



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 2260 OF 2014

BETWEEN

NICOLE PHYLLIS OKWIRI.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

M/S J.A.Guserwa & Company Advocates for the Claimant

Oraro & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 18th December 2014. She states she was employed by the Respondent Bank on 9th January 2009. She worked at Kenyatta Avenue Branch and Business Unit, in Nairobi. She was transferred to Wilson Airport Branch in October 2013, where she worked as Personal Banking Consultant. She held this position until 12th May 2014, when the Respondent terminated her contract of employment. Her last salary was Kshs. 77,670, excluding allowances. The Respondent alleged Claimant's performance was below standards and unacceptable, justifying the decision to terminate Claimant's contract. She avers termination was malicious. She was not given any notice of termination. She was not heard at all. She seeks Judgment against the Respondent in the following terms:-

- a. Reinstatement to her previous job without loss of benefits.
- b. Salary arrears for the entire period the Claimant has been out of employment.
- c. Damages for wrongful and/or unlawful termination.

In the alternative-

- d. 1 month salary in lieu of notice at Kshs. 77,670.
- e. 16 days of annual leave at Kshs. 47,396.
- f. Salary for 12 days worked in May 2014 at Kshs. 35,847.
- g. 12 months' salary in compensation for unfair termination at Kshs. 932,040.

Total...Kshs. 1,092,954.

- h. Costs and interest.

2. The Respondent filed its Statement of Response on 9th December 2015. Its position is that the Claimant was employed by the Respondent as a Clerk with effect from 19th January 2009. She was initially posted to Kenyatta Avenue Branch, and later to various units within the Respondent, before her last transfer to Wilson Airport Branch on 10th October 2013. Her letter of appointment allowed her to serve at any Branch or Offices of the Respondent. Her contract was terminated in accordance with Respondent's Management Policy Clause 4.7.2. Her performance was poor and unacceptable. She was placed under Performance Improvement Plan, but did not improve. She was given a chance to state her position. The Respondent did not act out of malice. Termination was fair. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claim was heard during the Court's service week at Nairobi, on 20th April 2018. The Claimant gave evidence, as did Respondent's Talent Resources Coordinator, Tabitha Munanie Mutura. The file was forwarded from the Court Registry at Nairobi, to the undersigned Judge at Mombasa, for writing of the Judgment, on 13th August 2018.

4. **The Claimant** in her evidence, restated her employment history, the terms and conditions of employment, as stated in the Statement of Claim, and summarized at paragraph 1 of this Judgment. She did not have issues of performance between 2009 and 2014. She worked well in all the Branches she was assigned to. She appealed against termination decision through a letter dated 13th May 2014. She asked for details of poor performance. None was provided. The Bank was malicious. There was no report exhibited by the Respondent Bank, supporting its assertion that Claimant's performance was poor.

5. Cross-examined, the Claimant told the Court that the Respondent undertook to pay her notice. She was not paid. She accepted in the appointment letter, transfer to any Branch. She met performance targets. She received termination letter on 12th May 2014. She did not know why the letter took 12 days to reach her. She did not have records of her performance. The Bank retained the records. There were no departmental meetings. She however had departmental meetings with her Supervisor Tom. These were basically brainstorming sessions about the Call Centre. The issue about Claimant's performance did not have merit. The Claimant reiterated on redirection, that she asked the Respondent to supply her with details of poor performance. The Respondent supplied nothing.

6. **The Respondent**, through its Talent Resources Coordinator told the Court that the Respondent had performance review in 2013. The Claimant did not meet performance standards. She was rated at 74% in July 2013, which was in rate 2. Between 80-100% was rate 3. Below 50% was unacceptable. 74% was rate 2- below performance standards. The Respondent terminated Claimant's contract. She was to be paid notice, and accrued annual leave of 9 days. The Bank's position is that the Claimant did not meet expectation. She did not work 12 days in May 2014. Termination took effect on 30th April 2014. Notice has been paid. She did not have accrued annual leave of 16 days. The Bank is not in a position to take her back.

7. Cross-examined, the Witness told the Court she works in Human Resources Department. She has Claimant's personnel file. Records from the personnel file were not availed to the Court. There was no document showing payment of any terminal dues to the Claimant. No document was made available to the Court to justify termination decision. An Employee with questionable performance ought to be placed on Performance Improvement Programme. The Claimant was not placed under such a Programme. She worked for 5 years. She was not given a hearing before termination. Termination letter gave a chance to appeal. Decision to terminate was made before this chance was taken up by the Claimant. The letter of termination is dated 30th April 2014. It was received at Claimant's Wilson Airport Branch on 12th May 2014. There was omission by the Respondent, in sending the letter of termination to the Claimant. The Respondent ought to pay for this default. Given time, the Respondent could supply the Court with evidence of poor performance. Redirected, this Witness told the Court that the Claimant retained copies of all her appraisal records. The Claimant worked at Wilson Airport Branch as of the date of termination.

The Court Finds:-

8. It is common ground of the Parties, that the Claimant was employed by the Respondent as a Bank Clerk effective 19th January 2009. Her letter of appointment is dated 8th January 2009. She was posted to Respondent's Branch at Kenyatta Avenue, in Nairobi. She worked at various other units of the Respondent, before transfer to Wilson Airport Branch on 14th October 2013. She worked at her new Branch as Personal Banking Consultant. It is not in dispute that she worked here, on a monthly salary of Kshs. 77,670, until the Respondent terminated her contract through a letter dated 30th April 2014. The letter of termination was received at Claimant's Branch on 12th May 2014.

9. Section 41 [1] of the Employment Act 2007 requires that an Employer shall, before terminating the employment of an Employee on the ground of *inter alia*, poor performance, 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 the explanation. Sections 43 and 45 of the Employment Act require termination is based on valid and fair reason or reasons.

10. In her evidence, Talent Resources Coordinator Tabitha Munanie Mutura, told the Court there are no documents exhibited before the Court, on Claimant's appraisal. There are no documents supporting termination. The Claimant was not placed on Performance Improvement Programme. There were no records of poor performance prior to the year 2013. Why would an Employee, who had worked from 2009 to 2013 without any complaints about poor performance, suddenly perform poorly, warranting termination? If her rate was 74% [rate 2], why did the Respondent allege in the letter of termination that the Claimant was rated as 1, which Mutura explained to mean unacceptable performance? The Court understood rate 1 to equate to below 50% rating. Evidence of poor performance was not only unsupported through appraisal documents; the oral explanation by Mutura did not add up. The Claimant worked for 5 years. She was not granted a hearing before termination. Termination decision was made before the Claimant exercised her right of appeal. Given more time, the Bank alleged it could supply the Court with evidence of Claimant's poor performance. The Claim has been pending in Court since 2014.

11. This evidence is sufficient to enable the Court conclude that termination was unfair. The Court needs look no further than the evidence of

Mutura, in reaching this conclusion. There was no valid reason to justify termination. There was no hearing in any form, granted to the Claimant, before termination. She was paid nothing after toiling for the Bank for 5 years. The Respondent completely disregarded the law, in terminating Claimant's contract.

12. The Court would have granted her prayer for reinstatement, but termination took place in May 2014, more than 4 years ago. The law does not allow the Court to give an order of reinstatement where termination took place in excess of 3 years back. The Court shall therefore consider alternative prayers pleaded by the Claimant.

13. There is no evidence that she was paid notice. The Respondent states it undertook to pay notice, but none was paid, and no document showing payment was availed to the Court. **Notice pay equivalent of Claimant's 1 month salary, is granted at Kshs. 77,670.**

14. The Respondent gave no document to support the position that the Claimant was owed 8 days of annual leave, and that she was paid for these 8 days. **She prays for 16 days of annual leave, which the Court allows at Kshs. 77,670 divide by 26 working days x 16 days = Kshs. 47,796.**

15. The letter of termination was received by the Claimant on 12th May 2014. It is dated 30th April 2014. This date is given as the effective date. The Claimant was an Employee of the Respondent, until she received the letter of termination. **She merits and is allowed the prayer for 12 days worked in May 2014, computed at Kshs, 77,670 divide by 26 working days x 12 days = Kshs. 35,847.**

16. It is clear termination infringed Claimant's right to fair procedural and substantive standards, under Sections 41, 43 and 45 of the Employment Act 2007. **She is granted a compensatory award equivalent to 12 months' salary at Kshs. 932,040.**

17. She has not established her case for damages for wrongful and / or unlawful termination, separate from the compensatory award. This item is rejected.

18. The prayer for reinstatement has been rejected and consequently, the prayer for arrears of salary for the entire period out of employment cannot stand.

19. **Costs to the Claimant.**

20. **Interest allowed at 14% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

i. Termination was unfair.

ii. The Respondent shall pay to the Claimant: notice pay at Kshs. 77,670; annual leave pay at Kshs. 47,796; salary for 12 days worked at Kshs. 35,847; and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 932,040 – total Kshs. 1,093,353.

iii. Costs to the Claimant.

iv. Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and signed at Mombasa this 19th day of September 2018.

James Rika

Judge

Dated, signed and delivered at Nairobi this 28th day of September 2018.

Jorum Abuodha

Judge