



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 1189 OF 2014**

**ALFRED MUTHOMI MUTIRIA & 2 OTHERS ..... CLAIMANTS**

**VERSUS**

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

**JUDGMENT**

1. The Claimants were employed by the respondent until 30.4.2014 when they were discharged. They brought this suit on 17.6.2014 alleging that they were unfairly terminated and discriminated against by being given less benefits than their colleagues who were terminated the same day under Voluntary Early. They prayed for the following reliefs:

(a) A declaration that the Respondent's actions of terminating the Claimants' from employment vide the Respondent's letter dated 30th April 2014 was unprocedural, unfair and unlawful.

(b) A declaration that the Respondent violated the Claimants' 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 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 Claimants exit terms similar to those enjoyed by the Respondents' employees who left employment under the voluntary early retirement plan.

(e) 12 months compensation for wrongful and unfair termination.

(f) General damages for breach of Claimants' confidentiality.

(g) General damages for violation of fundamental rights and freedoms

(h) Three month's salary in lieu of Notice.

(i) Payment in lieu of accrued leave days.

(j) An order directing the Respondent to issue the Claimants with favourable recommendation letters.

(k) Any such other appropriate relief as the Court may deem fit.

(l) Costs of this claim plus interest thereon.

2. The respondent has admitted having terminated the Claimants employment contract on 30.4.2014 but averred that the termination was lawfully done after their performance fell below the prescribed standard and failed to improve even after being placed on a Performance Improvement Plan (PIP). She averred that termination was done after following due process and in accordance with fair procedure and denied the alleged discriminative treatment from Voluntary Early Retirement employees.

3. The suit came up for hearing on 15.3.2018 when the Claimants testified as CW1, 2 and 3 respectively while the respondent called Mrs Tabitha Munanie Mutwa as RW1. Thereafter both counsels filed written submissions.

### Claimants ' Case

4. C.W.1 testified that he was employed on 2.4.2017 and in June, 2013 he was promoted to management position due to his good performance. On 6.5.2014, while on his annual leave, he was notified through phone call from a colleague in a different department that his services had been terminated. He then called his department and he was told that there was a letter for him but its contents were unknown. When he finally received it, he confirmed that he was terminated effective 30.4.2014 for alleged non-performance. He appealed against the termination but the appeal was dismissed.

5. C.W.1 further stated that the alleged non-performance was false because he had earned a promotion to the management in June, 2013 on account of good performance. He denied ever receiving any complaint or warning about his performance and stated that in 2013 appraisal he scored 71.3%, which was above board. He maintained that if at all he was under performing, he would not have qualified for loan in December, 2013 because as per Clause 1.1.3 of Staff Loan policy, employee could not get staff loan unless he scored 3 out of 5 in his performance appraisal. He further stated that he was never accorded any hearing on the alleged under Performance nor was he ever placed on any Performance Improvement Plan.

6. C.W.1 testified that as a result of the said termination of employment, he was unable to service his staff loans and his house was advertised for auction by the respondent. He contended that the default on the loans and the accrual of interest thereon was caused by the respondent failure to act fairly. He further contended that the termination was unfair and that the termination was unfair and prayed for compensation because he has never secured another job. He further prayed 3 months' salary in lieu of notice as per Clause 10 of his promotion letter dated 7.5.2013 and denied ever being consulted about or signing any contract for reduction of the notice period from 3 months to one month. He further prayed for salary for the days worked in May, 2014 before receiving termination letter.

7. He contended that he was terminated the same date with his colleagues who applied for Voluntary Early Retirement but they were given a better package than him including 40% rebate on all outstanding loans; a further 20% rebate on outstanding loan if the retiree paid 50% of the balance immediately after the 40% rebate, plus further benefits of severance pay of 15 days' pay per year of service.

8. On cross-examination C.W.1 admitted that Clause 4.5.2 of the Performance Management Policy was done twice per year and that in the period between July 2013 and January, 2014, he scored 71.3% which under Clause 4.6. was rated scale 2 out of 5 which was below performance standard. He however disputed that policy document and averred that it was not the one being used during the said appraisal. He further denied ever being placed on any Performance Improvement Plan for corrective measure or ever meeting with his supervisor/manager to discuss his performance. He maintained that he was only served with the termination letter on 8.5.2014 while on his normal leave. He however admitted that after the termination he was paid salary for the days worked in May, 2014 but no salary in lieu of notice. He further admitted that he still had outstanding loan including a mortgage secured by his house. He however denied that the loans were purely commercial and maintained that they were staff loans whose repayment was pegged on his salary.

9. On the issue of Voluntary Early Retirement, C.W.1 admitted that the respondent issued circular No. 1 of 2014 dated 19.2.2014 inviting applications for Voluntary Early Retirement by 31.3.2014 and outlined the benefits available. He further admitted that the employees who applied got the said benefits but he opted not to apply and continue with his employment.

10. C.W.2 testified that she was employed by the Respondent on 16.10.1995 and worked until 7.5.2014 when she was served with a letter dated 30.4.2014 terminating her services on ground of poor performance, effective the same date of the letter. As at the time of her termination her salary was kshs.149,511 per month. She contended that alleged poor performance was not valid and viewed the termination as an afterthought to lay off more employees after failing to achieve the number targeted through Voluntary Early Retirement Scheme which she opted not to apply.

11. C.W.1 contended that in July, 2013 she was appraised barely one month after transfer to BBC unit in June 2013 and the appraiser endorsed 'NIL' on the form and stated that 'productivity could not be assessed due to short period served in the unit.' She denied ever being served with any warning, notice or accorded any hearing on the alleged poor performance before the abrupt termination on 30.4.2014.

12. On cross-examination, C.W.1 admitted that she held monthly meetings with Accountant Green Span Branch where they discussed short comings and how to improve. She further admitted that she was appraised for January in December, 2013 and scored 13% which was below standards. She further admitted that the termination letter dated 30.4.2014 cited the reason for the termination as, unacceptable performance of 1 out of 5. She confirmed that her appeal against the termination was dismissed. She further contended that, after the termination, her benefits including one month's salary in lieu of notice were calculated at a deficit which was recovered from her bank account.

13. On re-examination, C.W.1 contended that she was only appraised on 24.2.2013 but no final score for the January-December, 2013 was given she maintained that the appraisal done on 11.7.2013 was rated NIL because she was too new in the department to be appraised meaningfully. She however admitted that after scoring Nil, she was called for discussion but no warning letter was served on her. She admitted that she owed the respondent leave days after taking her leave early in the year.

14. C.W.3 testified that he was employed by the Respondent on 21.4.1981 and worked for 33 years until 30.4.2014 when he was terminated on account of poor performance. He contended that the termination was unfair because he was not served with any notice or accorded hearing before the abrupt termination. He denied the alleged poor performance and maintained that in 2013 his appraisal indicated that he had met performance target. He maintained that due to his good performance he had been granted staff loans. He denied ever being placed on performance improvement plan or being served with any warning.

15. On cross-examination, C.W.4 admitted that by the appraisal report dated 7.1.2014, he scored 64% which was endorsed "**met performance.**" He however stated that on 6.5.2014, he was served with the termination letter dated 30.4.2014 citing the reason for

termination as below performance. He admitted that he appealed but the same was dismissed. He further admitted that the letter dated 9.12.2013 reduced the notice period for termination but contended that such letter was of no consequence because it was written without any prior consultation. He however admitted that he was paid one month salary in lieu of notice in May, 2014 and on 8.12.2014 he was issued with certificate of service. He denied ever discussing his performance after appraisal in January, 2014 and contended that he was even given a loan in February, 2014 in accordance with staff loan policy of scoring at least 3 out of 5 in the previous year's performance. He contended that he was terminated one month after receiving a loan and he has not secured any other job and he is now 58 years old. He concluded by stating that the employer has instructed an auctioneer to sell his property to recover the outstanding loan.

### **Defence Case.**

16. R.W.1 is the respondent. Talent Resource Co-ordinator and her duty is mainly general recruitment and filling of vacant positions. She also deals with exit of the staff. She confirmed that the Claimants were employed on 16.3.2007, 16.10.1995 and 22.4.1981 respectively and that they were all terminated on 30.4.2014 on account of poor performance. She further confirmed that the first and third. Claimants were promoted to management positions on 7.5.2013 and 1.7.1995 respectively.

17. R.W.1 testified that in 2013, the Claimants were among other employees whose performance was rated below the accepted standard and they were placed under performance improvement plan. She further testified that the Claimants never improved their performance and they were served with termination letter in line with Clause 4.7.2 of the Performance Management Policy. R.W.1 contended that in the half year appraisal done on 11.7.2013, the second Claimant scored NIL productivity and her overall performance in appraisal done in January, 2014 she scored 13%, equaling to 1 out of 5 (below performance). She maintained that the termination was procedurally in accordance with Clause 7.4.3 of the Human Resource Manual and the law, and prayed for the suit to be dismissed.

18. She contended by stating that the notice period for all management staff was reduced by the letter dated 9.12.2013 and the first and third Claimants never raised any objection.

19. She concluded by contending that the Claimants were not terminated under the Voluntary Early Retirement Scheme and as such they were not entitled to benefits under the Voluntary Early Retirement Scheme.

20. On cross-examination R.W.1 admitted that the second Claimant did objective setting (targets) for Customer Service but she was appraised for Sales at the BBC unit where she scored NIL and the appraiser endorsed that it was because of her short term of service at the unit. R.W.1 admitted that the second Claimant had served only for one month and had not set targets for the BBC unit after her transfer. She admitted that rating is only done on a scale of 1-5 and not NIL. She further admitted that it is from the half year appraisal where an employee is notified on the areas of improvement. She maintained that the second claimant must have been appraised for the full year after the one done in July, 2013 before the termination.

21. As regards first and third Claimants, R.W.1 contended that they performed below standard on a scale of 1 - 5 and they were placed on performance improvement plan but failed to improve. She maintained that a score of 71.3% for the second Claimant was equal to 2 in a scale of 1-5 and was therefore below performance under the company management Policy. She further stated that the third Claimant was appraised on 27/2/2014 but she confirmed that she did not have his appraisal report for his half year appraisal. She further admitted that Clause 1.1.32 under the Staff Loan Policy only staff with a full year performance of 3 out of 5 are eligible for staff loan.

22. In conclusion, she admitted that the Claimants were terminated before being accorded a hearing but contended that they were accorded hearing in their appeal. She however confirmed that Clause 7.1.3 of the respondent's Human Resource Manual provides for the right to hearing before termination. She further admitted that the change of the notice period for termination was done without consulting the concerned employees but she maintained that it was a policy review by the management.

Finally admitted that the Claimants were terminated the same day with 177 Voluntary Early Retirement employees.

### **Analysis and Determination**

23. There is no dispute that the Claimants were employed by the respondent until 30.4.2014 when they were all terminated on ground of poor performance. The issues for determination are:-

**(a) Whether the termination of the Claimants' employment contracts was unfair.**

**(b) Whether the Claimants are entitled to the reliefs sought.**

### **Unfair Termination**

24. Under section 45 (2) of the Employment Act, termination of employment contract of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

### **Reason for termination**

25. There is no dispute that the reason cited for the termination of the Claimant's services was poor performance. It is the defence case that the Claimants were appraised at the middle of the year and at the end of the year. She produced 2013 appraisal forms for the Claimants to support the allegation that they performed below the required standard and failed to improve even after being placed under performance improvement program. The Claimants have denied the alleged poor performance and the alleged placement under Performance Improvement Plan. They maintained that they would not have been promoted or given staff loans if their performance was rated below 3 out of 5 (below

performance). They have also dismissed the performance management policy instrument as strange and maintained that they were being appraised using a different policy instrument.

26. I have carefully considered the evidence and the submissions presented. The first Claimant scored 71.3% or between 3 and 5 out of 5 on all the 12 key performance indicators (targets). The third Claimant scored 64.6% or between 3 and 4 out of 5 on all the 17 key indicators (targets) except 2 where he scored 2 out of 5 and the appraiser acknowledged that the third Claimant had met performance. Finally, the second Claimant set her targets while serving at Greenspan branch in the Customer Care department but she was appraised on 11.7.2013 after being transferred to the BBC unit which was dealing with Sales. There is no dispute that the second Claimant was appraised after serving for a just one month after the transfer to the new department and before setting performance targets and that is why the appraiser rated her NIL and stated that her productivity could not be measured because of the short period served.

27. From the foregoing analysis, I am satisfied that the respondent has not proved on a balance of probability that the Claimants had performed their duties below the performance standards. They also did not prove that they placed the Claimants under Performance Improvement Plan with set targets agreed between the individual Claimants and their respective supervisor/manager. Although the Claimants admitted to holding of routine departmental meeting with their supervisors to discuss improvement on performance, at no time did they meet to discuss personal performance. I have also considered the admission by the second Claimant that after scoring NIL in appraisal done on 11.7.2013, she met with her Accountant, the respondent produced the targets agreed with her for improvement. The Respondent has not produced the agreed targets and any report of appraisal done at the end of the year after the alleged Performance Improvement Plan agreed after the 11.7.2013 appraisal. Consequently, I agree with the Claimants that their termination was done for no good cause. I further agree with them that had they been rated as per performances they would not have been promoted and or advanced any staff loans some of which were given one or three months before their services were terminated on 30.4.2014.

#### **Procedure followed.**

28. Section 41(1) of the Act provides that the employer shall, before terminating the employment of an employee, on 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 flour union representative of his choice present during this explanation. In addition subsection thereof requires that before terminating or dismissing the employee, the employer shall hear and consider any representations which the employee and his chosen companion may make in respect of alleged misconduct, or poor performance.

29. The foregoing provision is in consonance with Clause 7.1.3 of the respondent's Human Resource Manual which provides that:

***“In accordance with acts of natural justice, no employee shall be condemned unheard. This will further save the bank from litigation arising from wrongful dismissal.”. The hearing can be by way of oral supplications or written defence.”***

30. In this case the respondent has not proved that before terminating the Claimants' services on 30.4.2014, she explained to them in presence of another employee or union official that she was considering termination of their services on account of poor performance. Indeed R.W.1 admitted that the termination was never preceded by hearing the Claimants on the reason cited for the termination. Although she alleged that the Claimants were accorded hearing during their appeals, that did not make good the initial default to according them hearing before termination as required by section 41 of the Act and Clause 7.1.3 of the Respondent's Human Resource Manual.

31. Flowing from the findings herein above that the respondent did not prove that the claimants were guilty of poor performance and that they were accorded hearing before terminating their services, it is my finding that she has failed to discharge her burden of proving substantive and procedural fairness in terminating their employment contracts as required by section 45(12) of the Act. Consequently, I hold that the claimants' employment contracts were unfairly terminated for no good cause and without following a fair procedure.

#### **Reliefs**

32. In view of the foregoing I make declaration that the termination of the claimants employment by the respondent's dated 30.4.2014 was unprocedural, unfair and unlawful as prayed. I further make declaration the respondent violated the claimants' rights to fair administrative action and right to fair labour practices under Article 47 and 41, respectively, of the constitution as well as the rules of natural justice. However I dismiss the prayer for declaration that the claimants were entitled to similar exist terms as those enjoyed by employees who exited under VER Plan. The reason for declining the foregoing request is that the claimants did not exit under the VER plan. In fact they were unanimous that they were invited to apply for the VER but they opted not to and as such they cannot claim a right under an exit contract they never entered into.

33. I however grant the prayer for 12 months salary compensation for unfair termination under section 49(1)(c) of the Act. In making the maximum compensation, I have considered their long service to the respondent ranging between 7 and 33 years. In addition, I have considered their contention that since 2014 they have not been able to secure another employment or access loans to start business.

34. I have further awarded the first and third claimants two months salary each as outstanding salary in lieu of notice after having been paid only one month salary after termination instead of the three months salary in lieu of notice provided in their appointment letters. Clause 9.3 of the respondents HR manual provides;

***“Similarly the bank may terminate the appointment of an employee by giving notice in accordance with the provisions in the employee's letter of appointment or paying for the notice period in lieu.”***

35. Rw1 alleged that the management reduced from 3 to 1 month notice period as a matter of policy for all the management staff and the claimants never raised any objection after receiving the notice dated 9.12.2013. I however, agree with the claimants that the employer has no

managerial prerogative to alter the terms of an employee's contract without prior consent and agreement. Such action is even more unacceptable when it is done by the employer in contemplation of a separation like in this case.

36. The claim for General damages for breach of confidentiality has not been substantiated and it is therefore dismissed. Likewise the claim for General damages for violation of fundamental rights and freedoms is dismissed because the violation declared above in respect of right to fair administrative action and fair labour practices under Article 47 and 41 of the constitutions are in my view the basis of the compensation for unfair termination under section 49(1) (a) and (c) of the Employment Act. It would therefore amount to double compensation and unfair enrichment award the claimants General damages for the same violations which have already been compensated under section 49(1) of the Act.

37. The claim for cash in lieu of accrued leave is also dismissed for want of particulars in addition to the uncontested evidence by the respondent that the claimants who had outstanding leave days were paid for, after the termination.

38. Finally, the prayer to direction the respondent to issue the claimants with favourable recommendation letters is dismissed. Section 51 of the Employment Act does not bind the employer to give an employee a testimonial, reference or certificate relating to the character or performance of that employee. He is however bound to give the employee a certificate of service stating:

**“(a) the name and postal address of the employer;**

**(b) the name of the employee;**

**(c) the date when employment of the employee commenced;**

**(d) the nature and usual place of employee;**

**(e) the date when the employment of the employee ceased; and**

**(f) such other particulars as may be prescribed.”**

**Conclusion and Disposition**

39. For the reasons stated herein above I enter judgment for the claimants in the following terms;

**First Claimant**

months salary in lieu of notice Kshs.  $97,814 \times 2 = 195,618$

Compensation Kshs.  $97,814 \times 12 = 1,173,768$

1,369,386

**Second Claimant**

Compensation Kshs.  $149,511 \times 12 = 1,794,132$

**Third Claimant**

Salary in lieu of notice Kshs.  $295,560 \times 2 = 591,120$

Compensation Kshs.  $295,560 \times 12 = 3,546,720$

4,137,840

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40. The claimants are awarded costs plus interest from the date hereof till payment in in full. The said award will be paid subject to the relevant statutory deductions.

41. Orders accordingly.

**Dated and Signed at Nairobi this 27th day of June, 2018**

**ONESMUS N. MAKAU**

**JUDGE**

**Delivered at Nairobi this 29th day of June, 2018**

**HELLEN WASILWA**

**JUDGE**