



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 673 "B" OF 2014

NICODEMUS MUTUNGA TUNGU.....CLAIMANT

v

CFC STANBIC BANK LTD.....RESPONDENT

JUDGMENT

1. Nicodemus Mutunga Tungu (Claimant) was offered employment as *Officer, Foreign Trade* by Stanbic Bank Ltd (Respondent) through a contract dated 31 May 2007.
2. On 17 May 2011, the Respondent informed the Claimant that the contract was being terminated on account of *low performance against targets* and in line with clause 3 of the employment contract.
3. The Claimant was aggrieved and he instituted legal proceedings against the Respondent on 25 April 2014 stating the Issues in Dispute as
 1. Wrongful termination
 2. Payment of service and all terminal benefits
 3. Costs of the suit.
4. In a *Memorandum of Reply* filed on 5 June 2014, the Respondent contended that the termination of contract was lawful.
5. The Cause was heard on 30 July 2018 when the Claimant and Respondent's Senior Human Resources Business Partner testified.
6. The Claimant filed his submissions on 24 August 2018 while the Respondent's submissions were filed on 7 November 2018 (should have been filed before 30 September 2018).
7. The Court has considered the pleadings, evidence and submissions and identified the Issues arising for determination as, *whether the termination of the Claimant's employment was unfair, whether Claimant had accrued leave by time of separation and appropriate remedies/orders.*

Unfair termination of employment

Procedural fairness

8. It is not in dispute that the Claimant's performance was evaluated and he was found wanting and that discussions were held with him.
9. On 4 February 2011, the Respondent wrote to the Claimant to confirm that it had been agreed with him that he be put on a 3 month *Performance Improvement Programme (PIP)*.
10. The Claimant and his superiors thereafter agreed on a *Performance Improvement Action Plan* on 7 February 2011 covering 3 months.
11. As part of the *Performance Improvement Plan*, a review was held on 4 March 2011 in which it was concluded that the Claimant had not met the targets for the preceding month.
12. Another review was held on 4 April 2011, and again the Respondent indicated to the Claimant that he had not met the improvement targets.

13. The review was followed up with a meeting on 11 April 2011 between the Claimant, the Country Head of Operations and Head of Corporate and Investment Banking Operations which was followed up with a letter informing the Claimant of the termination of his contract on 17 May 2011.

14. In his testimony, the Claimant stated that there was no *notice of termination* or a *hearing* before the termination of his contract and that the Head of Human Resources was not involved in the process leading to the termination, and therefore the termination was unfair.

15. The Respondent's witness (admitted he joined the Respondent long after the termination of the Claimant's contract) maintained that the Claimant was afforded an opportunity to make representations before the termination of employment.

16. The question arising therefore is whether the process followed by the Respondent met the requirements of the law.

17. Section 35(1)(c) of the Employment Act, 2007 envisages *written notice of termination of employment*. In the instant case, there was no written notice.

18. Although it is not an issue addressed much by litigants in this Court, the notice envisaged by the section could be what is generally called *show cause*. The antecedents of the *show cause*, in the view of the Court may be traced in the provisions of the said section (in cases of summary dismissal the notice may not be given – see section 44(3) of the Employment Act, 2007).

19. Section 41 of the Act on its part contemplates a *hearing* where the employee is notified of the reasons for a contemplated termination of employment (could be indicated in the *notice of termination*), and is offered an opportunity to make representations, accompanied by a colleague if he wishes.

20. A contextual reading of section 41 of the Employment Act, 2007 in the view of this Court require the employer to notify the employee in a clear manner that *termination of employment* is under consideration.

21. In the case under consideration, it is common that the Claimant's performance was on the table and that a *performance improvement plan* was agreed, but still according to the Respondent, there was no improvement on the part of the Claimant.

22. However, what is not clear or disclosed was the stage or time when the Claimant was notified that because his performance had been found wanting and he had failed to improve over the 3 months, the *termination of his employment* was on the table.

23. For in the view of this Court, a *performance improvement review and/or performance improvement plan* does not by itself satisfy the test of *notice of termination* as envisaged by section 35 or the *hearing* as contemplated by section 41 of the Employment Act, 2007. An employee should be informed unequivocally that *termination of employment* is under consideration.

24. The Court therefore finds that in the absence of the *written notice and hearing*, the Respondent failed the procedural fairness test. The termination of the Claimant's employment was procedurally unfair.

Substantive fairness

25. With the conclusion, it is not necessary for the Court to examine whether the Respondent discharged the burden imposed on employers by sections 43 and 45 of the Employment Act, 2007 save to state that it was common agreement that the Respondent was fully aware that the Claimant was suffering and is still suffering a debilitating illness which affected his performance.

26. For the unfair termination, the Court finds that the Claimant is entitled to 1 month pay in lieu of notice and the equivalent of 5 months gross wages as compensation based on the 4 years of service.

Leave

27. The Claimant had put the Respondent on notice that he had accrued leave which he computed as equivalent to Kshs 4,775/-.

28. Despite the notice, the Respondent did not file employment/leave records and pursuant to sections 10(3) & (7) and 74(1)(f) of the Employment Act, 2007, the Court will allow the head of claim.

Conclusion and Orders

29. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(a) Pay in lieu of notice Kshs 71,810/-

(b) Accrued leave Kshs 4,775/-

(c) Compensation Kshs 406,800/-

TOTAL Kshs 483,385/-

30. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 16th day of November 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Lubullelah instructed by M.M. Uvyu & Co. Advocates

For Respondent Mr. Gichangi instructed by Muri Mwaniki & Wamiti Advocates

Court Assistant Lindsey