank and against its Performance Management Policy. In support of its reasonableness in terminating the Claimants, it relied on the cases of **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR** and **CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] eKLR**.

The respondent submitted that the Claimants are not entitled to the reliefs sought as the correct procedure was followed before their termination. It submitted that the Claimants opted not to apply for VER Programme thus they cannot be accorded similar terms to their colleagues who opted for distinct and separate VER Programme.

It submitted that in determining the award of compensation the Court is to be guided by the mandatory considerations under Section 49(4) of the Employment Act. That the Claimants did not prove the alleged violation of fundamental rights and freedoms to entitle them to award of general damages.

It submitted that it paid accrued leave or earned time as provided by the Bank's Policy less any debts owed to it. In conclusion, it urged the Court to dismiss the suit with costs.

Determination

It is undisputed that the Claimants herein were terminated for poor performance vide the letters dated 30th April 2014. The issues for determination are:

1. Whether the Claimants' termination on account of poor performance was lawful and fair.
2. Whether the Claimants are entitled to the reliefs sought.

Whether the Claimants' termination on account of poor performance was lawful and fair.

The Claimants aver that though they were terminated due to poor performance, their termination was a continuation of the VER Programme that was initiated by the Respondent. They both testified that they did not achieve their set targets and had been placed on PIPs.

CW1's termination letter indicated that on his end of year performance review, he had been rated as 2, which means Below Performance while CW2 was rated as 1 meaning Unacceptable Performance. RW1 testified that the Claimants' performance was unacceptable and that they did not improve thus the respondent had no option but to terminate them. She testified that an employee is put on PIP if they score less than 85%. However, the respondent's Performance Management System in the Human Resource Manual does not provide for such a clause. The guidelines for assessing performance are set out under Clause 4.5 of the Human Resources Manual 2012. Clause 4.5.2 of the Human Resources Manual 2012 (Section 4: Performance Management System) provides:

“Every Employee's annual performance will be assessed and entered on form HR-PMS 2. Which will be signed by the immediate Supervisor, Unit Manager and/or Head of Division. The form is finally forwarded to HR Division for necessary analysis, performance feedback will be given to each employee and areas requiring improvement will be pointed out and remedial measures identified and implemented.”

CW2 stated that he did not receive the letter dated 24th February 2014 informing him of his performance review – 2013 which gave him a rating of 1. In CW1's Performance Review produced by Respondent, the Manager's comments were that the staff (CW1) had been on the role for 4 months following the review in Quarter 1 of 2014. Indeed, CW1 testified that he had been appointed to a new role and that he had to familiarise himself with the new position. CW2 testified that he had been appointed to the position of BBC and he was at a new branch that was still building a customer base. This therefore affected his 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, the termination is deemed to be unfair within the meaning of Section 45.

The Court of Appeal in **National Bank of Kenya vs. Anthony Njue John [SUPRA]** 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 Claimants herein were serving new positions during the period of performance review as per their testimony which was not controverted. They were in the process of learning the ropes, so to say. In **Alfred Muthomi Mutiria & 2 others v National Bank of Kenya Limited [2018] eKLR** the Court held:

“Finally, the second Claimant set her targets while serving

at Greenspan branch in the Customer Care department but she was appraised on 11.7.2013 after being transferred to the BBC unit which was dealing with Sales. There is no dispute that the second Claimant was appraised after serving for a just one month after the transfer to the new department and before setting performance targets and that is why the appraiser rated her NIL and stated that her productivity could not be measured because of the short period served.

From the foregoing analysis, I am satisfied that the respondent has not proved on a balance of probability that the Claimants had

performed their duties below the performance standards.”

It is my finding that the Respondent has not proved that there was valid reason for termination under Section 43(1) of the Employment Act. This is because the claimants had not served for sufficient time in their new positions to be able to be assessed in the manner they were.

In respect of procedure, it is the Claimants’ case that they were never invited to a disciplinary hearing to defend themselves. In cross-examination, RW1 testified that she did not have proof that the Claimants were given a chance to defend themselves. CW1 was issued with a 2nd warning letter dated 11th February 2014 which informed him that the letter was to ensure that he meets the acceptable standards of performance expected of him and progress monitored closely and a feedback session held on 15th March 2014 at which time a decision was to be made on further action. The Respondent did not indicate if the feedback session was held prior to the termination on 30th April 2014.

In Banking, Insurance and Finance Union (Kenya) v National Bank of Kenya Limited [2019] eKLR this Court held:

“The grievants testified that they were never issued with warning letters or notice to show cause. Neither were they subjected to a disciplinary process on account of poor performance. The Respondent did not adduce evidence to controvert this position as this was also the evidence of RW1 on cross examination. As such, I find that the Respondent has failed to justify the reasons for terminating the grievants’ employment as the reasons it avers were never tested through any disciplinary hearing. By dint of section 45 (2) (a), an employer must not only have a reason but the reason ought to be valid.”

Section 41 of the Employment Act provides that before an employee is terminated on grounds off misconduct or **poor performance**, he ought to be given an opportunity to present his case. This having not been done, I find that the Respondent has not proved that there was procedural fairness as provided under Section 45(2) (c) of the Employment Act.

Whether the Claimants is entitled to the reliefs sought.

Having found that the termination of the Claimants’ employment was unfair, I declare so in terms of prayer (a) of the claim.

With respect to whether the Claimants were entitled to similar terms to those who applied for VER Programme, both Claimants did not apply for exit on the VER Programme and are not entitled to the said terms.

The Claimants are entitled to compensation for unfair termination as they were unfairly terminated. Taking into account the fact that they had just been assigned new roles in new branches which they had hardly settled into, the fact that they were not given a hearing before termination and which they would have had the opportunity to explain their plight, further taking into account their length of service, I award the 1st claimant 6 months’ salary and the 2nd claimant 12 months’ salary as compensation for unfair termination.

The claim for damages for violation of fundamental rights and freedoms is dismissed as the Claimants have been compensated under Section 49(1) of the Employment Act. Awarding such damages would amount to double compensation.

On 3 months’ salary in lieu of notice, the Claimants’ termination letters provided that they were eligible to 1 month’s salary in lieu of notice. The tabulation of the CW2’s terminal dues indicate that he was paid one month’s salary. However, the Claimants aver that the terms of their contracts were unilaterally changed. The letter dated 9th December 2013 informed CW1 that the termination notice had been reviewed from 3 months to one month. He however did not protest the change. I find that the claimants are not entitled to the prayer for 3 months’ notice.

The Claim for payment in lieu of accrued leave days fails. With respect to CW1, he did not state the leave days due to him. In the tabulation of the dues paid to CW2, the Respondent had advised that the amount payable to him was Kshs.6,467. The prayer therefore fails.

The Claimants are entitled a Certificate of Service as provided under section 51 of the Employment Act.

In summary I award the claimants the following –

1st claimant Peter Mutisya Musembi

6 months’ salary (87,321 x 6) **Kshs.523,926**

2nd claimant Thomas Kipleting Tenai

12 months’ salary (196,714 x 12) **Kshs.2,360,568**

The respondent shall pay the claimants’ costs for this suit. 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