



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE 1223 OF 2013

DAVID KIMANDI NDUBAL.....CLAIMANT

VERSUS

K-REP BANK LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant pleaded that he was employed by the respondent on 26th July, 1999 as a microfinance officer in the operations department. His salary was Kshs. 17,685/ per month. The claimant was on 1st July, 2004 promoted to the position of Senior Microfinance Officer at gross monthly salary of Kshs. 37,432/-.
2. The claimant was subsequently promoted to Assistant Manager and later Manager for Chuka Branch.
3. The claimant further pleaded that in the course of his employment with the respondent he was never found culpable of any professional negligence, gross-misconduct or poor performance.
4. As an internal regulation or requirement of service the claimant was required to undergo an appraisal or assessment on performance which was undertaken by his supervisor.
5. The claimant was consequently apprised and or assessed on 5th April, 2012 and was rated on a score of 3.3.
6. According to the claimant, the score which he attained after the appraisal met the basic requirements to continue with his employment.
7. The claimant further pleaded that irrespective of the foregoing and having not received any performance notice he was served with a letter dated 18th April, 2012 terminating his services with effect from 20th April, 2012. The termination was on account of poor performance after he had been put on three months performance notice and his performance remained unsatisfactory and below the agreed targets.
8. The respondent on its part conceded to the claimants chronology of his career progression since appointment and further pleaded that pursuant to the claimant's contract his performance was subject to appraisal from time to time. According to the respondent, the claimant was severally appraised and in May 2010 put on notice for poor performance. On 21st Septemebr, 2011 the respondent's Head of Risk and Legal wrote to the claimant on his performance with caution he takes full responsibility of his Branch. Following his 3rd quarter year 2011 review, the claimant received a rating of 4 meaning that his performance was wanting. Subsequently the following 4th quarter year 2011 review of the claimant once more received a rating of 4 meaning his performance was still wanting. On 26th Janaury, 2012 the claimant was placed on performance notice for 3 months to allow him improve. During the period the claimant was accorded ample opportunity to improve by his supervisors and the management in the delivery of services and to be heard on any issues arising. Despite the foregoing during his 1st quarter year, 2012 review the claimant scored 3.5 on his review which was rounded off for 4 meaning his performance was still wanting and still not improved despite the notice earlier issued to him by his supervisor. The claimant was thereafter terminated after following due process on 20th Aoril, 2012.
9. In his oral evidence the claimant further stated he was given a termination letter on 5th April, 2012. According to him an appraisal was done and he scored 3.3. hence was supposed to continue working. On 19th April, 2012 he received an email from his supervisor inviting him for a meeting at the head office. The email had information that his appraisal had been altered. When he arrived at the head office, he was issued with a termination letter. According to him the appraisal was done together with his supervisor. The agreed rating was to be signed by both parties and dated.

10. In cross-examination he stated that his contract had a termination clause. The clause was amended from initial three months to one month or salary in lieu. He further stated that performance appraisal was introduced in 2008. There was an earlier version in 2008. The 2008 version required that one sits down with his supervisor while in 2005 version this was not a requirement. It was further his evidence that his performance improved after the program

11. Upon termination he was paid Kshs. 206,446 which according to him was for days worked and leave.

12. In re-examination he stated that he was promoted shortly before he was terminated.

13. The respondents witness Ms. Jean Waluche stated that she was the respondents Head of Human Resource and that she was appointed in May, 2015. According to her the claimant was moving laterally and this was not a promotion. All his terms remained unaltered. It was further her evidence that the claimant scored 3.35 on appraisal. This according to her was poor performance. The claimant signed the appraisal and was put on performance improvement plan. The claimant thereafter scored 4 which meant he partially met his targets.

14. Concerning service pay, it was her evidence that the claimant was not entitled to service pay because he was contributing to a pension scheme. Further that, there was no provision for gratuity in the contract. In cross-examination she stated she could not confirm if there was a hearing before termination.

15. The respondent's Human Resource Policies and Procedures Manual at Clause 3.7.2 provides among others that an employee's services may be terminated on grounds of poor performance.

16. The claimant herein was last rated at 3.5. which was rounded to 4 hence deemed by the respondent as poor performance. This rating however was initially placed at 3.3. which the respondent later varied claiming the claimant was overrated on certain components.

17. A rating of 4 is described by the respondent in its Human Resources Polices and Procedures as "needs improvement". It means the employee meets more than three quarters of the objectives which include all key deliverables. Below rating of 4 is rating 5 which is described as poor performer. It means an employee's performance falls below expectations and has met less than 70% of the objectives. The remedy for a rate 4 employee is prescribed in the manual as "requires immediate coaching and a development plan to get performance to acceptable standards within the next six months"

18. Clause 8.1.2.3 of the 2012 version of respondents' HR Polices and Procedures provides that whenever and wherever possible penalties imposed for disciplinary offences will be progressive and stricter penalties will not normally be imposed unless the employee concerned has previously received a written warning concerning his/her conduct.

19. The claimant was rated at 4 as opposed to 5, the latter which is regarded as poor performance. At rate 4 the claimant could not be by virtue of the respondent's own Human Resource Polices and Procedures produced by them in court be regarded as poor performer to be terminated on that ground. If the claimant's performance at 4 was a source of concern to the respondent he could have been handled progressively as provided in the respondents' HR Polices and Procedure. Termination in the court's view was severe and unreasonable. Contrary to the principles contained under Clause 8.1.2.3. of the respondents HR Manual.

20. The burden of proof of reason for termination of employment is cast upon the employer. Failure to prove the reason for termination of employment leads to finding that the termination was unfair. In this particular case the court finds and holds that the respondent has failed to prove that it has a valid reason for terminating the claimant services herein the termination is found to have been unfair. The court therefore enters judgment against the respondent in the sum of Kshs. 1,210,520 being ten months salary as compensation for unfair termination of service. This award shall be subject to taxes and statutory deductions and shall attract interest at court rates from the date of the judgment till payment in full.

21. The claimant shall further have costs of the suit.

22. The other heads of claim are hereby rejected for lack of evidence.

23. It is ordered.

Dated at Nairobi this 18th day of January, 2019

Abuodha Jorum Nelson

Judge

Delivered this 18th day of January, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge