



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 989 OF 2015**

**ESTHER MBINYA MUSAU.....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 30th August, 2019)

**JUDGMENT**

The claimant filed the statement of claim on 10.06.2015 through Omari Muumbi & Kiragu Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's actions of terminating the claimant from employment vide the respondent's letter dated 13.04.2015 was un-procedural, unfair and unlawful.
- b) A declaration that the respondent violated the claimant's 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 claimant was entitled, on termination, to terms similar to those accorded by the respondent to employees who left employment under the voluntary early retirement plan.
- d) An order that the respondent does implement for the claimant 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 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 claimant with a favourable recommendation letter.
- j) Any such other appropriate relief as the Court may deem fit.
- k) Costs of the claim plus interest thereon.

The respondent filed the memorandum of reply on 08.04.2018 through Oraro & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

There is no dispute that the claimant was employed by the respondent as clerical staff by the letter of appointment signed by the claimant on 04.09.1995. It is not in dispute that sometimes in 2013 the respondent came up with a voluntary early retirement scheme whereby an early voluntary retirement package was offered. The claimant was eligible but elected not to take up the early retirement.

The claimant's employment was terminated by the letter dated 13.04.2015. The letter stated that performance review for the year 2014 had been concluded and the claimant's rating confirmed as 1, unacceptable performance. The letter further stated that despite several performance discussions the claimant's performance had declined to the current level and the bank had no alternative but to terminate the claimant's contract of service effective 13.04.2015 as per the bank's management policy clause 4.7.2. The claimant was eligible to one month's pay in lieu of notice, pay for accrued leave or earned time, and less debt owed to the respondent. The outstanding loans would revert to bank's prevailing market rates upon lapsing of 90 days and without reference to the claimant.

The claimant replied to the letter of termination by her letter dated 20.04.2015 and raised matters to the following effect:

- a) In January 2013 parties agreed upon key performance indicators (KPIs) and despite fewer staff in the department and the centralisation of credit, at the end of the period the claimant was ranked 4 out of possible 5 and congratulated by the line manager. In that regard she was awarded salary increase per the letter of 10.04.2014.
- b) In April 2014 there was no manager in securities and documentation but the work flow remained the same as staff left on voluntary early retirement. On 14.04.2014 the claimant was assigned to run the entire division. For half year review 2014 she was ranked 4, that is, exceeded performance.
- c) In August 2014 a new manager was deployed to head the division. The claimant noted that the in-coming manager appeared not to want to take over from her and in the process of handing over the new manager assigned her duties which she diligently performed.
- d) In November 2014 the new manager implied that he did not want to work with the claimant. He asked the claimant to identify another section to work in beginning January 2015. The same manager was to appraise the claimant for 2nd half year 2014 though he was still on probation. He awarded the claimant 2 out of 5 meaning below performance expectation. So in 4 months only the claimant performance had dropped from 4 to 2.
- e) The new manager went to the CRO's office and explained he could not work with the claimant. The CRO noted the personal differences involved but endorsed the award of 2 for the claimant's half year 2014 performance. It was proposed that the claimant be placed on performance improvement plan (PIP). On 22.01.2015 during appraisal for last quarter for 2014 CRO endorsed the claimant be put on PIP but discussion was not about bank's work but about how the new manager did not want to work with the claimant.
- f) The claimant denied that there had been numerous discussions about her performance with her managers and as alleged in the termination letter. The line manager had not explained how her performance had dipped from 4 to 1 in just 4 months. The claimant denied that her performance had deteriorated as was alleged.
- g) The claimant prayed for a review and a fair judgment.

By the letter dated 19.05.2015 the respondent upheld the termination. The claimant testified to support her case and the respondent's witness (RW1) was Tabitha Mutua, the Employee Relations Advisor.

The Court has considered the pleadings, the evidence and the submissions.

To answer the **1st issue** for determination, the Court returns that the termination of the claimant's employment was unfair. First the claimant was not given a notice and a hearing as per section 41 of the Employment Act, 2007. Second, in her appeal or reply against the termination the claimant raises serious grievances including that she had personal differences with the incoming new line manager. The grievances appear not to have been ventilated prior to the termination because the claimant had not been notified about the looming termination on account of poor performance. The claimant's concerns that her otherwise good performance could not have suddenly deteriorated have not been addressed at all. Whereas the appraisal was purportedly conducted as per the respondent's policies, that in itself did not amount to a justification for termination and in the opinion of the Court, the claimant was entitled to a due process of a notice to show-cause and a hearing prior to the termination. In any event, the Court returns that the termination was said to be in accordance with clause 4.7.2 of the Bank's Performance Management Policy but which has not been exhibited and the Court finds that the clause being not in existence, it cannot be said that the termination was upon a valid reason and due process as per section 43 as read with section 45 of the Act. The respondent exhibited its Human Resources Manual of June 2012 whose section 4 on Performance Management System runs from 4.1 to 4.5.3. The Court has revisited the entire section 4 of the Manual and nowhere is it stated that the performance management system may be implemented in a manner that may result in a sudden termination on account of poor performance as was done in the instant case. Accordingly, the Court returns that the termination was unfair.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The Court has found that the termination was unfair and the claimant is entitled to a declaration as prayed for.
- b) The Court finds that the claimant has not established violation of Articles 47 on fair administrative action and Article 27 on freedom from discrimination. In particular the Court returns that the voluntary retirement programme was optional and the claimant has pleaded and testified that she opted not to participate in the voluntary early retirement as was offered by the respondent. Thus the Court finds that the claimant is not entitled to compensation for the alleged violation of the cited constitutional provisions and is further not entitled to payment of the separation package under the voluntary early retirement scheme as prayed for. The Court further returns that any violations of Article 41 of the Constitution on fair labour practices is subsumed in the unfair termination as found under the breach of the cited provisions of the Employment Act, 2007 and no separate remedy would flow under Article 41 of the Constitution in the circumstances of the suit.

c) The claimant prays for 12 months compensation under section 49 of the Employment Act, 2007 for the unfair termination. The Court has considered the evidence against the factors under section 49. The claimant had a clean record of service until the disputed appraisals on poor performance starting end of 2014. The claimant had served a long period of time with due diligence, promotions and congratulations and she desired to continue in employment. The aggravating factor is that the unfair termination issued despite the prevailing loans that the respondent has allowed the claimant to borrow and with the consequence that 90 days after the termination the loans would revert to market interest rates. The Court has considered the mitigating factor that the claimant signed the otherwise disputed appraisals suggesting that she had condoned the grievances she later raised in her reply to the letter of termination. Taking into account all these factors, the claimant is awarded 10 months' gross salaries at the last monthly rate as at termination.

d) The claimant is entitled to a certificate of service as per section 51 of the Employment Act, 2007.

e) The claimant has exhibited the letter dated 10.11.2009 which shows that she was entitled to 3 months' pay in lieu of the termination notice. Accordingly, she is awarded accordingly.

h) The pay for leave days was surrendered and no due leave days were established.

i) The claimant's last monthly pay was Kshs. 178, 714.00 and the claimant has been awarded a sum of 13 months' pay making **Kshs. 3, 323, 282.00 payable less PAYE due.**

In conclusion judgment is hereby entered for the claimant against the respondent for:

1) The declaration that the respondent's actions of terminating the claimant from employment vide the respondent's letter dated 13.04.2015 was un-procedural, unfair and unlawful.

2) The respondent to deliver to the claimant the certificate of service and other positive recommendation letter as appropriate as and not later than 01.10.2019.

3) The respondent to pay the claimant a sum of **Kshs.3, 323, 282.00 less PAYE due** and to pay by 15.10.2019 failing interest to run thereon at Court rates from the date of this judgment till full payment.

4) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 30th August, 2019.**

**BYRAM ONGAYA**

**JUDGE**