



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 501 OF 2018

BETWEEN

KASSIM NYONGESA BARASACLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

Rika J

Nguyo Kariuki & Company Advocates for the Claimant

Federation of Kenya Employers, for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 8th November 2018. He states he was employed by the Respondent Bank, in various positions, from 1994. His last position was Personal Banker in Retail Department, Bamburi Branch in Mombasa, with a monthly salary of Kshs. 155,000.
2. His role entailed: sales activities to government and private entities of mortgages, loans and policies; targeting new businesses such as petrol stations and hotels; and opening of new accounts. His role involved constant local travel. He worked well until the year 2015, when his performance deteriorated, due to his falling ill with rheumatoid arthritis. In 2015 he was rated as ‘needs improvement’ and in 2016, as ‘underperforming.’
3. He was in constant pain and requested for lighter duty. Change in the role was medically advised. The Respondent did not assign to the Claimant lighter duty.
4. At the same time, the Respondent was downsizing in all its branches. He was warned about his performance on 13th June 2016. He was given 12 months to improve. On 21st January 2017 he was asked to show in writing, why disciplinary action should not be taken against him. He wrote back explaining about his medical condition. He was invited for a capacity hearing meeting on 15th February 2017 where he restated his explanation. He received a letter of termination from the Respondent, dated 7th March 2017. He was advised that he had failed to meet performance targets. He was offered 1 month’s salary in lieu of notice.
5. The Claimant appealed the decision to the Human Resource Director in accordance with the Respondent’s Human Resource Policy, through a letter dated 16th March 2017. He was heard on appeal, on the 31st March 2017. He was advised through a letter dated 4th April 2017, that his Appeal did not succeed.
6. The Claimant states, termination did not follow a fair procedure. He holds that he was forced out through an unlawful redundancy. The Respondent closed its Bamburi Branch shortly after terminating Claimant’s contract. His staff loans were adjusted to prevailing commercial rates, within 30 days of termination.
7. He prays for Judgment against the Respondent for:
 - a. 1 month’s salary in lieu of notice at Kshs. 155,000.

- b. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1,860,000.
- c. Repayment of extra interest charges incurred by the Claimant on his staff loans.
- d. Certificate of Service to issue.
- e. Costs.
- f. Interest.

8. The Respondent filed its Statement of Response on 17th June 2018. It is not denied, that the Claimant was an Employee of the Respondent. His performance was below set targets. He was asked to show cause. He responded, conceding poor or underperformance. He was invited to a disciplinary hearing and advised fully, on his procedural rights. He was heard. It was confirmed that: the Claimant underperformed in 2015 and 2016; there was marginal improvement in 2016, but without meeting of targets; and the Claimant was clear about his performance targets. His contract was terminated on 7th March 2017. He appealed the decision. He was heard on 31st March 2017. Termination decision was upheld. He was issued his Certificate of Service. The Respondent prays for dismissal of the Claim with costs.

9. The Claimant, and Respondent's Head of Employee Relations Vaslas Odhiambo Agola, gave evidence on 4th December 2019, closing the hearing.

10. The Claimant adopted his Witness Statement and Documents on record. He stated he was first employed as a Clerk, then Cashier, and lastly as Personal Banker. He reiterated that his performance was not good from 2015, as he had fallen ill. He narrated about the steps taken by the Respondent against him, leading to termination. No assistance was given to him, to help him improve. He was denied light duty as had been recommended by the Doctor. He confirmed that he appealed against the decision to terminate his contract, without success. His Branch shut down a month after termination.

11. Cross-examined, the Claimant stated he had sales experience of 20 years. Targets were set for him. He accepted them. Reviews were done monthly, quarterly and annually. He was given a chance to comment on reviews. He did not raise issues on review. He confirmed his performance in 2016 was poor. He discovered poor performance was due to ill health, when he went to hospital in 2015. Poor performance was in 2016, not in 2015. He informed the Respondent about his illness in May 2016. He formally applied for variation of his role. He did not exhibit the letter seeking variation of role in Court. He gave the Medical Report to his Line Manager. The Respondent did not acknowledge receipt. He did not say specifically, that he suffered arthritis in response to the letter to show cause. Someone would not know what ailed the Claimant, from a reading of his letter. He did not say he suffered arthritis because his job was on the line. In redirection, the Claimant told the Court he communicated his medical condition to the Respondent on appraisal, on notice to show cause, and shortly before termination.

12. Agola confirmed the narrative made by the Claimant on his employment history; terms and conditions of service; and termination of the Claimant's contract, on account of poor performance. Appraisal was carried out and discussed with the Claimant periodically. His performance was unsatisfactory in 2016. The Claimant made an undertaking to improve. He said he would even exceed the targets. He did not say he was ill. Agola never received the Medical Report dated 18th May 2016. Review was in April 2016. Objectives were agreed upon very clearly. The Claimant stated at the end of his Performance Improvement Plan, that he was focused and ready to exceed performance targets. He only mentioned in August 2016, that he needed variation of role. He never wrote asking to have lighter duty.

13. Cross-examined, Agola told the Court he did not work at Bamburi Branch; he is Head of Employee Relations, based at the Head Office, Nairobi. He was not present during appraisal of the Claimant's performance. Agola was not informed that there was an Employee at Bamburi Branch, who was not performing on account of an illness. The Line Manager sat with the Claimant and held discussions. The Claimant did not avail medical records. Agola does not get involved in all Branch affairs. Branch Managers are there to attend to some matters. The Claimant exceeded target on Savings Account. He was able to achieve a 7 against a target of 6. Agola would ask why the Claimant could not achieve the target on other objectives. The Respondent reasonably accommodates its Employees upon proof of illness. The Claimant alleged that arthritis affected his visits to Customers. Bamburi Branch was closed down after the Respondent carried out a market survey. Due digitalization of banking, several Branches were amalgamated. Employees were transferred to other Branches. There was no relation between the closure, and Claimant's termination. Redirected, Agola told the Court the Claimant performed well, in one line, even as he justified poor performance on his illness, in other lines.

The Court Finds: -

14. The employment history of the Claimant, his contract with the Respondent, and the fact of termination by the Respondent, are not disputed.

15. It is not contested that he left employment after the Respondent concluded the Claimant's performance was below par. The Claimant does not dispute that he performed poorly in 2016 particularly, and was placed on PIP.

16. It is agreed there was no improvement in Claimant's performance, even after he committed himself to improve and even exceed targets.

17. He explains his poor performance on the basis of ill-health. He states that a letter dated 18th May 2016, from a Doctor Rishad A.S, signed off in the letter as a Consultant Physician / Nephrologist, confirmed the Claimant was stricken with rheumatoid arthritis. The letter states that this affected his performance, recommending that the Claimant is given a new role.

18. The Respondent does not acknowledge receiving this letter.

19. The letter, though not clear from which medical institution it issued from, does not look to the Court supportive of the Claimant's position that illness affected his performance. It was not presented to the Respondent during appraisal discussions. Instead, the Claimant committed himself to meet his targets and even to over-hit those targets.

20. During the capability hearing on 31st August 2016, the Claimant told the panel, that there were challenges, but that these had been resolved. He disclosed that he had changed medication and was set to improve performance. He did not assert that illness was continuing to bog him down; he reassured the Respondent illness, with changed medication, was a thing of the past. In review of 4th April 2016, he was assessed to have exceeded target on savings accounts. He did not come out clearly why this was not affected by his illness. He undertook to 'be green' by end of 2016. 'Green' in the performance lexicon of the Respondent, denotes superb performance. He did not improve. He was issued a final warning letter dated 19th September 2016. He was advised the warning was valid for the next 12 months. He was advised he was entitled to appeal against the decision.

21. He did not appeal against the final warning. But on 21st January 2017, the Respondent issued the Claimant a show cause letter. The Claimant was advised that his performance for the full year 2015 and full year 2016, was below the targets.

22. His reply of 24th January 2017, was weighty. He stated that he had attended capability hearing at the end of 2016, which culminated in the final warning. The letters of warning and show cause, related to the same periods- 2015 and 2016.

23. The Court has not been made to understand by the Respondent, why the letter to show cause issued, while the Claimant had not been given the chance to show improvement in the subsequent appraisal period- the year 2017. There is no evidence of Claimant's poor performance between October 2016, after the final warning, and January 2017. A warning is a form of punishment, and unless there is evidence of repeated offence, the Employer would be hard-pressed to justify additional disciplinary measures. The Claimant nonetheless emphasized he was ready to improve in all areas, in the new year, 2017.

24. He was required to attend a second capability hearing on 2nd February 2017. The ink had hardly dried on the warning letter. He was advised he could be subject to disciplinary proceedings, depending on the outcome of the second capability hearing. He was again taken through the same questions which obtained in the first capability hearing, and in main, gave the same response. He was asked about his strategy for the year 2017. Why would he be asked about 2017, and then denied the opportunity to put his strategy into motion? One of the panellist, Simon Kinuthia, observed that the Claimant had a lot of experience, and that the Claimant had clear objectives for 2017. It was observed that the Claimant was clear on his deliverables for the year 2017.

25. Strangely, the panel recommended that the Claimant's contract is terminated, based on his poor performance for the year 2015 and 2016. This had been the subject of the previous capability hearing.

26. The capability hearings were not, in the understanding of the Court, disciplinary proceedings. They were a continuation of performance management. On both occasions, the Claimant was advised that: *"depending on the outcome of the meeting, you may be subject to disciplinary action."*

27. Where are the disciplinary proceedings, leading to the decision to terminate the Claimant's contract? Is a capability hearing the same thing as a disciplinary hearing? Does the law contemplate 2 disciplinary hearings at the same level, if capability hearing is to be taken to be the same thing as a disciplinary hearing? In the view of the Court, these capability hearings were no more than investigatory procedures, meant to collect facts, to be presented at a proper disciplinary platform, if need be. Section 41 of the Employment Act does not contemplate capability hearing, in cases of poor performance. Poor performance is lumped together with other instances of indiscipline. There is a single procedure under Section 41, which is commonly understood as a disciplinary hearing. The Respondent could be having capability and disciplinary hearings, as separate procedures in its Human Resource Policy. The Policy document was not availed to the Court. It was not explained to the Court by the Respondent whether capability issues at the Respondent workplace, are dealt within an existing disciplinary process, or as a standalone capability procedure.

28. In all the Respondent had a valid ground in terminating the Claimant's contract. He acknowledged poor performance. The Respondent met the requirement of substantive justice, under Sections 43 and 45 of the Employment Act.

29. Procedure was flawed. The Claimant was taken through capability hearings, relating to the same appraisal periods- 2015 and 2016. He was issued a final warning letter for poor performance over the same period. He was advised, the warning was valid for another year. Shortly after the warning, he was called to the second capability hearing. He was encountered with the same complaints over which the final warning issued. The Claimant and the panellists who heard him lastly, seemed agreed on gauging the Claimant's performance from the year 2017. There was a chance for rebirth. It was always possible to rehabilitate the Claimant. He was a long-serving Employee, with over 20 years' experience, and without adverse antecedents. The final warning was the sanction the Claimant received for poor performance for the years 2015 and 2016. He gave his reassurance that he had a strategy for improved service in 2017. Yet, he was judged on the past performance, from the years 2015 and 2016. He was not invited to a disciplinary hearing before termination. He was instead advised disciplinary action would follow, depending on the outcome of the capability hearing. After the decision was made, the Claimant appealed. He was invited to the hearing, and this time advised that he would appear before disciplinary hearing panel members. It was not made clear by the Respondent what, in its Human Resource Policy, entails Capability Hearing, Disciplinary Hearing, and Appeal Hearing. While the Court thinks the Respondent would be justified based on the Claimant's admission of poor performance, and in the absence of clear medical evidence shown by the Claimant explaining poor performance, to terminate the contract, procedure in reaching that decision was tellingly lacking in fairness.

30. Termination was unfair for lack of fair procedure.

31. The Claimant had worked for the Respondent from 1994, and in different capacities. His exhibit 'KNB 1', shows he first worked at Respondent's Nkurumah Branch, Mombasa with effect from 15th August 1994. By the time of termination on 7th March 2017, the Claimant had served for about 23 years. There were no complaints about his performance before the year 2015. He left employment, heavily burdened

by the weight of staff loans which the Respondent, immediately on termination, reverted to commercial loans. He did not tell the Court how much longer he expected to go on working with the Respondent. He contributed to the circumstances leading to termination of his contract, through his unexplained dip in performance. It is not clear if he was paid any benefits on termination. **He is granted 5 ½ months' salary in compensation for unfair termination at Kshs. 852,500.**

32. Having concluded that the Claimant's contract was terminated for valid reason, notice is not payable.

33. The Claimant has not established what interest charges he seeks from the Respondent, his staff loans having been transitioned to the commercial rates. There are no specific figures contained in the Statement of Claim. His evidence did not assist the Court on the interest amounts sought. In principle the Court does not approve of staff loans being converted into commercial loans by an Employer after an Employee has lost his/her job. It is unconscionable and an unfair labour practice, particularly in a case such as the Claimant's, where he has invested 23 years of his life working for the Respondent, and where staff loans issued on concessionary interest rates, recoverable through salary check-off. The concessionary rate should be viewed as an accrued benefit, not to be impaired by termination. Nonetheless the Claimant has not shown specifically what he claims under this head. The Court cannot grant speculative orders. The Judgment of the Court must be specific, clear, effective and capable of execution, otherwise there is always the risk of engendering secondary disputes between the Parties.

34. Whereas the Respondent has exhibited a Certificate of Service in the name of the Claimant, it has not been shown that the Certificate was handed to the Claimant. **The Certificate shall be released to the Claimant forthwith.**

35. **No order on the costs.**

36. Taking stock of the impact of Covid-19 on the global economy, and the ability of Employers to meet their financial obligations timeously, **the Court allows sua sponte,**

45 days' stay of execution.

37. **Interest allowed at the rate on 16% per annum, calculated from the end of the stay of execution period, till payment is satisfied in full.**

IN SUM, IT IS ORDERED: -

- a. **Termination was on valid ground, but procedurally flawed, and to that extent unfair.**
- b. **The Respondent shall pay the Claimant 5 ½ months' salary in compensation for unfair termination at Kshs. 852,500.**
- c. **No order on the costs.**
- d. **Certificate of Service to issue.**
- e. **Stay of execution granted for a period of 45 days from the date hereof.**
- f. **Interest allowed at the rate of 16% per annum from the end of period of stay of execution.**

Dated, signed and released to the Parties under the Ministry of Health and Judiciary Covid-19 Guidelines, at Chaka, Nyeri County, this 29th day of July 2020.

James Rika

Judge