



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE 1602 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th September, 2019)

RABIN PATRICK OPWAKA.....1ST CLAIMANT

AGNES NDUTA NJENGA.....2ND CLAIMANT

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

JUDGMENT

1. The Claimants filed this claim on 10th August 2015 challenging the termination of their employment. They sought the following prayers-
 - a. A declaration that the Respondent's actions of terminating the Claimants from employment vide the Respondent's letter dated 13th April 2015 was unprocedural, unfair and unlawful.*
 - b. A declaration that the Respondent violated the Claimants rights 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 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 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 a favourable recommendation letter.*
 - j. Any such other appropriate relief as the Court may deem fit.*
 - k. Costs if this claim plus interest thereon.*

2. The Claimants were employed by the Respondent as a Relationship Manager and Business Relationship Officer respectively, at the Respondent's Nakuru branch. In 2013, the Respondent came up with a voluntary early retirement (VER) plan for the employees who were willing to retire in return for certain benefits such as loan rebates, preferential interest rates for their existing loans and medical cover for one year after retirement. The Claimants opted to continue serving the Respondent.

3. In December 2013, the notice period was reviewed from the 3 months stipulated in their contract to 1 month, without consulting the Claimants or getting their consent.
4. Their employment was terminated vide a letter dated 13th April 2015 on the ground of poor performance. They were not issued with a notice or accorded a hearing and neither did the Respondent complain about their performance. At the time of termination, they had loan facilities with the Respondent for which the Respondent charged a preferential interest that was much lower than the market rates.
5. The Claimants aver that they were not paid their rightful dues being payment in lieu of notice and compensation of their improper dismissal. Further, they were accorded different terms compared to their colleagues who opted to voluntarily retire.
6. CW1 testified that he received a letter of good performance on 10th April 2014. Upon cross-examination, it was his testimony that he received the 1st warning letter but did not appeal. It was also his evidence that he received the review of his poor performance but never wrote a reply. He admitted to being put on probation to which he did not respond to.
7. On the issue of the performance improvement plan, it was his testimony that he discussed it with his boss and came up with an improvement plan. However, the portfolio growth was disputed at the time. He conceded to not applying for the VER. On re-examination, he stated that there was discussion of his performance after the issuance of the letter dated 10th April 2014.
8. During cross-examination, CW2 testified that she signed a performance improvement plan on 5th December 2013. She admitted to not rejecting the VER plan and conceded that the loan interest rates were to go back to market rates once her employment was terminated.
9. The Respondent filed its Memorandum of Reply on 15th March 2017 seeking to have the claim dismissed and to be awarded costs of the claim. They contend that the loan facilities are granted to its staff pursuant to clause 10.1 of its Staff Loan Policy and is not an entitlement. Further, the preferential interest rates granted to its employees was a privilege accorded to deserving employees under the Staff Loan Policy and may be suspended, withdrawn or amended and is subject to review from time to time.
10. The Respondent contends that the Claimants were not diligent workers and had been issued with several warning letters urging them to improve on their performance which was below the Respondent's standards. They were given the opportunity to improve as required by clause 4.7.2 of the Respondent's Performance Management Policy. Staff Performance Reviews were carried out on them and after the overall rating, they were reviewed and discussed with their managers.
11. It is the Respondent's case that the change of the notice period was for all its management staff which was done lawfully in order to align itself with the practice in the banking industry. It is their contention that the Claimants were paid their rightful dues of KShs. 152,256.60 and KShs. 224,227.95 respectively, on 24th April 2015.
12. They further contend that the termination of the Claimants' employment was on the basis of poor performance and not under the voluntary retirement package which the Claimants opted not to take. They were therefore not entitled to the terms under the package. Additionally, the voluntary early retirement programme took effect in April 2014 whereas the Claimants' employment was terminated in April 2015.
13. RW1, Tabitha Mutwa, relied on her witness statement filed on 12th June 2019 and the Respondent's bundle of documents, as her evidence. On cross examination, she maintained that the 1st Claimant never responded to the first warning letter issued. She conceded that there was no acknowledgement of receipt of the letter of 26th February 2014 by the 1st Claimant.
14. It was her evidence that since the PIP was done after 3 months, once it was done in December 2013, a review was to be conducted in March 2014. Instead, a PIP relating to 2013 was signed on 9th May 2014. She testified that the scorecard of 21st January 2015 related to the 1st Claimant's achievements in 2015 which he signed in his capacity as a relationship manager.
15. She stated that the performance score card at page 13 of the Respondent's bundle indicated that the 2nd Claimant's performance was 66.6% which fell under 1. It was her testimony that there were disciplinary hearings held. On re-examination, she testified that the ratings were stipulated in the Respondent's Management Policy where a rating of 1 was unacceptable performance.

Submissions by the Parties

16. The Claimants filed their written submissions on 27th June 2019 where they submitted that the Respondent has failed to establish that its reasons for terminating the Claimants' employment were valid as required under section 43 of the Employment Act.
17. They further submit that due procedure as set out in section 41 of the Act was not followed. They have relied on the cases of **Lilian O. Ochang vs. Kenol Kobil Limited [2015] eKLR**, **Elizabeth Osiche Apwora vs. National Bank of Kenya [2017] eKLR**, **Mary Matanu Mwendwa vs. Ayuda [2013] eKLR** and **Kenya Union of Commercial Food and Allied Workers vs. Meru North Farmers Sacco Limited [2013] eKLR** which are to the effect that sections 41 and 43 must be adhered to by an employer where they are terminating an employee's services.
18. The Claimants submit that they are entitled to payment in lieu of notice since their employment was terminated without the issuance of a notice. They also submit that they are entitled to compensation for wrongful termination and that the Court should consider their financial circumstances and their length of service to the Respondent.

19. It is their submissions that since their termination took place at the same time with the VER exit, they are entitled to the benefits accruing from the VER programme. It is their further submissions that they are entitled to general damages because the Respondent violated the rules of natural justice, the provisions of statute and the terms of contract. They rely on the case of **Patrick Njuguna Kariuki vs. Del Monte Kenya Limited [2012] eKLR**.

20. The Respondent in their written submissions filed on 11th July 2019, submit that the Claimants' employment met the requirements set out in Section 41. They were issued with warning letters, their performances reviewed and they were given an opportunity to improve on their performance vide PIPs. They rely on the case of **David Gichana Omuya vs. Mombasa Maize Millers Limited [2014] eKLR** where the Court was of the view that adherence to section 41 promotes procedural fairness. They also rely on the case of **Kenfreight (EA) Limited vs. Benson K. Nguti [2016] eKLR** where the Court stated that termination of employment would be deemed unfair if the reason is invalid or the procedure is unfair.

21. It is also their submissions that the Claimants have not met the threshold set out in section 47 (5) of the Employment Act requiring them to prove that the termination of their employment was indeed unfair. It is their position that they have proved that the reasons for terminating the Claimants' employment were valid. They rely on the cases of **Cooperative Bank of Kenya Limited vs. Banking Insurance & Finance Union [2017] eKLR**, **Nazareno Kariuki vs. Feed the Children Kenya [2013] eKLR** and **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR**.

22. The Respondent submits that the Claimants are not entitled to any of the prayers sought. In particular, they are not entitled to prayer (a) and (b) as the correct procedure was followed before and after the termination of their services. The Claimants are not entitled to prayers (c) and (d), having refused to exit under the VER, a fact they admitted, they were not entitled to enjoy the exit terms under the same.

23. The Respondent urged this Court to disallow prayer (e) on compensation for wrongful employment as the termination was fair. They rely on the cases of **CMC Aviation Limited vs. Mohammed Noor [2015] eKLR** and **Edgar Khaemba Pukah vs. County Assembly of Trans Nzoia [2017] eKLR**. The Respondent submits that prayer (f) for general damages for compensation for violation of fundamental rights and freedoms was not specifically pleaded or proved hence should not be awarded.

24. It is their submissions that the Claimants are not entitled to 3 months pay in lieu of notice since the change of the notice period to 1 month was done lawfully. The Claimants admitted to receiving the 1 months' notice pay. They submit that the claim for payment in lieu of accrued leave should not be entertained as the same had already been paid. It is also their submissions that the Claimants ought to bear the costs of the claim.

25. I have examined all the evidence and submissions of the Parties herein. From the Respondent's submissions, the Claimants were terminated due to poor performance. The Claimants contention is that the termination was unfair as they were terminated without being accorded a hearing.

26. 1st Claimant testified in Court and in cross examination he admitted that on 19.12.2013 he was given a 1st warning and on 30/4/2014 he was placed on a Performance Improvement Plan (PIP) and was late rated at below performance.

27. He avers that after the letter of 10.4.2014 which letter put him on performance review, there was no any other discussion with him before he was terminated.

28. CW2 also testified in Court and also indicated that he had been placed on a Performance Improvement Plan (PIP) and rated below performance.

29. The RW1 also testified in Court and when cross-examined over his evidence, he stated that a Performance Improvement Plan (PIP) is supposed to be for 3 months but the one for 1st Claimant was done in December 2013 and review in March 2014.

30. He also indicated that there were discussions before the termination. The Respondents however failed to show that there were any discussions or hearings before the Claimants were terminated.

31. Section 41 of Employment Act 2007 states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

32. The requirement for a hearing between an employer and an employee even in case of poor performance cannot be over emphasized.

33. In the case of the Claimants, the Respondent omitted this important aspect in giving the Claimants a chance to present their own version of the case.

34. Though the Claimants' performance has been rated below performance that did not exclude a request for a disciplinary hearing before the

termination, which would have given an opportunity to the Claimants to explain themselves.

35. In the circumstances of this case, I find that the Claimants' termination was therefore unfair as envisaged under Section 45(2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

36. As for remedies sought, I find that the Claimants are entitled to maximum compensation of 12 months salary in lieu of notice in view of termination without a hearing:-

1. 1st Claimant = 97,669 x 12 = 1,172,028/=

2. 2nd Claimant = 135,278 x 12 = 1,623,336/=

3. The Respondent will also issue the Claimants with a certificate of service.

4. The Respondent will further pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this 30th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ougo holding brief Chacha Odera for Respondent – Present

Claimants – Absent