



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 756 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

EMMA MWONGELI MWEMA.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

Vide a Memorandum of Claim filed on 5th May 2016, the Claimant, who was the Respondent's Director of Institutional Banking, alleges that she was unfairly terminated for reasons of poor performance. She alleges that her 2014 appraisal was done contrary to the Respondent's Appraisal Policy and that the Respondent's Managing Director purported to appraise her without disclosing the same to her. She contends that the appraisal was a deliberate act to paint her as a non-performer. She further states that the Respondent's Managing Director discriminated against her on several occasions by forcing her out of office and out of an Executive Management Committee meeting held on 3rd November 2014, which she had been invited to attend.

She avers that she was compelled to resign from employment on 16th February 2015 but the resignation was not accepted. She was instead served with a termination letter on 18th February 2015 which stated that her performance was unacceptable. She therefore seeks the following reliefs:

- a. Compensation for loss of employment equivalent to 12 months' salary being Kshs.8,580,000/=
- b. Damages for mistreatment and discriminatory practice being Kshs.20,000,000/=
- c. Costs of the suit.
- d. Any other and/or further relief that this Court may deem fit and just to grant in the circumstances.

The Respondent filed its Statement of Defence on 28th June 2016. It avers that the claimant's purported resignation was to pre-empt her inevitable termination on grounds of unacceptable performance. It avers that it always ensured a conducive working environment for its employees devoid of discrimination, hostility and unfairness. It denies the Claimant's unfair termination and avers that upon her termination the claimant was paid all the dues owing to her.

Claimant's case

The Claimant testified that she was employed by the Respondent on 1st February 2013 as the Director in charge of Institutional Banking. She testified that she held that position for 8 months. When the Director of Corporate Banking resigned, she was appointed to act in that capacity for a period of 7 months. She testified that while acting as the Director of Corporate Banking she still held her previous position as the Director Institutional Banking. It was her testimony that she initially earned Kshs.485,000 per month. Upon confirmation her salary was increased to Kshs.715,000 per month.

She testified that she did not have any problems with the Bank and she was never informed that she was not performing. She further testified that she was never involved in any disciplinary issue.

It was her testimony that problems began when the Executive Director of Corporate and Institutional Banking was substantively appointed in 2013. The Managing Director and the Executive Director changed the roles of the position she was heading without involving her.

She testified that she was wrongly appraised in 2014. That the appraisal was presented to her when it had already been filed and she was required to sign it but she declined. She testified that the appraisal was given to her by her junior who claimed it was from the Managing Director who was to appraise her. She testified that a junior staff named Reuben Koech filled the appraisal form and she did not know how the scores were arrived at.

She testified that she enquired about the scores but nobody explained to her. That Reuben who was her junior asked her to discuss her performance with him. She testified that the appraisal which was for the year 2014 was done towards the end of January 2015. According to her, her actual performance rating in 2015 was very good as she was the first and only employee in Corporate banking and was able to put together a team of 60 which was able to move institutions that had left the Bank. She testified that the MD had singled her as the most productive employee and had appreciated her work as at March 2014. She further testified that the Chief Finance Officer also congratulated her.

She testified that in 2014 her loan of Kshs.22 million was approved and that banks do not give loans to underperforming employees. She testified that the appraisal did not reflect to her performance as in 2013 and 2014 she was paid a bonus. She testified that at no time did the Bank ask her to improve on her performance and that the first time she saw it was in the appraisal form for the year 2014.

She testified that she sat at the executive floor on 2nd Floor until she left for a conference that was to take place in the United States of America during which time her acting appointment was cancelled. She stated she was moved to the 13th floor where only her office was unfurnished. She testified that her access badge was also disabled and thus she could not attend meetings that were held on the 2nd Floor. She testified that upon attending one meeting the CEO, Mr. Munir, asked her who she was representing. That she later sought an appointment with the Managing Director but she did not get one. She testified that when she spoke to the Human Resource Director he told her to resign or she was going to be fired.

She testified that she wrote her termination letter dated 16th February 2015 not out of her own free will as she still wished to serve the Bank. That at the time the CEO was on leave and Chris Chesire who was acting directed that she should proceed on terminal leave as the respondent looked into her request for mutual separation.

She testified that day she was issued with a letter which she refused to sign and on 18th February 2015 she was terminated on grounds of poor performance.

She testified that the Bank paid her one month's salary, accrued leave and days worked. She maintained that the reason for her termination was not valid.

In cross-examination, she testified that her resignation letter was written pursuant to the friendly advice by the Human Resource Director. She admitted that she did not indicate this in her claim.

She testified that she expected to be put on a performance improvement plan but this was not done.

It was her testimony that performance appraisal is standard procedure which in the Bank it is carried out in 2 levels; self-appraisal and appraisal by a supervisor. She testified she did not appraise herself and did not know who filled the handwritten section of her appraisal form for 2014. She testified she did not accept the rating.

In re-examination she testified that she was condemned unheard.

Respondent's Case

STEPHINE OPIYO OBONGO, RW1, the Respondent's Head, Employee Relations testified that he joined the Bank on 1st March 2018 and part of the issues he took over was this matter. He testified that there was a change of structure and the person who made the changes had the authority to run the Bank as an institution.

In cross-examination, RW1 testified that the reasons for the Claimant's termination was poor performance. He testified that the Bank conducts appraisals in 4 different stages of which 2 are formal while the other 2 are informal and on continuous. He testified that Clause 4.5.3 of the Human Resources Manual provides that appraisals are to be conducted in June and December. That in respect of the Claimant's 2014 appraisal he presumed that there was an appraisal for June which was not presented to the Court.

He testified that as stated in various emails the Managing Director and the Chief Finance Officer (CFO) were satisfied with the specific job that the Claimant did. He further testified that there was no document in the Claimant's employment records that showed that the Claimant's performance was below par between January and December 2014.

It was his testimony that the Claimant was not put on Performance Improvement Plan. He testified that the Respondent's letter of termination states that the Claimant declined in performance but he did not have any correspondence confirming that the Claimant was called to a meeting to discuss her performance. He further testified that he was not aware that the Claimant declined to discuss the performance appraisal. He further testified he was not aware that the Managing Director directed the Claimant's juniors not to report to her directly or that the Claimant did not have furniture. He contended that the meeting which the Claimant was chased away from was an executive management committee meeting.

It was his testimony that the Claimant had resigned but the Bank declined her resignation through the letter of termination in which she was informed that the resignation was not accepted. He testified that the Claimant was not issued with a notice to show cause because the termination was due to performance and not discipline. He further testified that the Claimant was not given a hearing.

In re-examination, he testified that the reason the disciplinary process was not complied with was that the Claimant had been informed of her poor performance and that she had declined to go through a performance improvement plan and instead opted to resign.

He testified that accepting the Claimant's resignation would have meant that the Bank was accepting her terms. According to him, the Bank terminated the claimant and gave her the reason for termination. He testified that the Claimant did not prove that there was coercion. He testified that under the circumstances it was not possible to take the Claimant through disciplinary process.

He testified that the Claimant did not put comments on the 5 matrices she was appraised on. He further testified that she did not invoke Clause 4.8 of the Human Resources Manual, which provides that an employee who is dissatisfied with performance evaluation should appeal to an independent committee.

Claimant's Submissions

The Claimant submitted that the Respondent did not comply with the mandatory provisions of Section 41 of the Employment Act as there were no particulars of any wrongdoing that were explained to her Claimant and she was not given any opportunity to appear before a disciplinary committee prior to her termination.

She submitted that the Respondent failed to give an opportunity to the Claimant to rebut the alleged poor performance before a credible disciplinary committee yet it is the Claimant's constitutional right to be heard by an impartial committee before termination is considered. She submitted that it has been held that when termination is premised on poor performance, the employer must show the history of such performance and how the employee was assisted to improve.

She submitted that the process leading to her termination was not fair as the Respondent failed to justify the reason for the unfair termination. In support of this she relied on the decisions in **Daniel Wanjau Muhoho -V- Ol Pejeta Ranching Limited [2014] eKLR** and **Pamela Nelima v Mumia Sugar Company Limited [2017]eKLR**.

She also relied on Section 45(1) of the Employment Act and submitted that there were no valid reasons to terminate her and that the reason given in her termination letter did not form part of any prior disciplinary process. She submitted that poor performance had to be historical and that her performance appraisals leading to December 2014 were excellent. She submitted that the lack of validity of any reason for termination is shown in the termination letter wherein the reason given for termination was that she did not discuss her performance with her boss.

The Claimant submitted that the Respondent failed to follow its own disciplinary procedure manual and failed to put her on a performance improve plan. She submitted that his amounted to discrimination. That she was subjected to a hostile work environment thus she is entitled to damages for discrimination in the sum of Kshs.20,000,000.

She submitted that she is entitled to maximum compensation of 12 months as she was unfairly terminated. She also submitted that she was compelled to file the case against the respondent thus she is entitled to costs of the suit.

Respondent's Submissions

The Respondent submitted that the Claimant unilaterally terminated the contract of employment vide her letter dated 16th February 2015 thus her contract of employment was terminated by operation of the law and she would not be entitled to file the claim herein for wrongful and unfair termination of employment relying on the decision by the Labour Court of South Africa in **Ronnie Peter Lottering and 2 Others v Stellenbosch Municipality**.

The Respondent further submitted that even though the Claimant had terminated her employment by virtue of her resignation, the Respondent was entitled to and had valid reasons to author the termination letter dated 18th February 2015. It submitted that the Claimant declined to participate in a performance appraisal thus frustrating the employer's desire to measure her performance.

It submitted that should the court find that the claimant was unfairly terminated, the Court should award 2 months' pay as compensation under section 49 of the Employment Act.

It submitted that the claim for discrimination was not properly presented as the perpetrator of the alleged actions was not a party to the suit. It further submitted that the claim was not proved and that the Claimant did not escalate the allegations to the Human Resource head and Board of directors. It relied on the case of **Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR** where the Court of Appeal stated that in a claim for alleged discrimination evidence ought to show such discrimination was premised on any of the impermissible grounds.

It submitted that there is no pleading or evidence on record that the Claimant was treated differently from other employees. In conclusion, the respondent urged the Court to dismiss the entire claim with costs.

Determination

The issues for consideration are:

- a. Whether the Claimant was unfairly terminated or whether the Claimant resigned from employment, and
- b. Whether the Claimant is entitled to the reliefs sought.

c. Whether the Claimant was unfairly terminated on account of poor performance.

The Claimant testified that she was advised by the Human Resource Director, on a friendly basis, to resign or she would be fired. In paragraph 51 of her Memorandum of Claim, she avers she was compelled to resign against her will through her letter dated 6th February 2015 due to the Respondent's breaches, humiliation, mistreatment and hostility at work.

In her letter dated 16th February 2015 addressed to the Managing Director the Claimant stated thus:

“Emma Mwangeli

P.O. Box 67991 – 00200

Nairobi

16th February 2015

The Managing Director

National Bank of Kenya

Nairobi

Thro' Ag. Executive Director, Corporate and IB

Dear Sir,

REQUEST TO END EMPLOYMENT CONTRACT BY MUTUAL CONSENT

I wish to request for your consideration to end our employment relationship through separation by mutual consent. So as to have a smooth transition and to manage my liability burden with the bank, I would request that you consider the following terms of separation:

- 1. Payment of three months' salary notice on separation.*
- 2. A payment of 1 and ½ month's salary for every year to my retirement age. This request is made exceptionally for consideration as I exit the bank at a prime age of 45 years and at the peak of my career having served the Bank diligently and with dedication.*
- 3. A 50% rebate on the outstanding loans to granted upon settling this amount.*
- 4. Three months' grace period within which to clear the said outstanding loans.*
- 5. Retention for the remainder of the year 2015 of medical benefits already being enjoyed by myself and my family.*

I would like to thank you for the opportunity given to me to be part of the transformation team at the National Bank over the last two years. I will appreciate your approval of my request and wish you God's blessings as you steer National Bank to become a top tier Bank by 2017”

In response, the Respondent wrote a letter dated 18th February 2015 in which it stated as follows:

“Dear Emma,

RE: TERMINATION OF EMPLOYMENT

We acknowledge receipt of your letter dated 16th February 2015 wherein you have requested for separation by mutual consent.

This is to inform you that your request is hereby declined as it is aimed at pre-empting the Bank's remedial action resulting from your 2014 end year performance rating of 1, unacceptable performance, notwithstanding the fact that you declined to discuss, acknowledge or sign the said review.

This letter therefore represents a formal notification to terminate your employment with the bank, effective 8th February 2015. Your termination is in accordance with the Bank's performance management policy clause 4.7.2 on account of unacceptable performance during the financial year 2014...”

From the foregoing it is for the court to determine whether the claimant resigned as averred by the respondent or she was terminated unfairly as she alleges. It also presents the question whether an employer can refuse to accept the resignation of an employee.

Clause 9.2 of the National Bank of Kenya Limited Human Resources Manual provides:

“An employee will be required to provide/give notice in line with the provisions in his/her letter of appointment.”

The Claimant’s letter of appointment dated 4th January 2013 at Clause 12 stated:

“During probationary period of employment your employment may be terminated by either party giving the other one month’s notice or paying one month’s salary in lieu of notice.

After confirmation your employment may be terminated by either party giving the other three months’ notice in writing or paying three months’ salary in lieu of notice”

In *Kenya Hotels & Allied Workers Union v Mara Siria t/a Safari Camps (K) Ltd [2016] eKLR* the Court held:

“The present case goes beyond what the Court addressed in the Sorgor case as it requires a determination whether an employer can refuse to accept a valid resignation.

Because the Court has not found any domestic case in point on the question, it is appropriate to resort to comparative jurisdictions.

In African National Congress v Municipal Manager, George Local Municipality & Ors (2010) 3 BLLR 221 (SCA), it was held by the Supreme Court of Appeal that resignation must be effective immediately or from a specific date, and being a unilateral legal act, does not need to be accepted by the intended recipient to be effected. It must however be unequivocally communicated to the other party.

In Mafika v SA Broadcasting Corporation Ltd (2010) 5 BLLT 542, the Labour Court South Africa held that a sms sent by an employee of her unambiguous notice of resignation could constitute written notice. It was further irrevocable from the moment the intention came to the employer’s attention.

The Grievant’s resignation letter indicated that it was effective 23 March 2014 and failing mutual agreement, it was not open to the Respondent to purport to refuse it and then proceed to summarily dismiss the Grievant.”

The Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR* held:

“In constructive dismissal, it is not mandatory that the employee must leave immediately without notice, the employee may leave immediately or may terminate the contract with notice; notice or no notice the departure must be within a reasonable time and the employer’s conduct must be the effective cause of leaving or termination. Notice of termination is not necessarily a bar to a claim based on constructive dismissal. Further, a quitting employee need not be unemployed for some period of time to succeed in a claim of constructive dismissal.”

The claimant’s resignation letter was not unambiguous or unequivocal. She made an offer and attached conditions to the same. The letter clearly states at the opening thereof that *“I wish to request for your consideration, to end our employment relationship through separation by mutual consent.”* Upon receipt of the letter, the respondent rejected the offer and instead opted to terminate the claimant’s employment.

I thus find that the claimant did not resign. She only made an offer for mutual separation, which the respondent was free to accept or reject, or to make a counter-offer. It was not a reason to terminate the employment of the claimant without compliance with the mandatory requirements of Section 41, 43 and 45 of the Employment Act which require that when an employer intends to terminate the employment of an employee on grounds of poor performance or any other grounds, the employee must be given a hearing in the manner set out therein. Specifically the employee must be informed of the reasons for the intention to terminate the employment relationship and be given an opportunity to defend himself or herself, in the presence of either a union official or an fellow employee of his/her choice.

The claimant was not given an opportunity to defend herself. No charges were put to her that she was required to respond to.

The wording of Section 41(2) is unequivocal and couched in mandatory terms, that –

(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.

Section 45(2) further provides that –

45. Unfair termination

(1)

(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.

From the foregoing, I find that the termination of the claimant’s employment was procedurally unfair.

In view of the fact that she was never given an opportunity to respond to the grounds in the letter of termination, the said grounds were not proved in terms of the provisions of Section 43 of the Employment Act which require that an employer proves the reason for termination. The respondent did not adduce any evidence to prove the reasons for termination at the hearing thus the termination was also substantively unfair.

Remedies

The claimant sought compensation for loss of employment in the sum of Kshs.8,500,000, damages for mistreatment and discriminatory practice in the sum of Kshs.20,000,000/=. The claimant did not justifying the prayers either in her testimony or in the written submissions filed on her behalf.

I have found that the termination was unfair both procedurally and substantively. For this, the claimant is entitled to compensation which the court must assess based on the grounds set out under Section 49(4) of the Employment Act.

I have considered the evidence on what the claimant refers to as mistreatment and discrimination as contained in her witness statement, the correspondence attached to her pleadings and her testimony in court. I have also considered the events leading to the termination as narrated by the claimant, which the respondent did not contest. I however do not find sufficient proof of discrimination and hostile work environment as to constitute a separate head of compensation to justify award of general damages. What I find is circumstances that would enhance the compensation payable for loss of employment. I find that the claimant was subjected to a very hostile work environment and was also lured into resigning by the Human Resource Director by the threat that she faced imminent dismissal if she did not immediately resign. There is no doubt that the claimant was humiliated and embarrassed by the respondent’s Managing Director when she was sent out of a meeting, transferred from the Executive Floor to 13th Floor, to an office without furniture, when her access to the executive 2nd floor was unilaterally withdrawn, when she sought and was denied an appointment with the Managing Director just before she wrote her resignation letter and also in the manner she was treated on the date she was relieved of her employment. At the time she left, she had a heavy loan burden, which she had taken in the expectation that she would work long enough to repay. I have also considered the fact that there was no prior indication that the claimant was no performing and that all her problems started after the position she was acting in was substantively filled.

Although the claimant had worked for only a short period, the manner and circumstances under which she left and was treated would justify compensation which I assess at 8 months’ salary in the sum of Kshs.5,720,000.

The claimant’s letter of appointment further provided that after confirmation her employment may be terminated by three months’ notice yet. The letter of termination only gave her one month’s notice. She is thus entitled to the balance of notice of Kshs.1,430,000

I thus enter judgment for the claimant and award her the following –

- | | |
|-----------------------------------|-----------------------|
| 1. Eight (8) months’ compensation | Kshs.5,720,000 |
| 2. Balance of two months’ notice | <u>Kshs.1,430,000</u> |
| Total | Kshs.7,150,000 |

The respondent shall pay claimant’s costs. The decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE