



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 951 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ALOIS MAKAU MALUVU.....CLAIMANT

-Versus-

CITITRUST KENYA LIMITED.....1ST RESPONDENT

CITIBANK N. A KENYA.....2ND RESPONDENT

JUDGMENT

Background

The claimant was employed by the 2nd respondent on 5th February 2002 as portfolio analyst and worked with the 2nd respondent until 13th August 2007 when his services were transferred to the 1st respondent by letter dated 8th August 2007. The 1st and 2nd respondent's are related in that the 1st respondent is a subsidiary of CITY TRUST N.A which is the owner of CITY BANK N.A KENYA, the 2nd respondent.

At the time of transfer of the claimant to the 1st respondent he had risen through the ranks to the position of Assistant Manager and was transferred as a Manager.

The respondents carried out an appraisal of staff, which was done in midyear June/July and full year December/January every year. The claimant had consistently performed well in the appraisals until 2011 when he was given a rating of 4, which means poor. He was put on a Targeted Performance Management process. In the 2012 mid-year performance review, the claimant's Manager concluded that he *"still needed to work hard with initiative, independence, consistency and spend less time on personal calls and visitors during working hours to improve his rating from last year."* The claimant's comments to his Manager's assessment was –

"I do not agree with some of the comments made on the Manger's feedback as were not discussed during the midyear discussion. I am the BUCO for Nairobi and I am not responsible for certification of new staff as this is not a compliance role."

On 27th August 2012 the claimant received a Notice of Disciplinary Enquiry inviting him to attend a disciplinary inquiry at 3.00 pm on Thursday, 20th August 2012 to answer to the following allegations –

1. Despite being given an opportunity to improve your performance during the first half of this year, your actions as detailed hereunder have not demonstrated a desire to perform to the expected standards.
2. You have demonstrated a disengaged, disinterested and indifferent approach to work
3. You displayed unwillingness to take on responsibility and need to be supervised closely and followed up to complete tasks
4. Lack of initiative and reluctance to engage in various C & C activities
5. Despite your being adequately qualified, you have failed to perform to expected standards on tasks that required hard work and diligence
6. You have repeatedly failed to give timely feedback to your supervisor

The notice informed the claimant of his right to be represented by a fellow employee at the disciplinary inquiry, access to documents and right to lead evidence, call witnesses and cross-examine any witnesses called by the respondent.

The claimant attended the disciplinary inquiry on 30th August 2012. The minutes of the disciplinary inquiry state that the Chairman explained to the claimant the Disciplinary procedure, which had been sent to him and reminded him of his right of representation, and to appeal if he felt the decision or the committee was not fair. The minutes further state that the charges were read to the claimant by the Chairman. The minutes reflect that the claimant participated fully in the disciplinary inquiry.

On 10th September 2012, the claimant received a letter of termination of his employment. He appealed against the termination by letter dated 12th September 2012 and received a reply to the appeal by letter dated 30th October 2012 signed by Daniel Connelly, the Chief Executive Officer, East Africa.

The claimant was aggrieved and filed this claim dated and filed on 4th June 2015 in which he alleges unfair termination contrary to the Employment Act. He gives the particulars of unfairness as follows –

1. Failure to accord the Claimant due process in terms of the relevant provisions of the Employment Act.
2. Failure to disclose the exact accusations against the Claimant.
3. Failure to accord the Claimant appropriate notice to terminate employment.
4. Failure to accord the Claimant a fair opportunity to state his case and defend himself in a fair hearing.
5. Failure to give the Claimant sufficient notice to prepare for the disciplinary hearing.
6. Dismissing the Claimant for reasons which do not warrant dismissal

He prays for the following remedies –

a) A declaration that the Claimant was wrongfully and unfairly terminated from his employment

b) Kshs.5,623,467.50/= as tabulated below –

(i) One month's salary in lieu of Notice	Kshs.401,676.25
(ii) 12 months' pay for unfair dismissal	Kshs.4,820,115.00
(iii) Unpaid leave	<u>Kshs.401,676.25</u>
TOTAL	<u>KSHS.5,623,467.50</u>

c) Exemplary damages

d) Costs and interest of this suit

e) Certificate of service.

f) Any other suitable relief that the court may deem fit and just.

The respondents filed a memorandum of defence on 22nd July 2015 in which they deny the allegations in the memorandum of claim.

The case was heard on 17th January 2018 when the claimant testified on his behalf and the respondents called WYCLIFFE MORRELL OSSO, the Senior Vice President of the 2nd respondent and the claimant's Matrix Supervisor at the time of leaving service.

The parties thereafter filed and exchanged written submissions.

Claimant's Submissions

The claimant submitted that the respondents failed to prove that the claimant's performance was below expectation, relying on the case of **FREDRICK OWEGI -V- CIC LIFE ASSURANCE**.

It is further submitted that for the 10 years that the claimant worked for the respondents he was never involved in any disciplinary issue relying on the case of **JANE WAIRIMU MUCHIRA -V- MUGO WAWERU & ASSOCIATES** and the case of **JANE SAMBA MUKALA -V- OCTUKAI LODGE LIMITED**.

It is submitted that the notice of three days given to the claimant was not sufficient for him to prepare for the disciplinary inquiry. The claimant relied on the case of **NAZARENO KARIUKI -V- FEED THE CHILDREN KENYA**, the case of **REBECCA ANN MAINA & 2 OTHERS -V- JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY** and the case of **ALPHONCE MUCHANGA MWACHANYA -V- OPERATION 680 LIMITED**.

The claimant further submitted that the charges against him were nonspecific and he had difficulty in responding to the same citing the cases of **BANKING INSURANCE AND FINANCE UNION (KENYA) -V- CO-OPERATIVE BANK OF KENYA LIMITED** and the case of **CMC AVIATION LIMITED -V- MOHAMMED NOOR** cited with approval in the case of **KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS -V- MERU NORTH FARMERS SACCO LIMITED**.

It is further the claimant's submission that the respondents failed to prove the allegations of negligence for which he was terminated, citing the case of **BANKING INSURANCE & FINANCE UNION (KENYA) -V- CO-OPERATIVE BANK OF KENYA** (supra).

The claimant has submitted that the disciplinary inquiry was flawed as the members were composed of former employees of the respondents. He relied on the case of **REPUBLIC -V- KENYA SCHOOL OF LAW, EX-PARTE THOMAS OTIENO ORIWA** and the case of **GLADYS BOSS SHOLLEI -V- JUDICIAL SERVICE COMMISSION**.

Respondents' Submissions

The respondents submitted that the claimant's termination was on grounds of poor performance, that the respondents had proved the reason for termination was valid, that fair procedure was followed, that there was fair reason related to the claimant's conduct of his duties and that the respondents actions was in line with the policy guidelines of disciplinary process and procedures set out in the respondent's Human Resources Manual.

The respondents relied on the following authorities –

1. WALTER OGAL ANURO -V- TEACHERS SERVICE COMMISSION [2013] eKLR

In this case, the Court held that;

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

2. ALPHONCE MACHANGA MWANCNYA -V- OPERATION 680 LIMITED [2013] eKLR

In this case, the court summarized the legal fairness requirements for termination of employment on grounds of misconduct (including gross misconduct) poor performance or physical incapacity as set out in Section 41 of the Employment Act as follows;

- a) That the employer has explained to the employee in a language the employee understand the reasons why termination is being considered;**
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;**
- c) That the employer has heard and considered any explanation by the employee or their representative;**
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules."**

3. JANE SAMBA MUKALA -V- OITUKAI LODGE LIMITED INDUSTRIAL CAUSE NUMBER 823 OF 2010: [2010] LLR 255 (ICK) (September, 2013)

Where the honourable court held that:-

"Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place, it will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination

shared with the employee.”

4. JAMES ONDIMA KABESA -V- TROJAN INTERNATIONAL LIMITED [2017] eKLR

In this case, Onyango, J. observed as follows;

“Under Section 41 of the Employment Act an employer is required to inform the employee in the presence of a fellow employee or a shop floor union representative of his choice, the reasons for which the employer contemplates to terminate the services of the employee. The employer is then supposed to hear the employee s representations and the representations of the person who has accompanied the employee to the disciplinary hearing.

The employer is also expected to observe the rules of natural justice of giving the employee notice of the impending hearing and the grounds for the disciplinary hearing to enable the employee prepare to defend him.”

Determination

I have considered the pleadings, evidence, submissions and authorities cited by the parties. The issues for determination are whether the termination of the claimant’s employment was valid both procedurally and substantively, and whether the claimant is entitled to the remedies sought.

Fair Termination

Section 41 of the Employment Act provides for the procedure for termination while Section 43 provides that the employer must prove valid reason. Section 45(2) provides that where the employer fails to prove either procedural fairness or validity of reason the termination of employment is unfair. Section 47(5) further provides for burden of proof as follows –

47. (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Section 41 specifically recognises termination on grounds of misconduct, poor performance or physical incapacity while Section 45(2)(b) recognise conduct, capacity, compatibility and operational requirements of an employee as valid grounds for termination provided the same are proved and there is fair procedure.

In the instant case, the claimant admitted that there was an appraisal system and that he had been given a rating of 4, which stood for poor performance at the end of 2011. He further admits having been put on an improvement program in 2012. In his own comments to the mid-year appraisal by his Supervisor, he stated that he does not agree with **some** of the comments by the Supervisor. He did not state which comments he did not agree with and which ones he agreed with.

At the disciplinary inquiry, the claimant was allowed to ask questions and seek clarifications. The minutes show that these explanations were given to the claimant.

The claimant did not raise any issue on the composition of the committee, or on the length of notice that was given to him. These issues have been raised for the first time in the submissions.

The claimant further admitted during the disciplinary hearing that he had not achieved some of his objectives and there was room for improvement.

In cases of discipline on grounds of poor performance, all an employer has to prove is that the employee was aware of the applicable standards of performance and efforts were put in place to support the employee with time to allow for improvements as was stated in the case of **FREDERICK OWEGI -V- CIC LIFE ASSURANCE** and **JANE WAIRIMU MUCHIRA (supra)**. The claimant acknowledged having been given time to improve from January to July 2012, and having been aware of the improvement areas as well documented in the performance appraisal.

I however find that there was no warning to the claimant that should his performance not improve his employment would be terminated. The comments of his Supervisor after the mid-year appraisal did not in any way warn the claimant of the impending termination. Indeed the Supervisor’s comments were that the claimant had made significant improvement but needed to improve in the areas stated. The claimant ought to have been informed of a specific time frame within which to improve with an express warning that should he not achieve the set targets his employment would be terminated. This is especially significant in the case of the claimant who for a period of 10 years was rated as a high performer and who was not warned at the commencement of the performance management process of the period within which he would be on the improvement program or that the consequence if he did not improve. He was therefore ambushed by the disciplinary inquiry.

In the minutes of disciplinary hearing it is stated –

“Wycliff stated that deterioration in performance started in 2010 when Alois was rated consistently strong and culminated in partially effective rating at the end of 2011.”

I find that although the procedure was complied with and there was valid reason, the respondent did not act in accordance with justice and equity in terminating the employment of the claimant, taking into account all the circumstances of his case.

Remedies

The claimant prayed for notice. The same was paid as reflected in his payslip for September 2012. The claimant further prayed for compensation. Taking all the circumstances of this case into account including the long service of the claimant which was without any performance or discipline related issues and further taking into account the abrupt manner in which his employment was terminated, I award the claimant 6 months' salary as compensation.

The prayer for aggravated damages has not been justified and is declined.

The respondent did not deny that the claimant is entitled to prorated annual leave for the period worked in 2012.

Orders

In the final analysis, I award the claimant the following –

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|---|---------------------------------|
| 1. Compensation of 6 months' salary in the sum of | Kshs. 2,410,058 |
| 2. Annual leave for (8) months prorated | <u>Kshs.216,287.20</u> |
| TOTAL | <u>KSHS.2,626,344.70</u> |
3. Respondent shall pay claimant's costs for this suit.
 4. Decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE