



**REUBLIC OF KENYA**

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

**CAUSE NO.1278 OF 2014**

**ANTHONY NJUE JOHN .....CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

1. On 28<sup>th</sup> setptmeber, 1992 the Claimant was employed by the respondent, a commercial bank operated under the Banking Act. The Claimant position was that of Clerical Staff where diligently performed his duties and was promoted through the ranks to officer managerial position in Sales as at 24<sup>th</sup> June, 2014. The Claimant was earning Kshs.194, 413 .00 per month in salary.

2. By letter dated 27<sup>th</sup> February, 2014 the Respondent issued the Claimant with a transfer letter moving him from Karatina to Nairobi, Moi Avenue Branch. The Claimant complied and moved to Moi Avenue Branch and diligently undertook his duties until 30<sup>th</sup> April, 2014 when he was served with a termination letter stating that he had been terminated in accordance with clause 4.7.2 of the Bank's performance management policy where he had been found to have been of unacceptable performance.

3. The claim is that the termination was effected maliciously without regard to the claimant's welfare and rights due to him. The malice was that there was no notice given to the Claimant on the intended termination; there was no hearing; there were false allegations against the claimant; there was no justification to the termination or any evidence of poor performance; and the transfer of the Claimant to a new position with underlying malice to set him up for termination. The Claimant is seeking damages for such malice. The claim is for;

*Pay in lieu of notice of one month at Kshs.194, 413 00;*

*Pay in lieu of leave days earned Kshs.44, 742.00;*

*Salary for the month of June, 2014 Kshs.194, 413 00;*

*Pay in lieu of leave accrued May/June 2014 Kshs.25, 567.00; and*

*Salary for the period July, 2014 to April, 2029 Kshs.34, 870.00*

4. The Claimant being aggrieved is seeking for orders that he be reinstated to his position without loss of benefits; payment of his salary arrears; damages for wrongful termination; in the alternative, a payment of all lawful terminal dues with compensation and costs of the suit.

5. In evidence, the Claimant testified that since his termination by the Respondent he has remained jobless. While serving the Respondent he was a champion of new branches and was at Moi Avenue branch which opened a month before he was terminated after serving for 22 years. On 27<sup>th</sup> february, 2014 he was transferred from Karatina branch to Nairobi as Cash Teach leader. He was diligent in his duties until 24<sup>th</sup> june, 2014 when he realised he had not been paid the June, 2014 salary and called head office and write an email to the manager to which he got a scanned letter stating that it was back-dated with a termination on 30<sup>th</sup> april, 2014.

6. The Claimant appealed seeking reinstatement but on 16<sup>th</sup> May, 2014 the Respondent confirmed the termination. The termination letter was issued by the acting Regional Manager in the presence of the regional manager noting that the claimant's services were no longer required. The Operations Manager had left on 30<sup>th</sup> april, 2014 and the Claimant had been left in charge of the Moi Avenue Branch and when he went to hand over he was issued with a termination letter. The termination letter was based on the grounds of poor performance. The performance had never been an issue and the Claimant was not aware what the Respondent was making reference to. There was no notice of poor performance or a hearing on the same.

7. The Claimant lodged an appeal but it was rejected. On 16<sup>th</sup> My, 2014 the Claimant was asked to continue at work as there was an error but on 22<sup>nd</sup> May, 2014 he was called before a panel and told that there had been a mistake, he should resume work and wait for communication. Despite resuming work, there was no salary paid. The Claimant discussed with his manager who said that he had been instructed to ask the Claimant to exit and he handed over.

8. The Claimant also testified that the Respondent was malicious in terminating his employment. In May, 2014 he was aged 44 years and had 16 years more to work before retirement.

9. The Claimant is seeking notice pay; leave due; accrued leave not paid; pay for days worked in June, 2014; salaries due until retirement; compensation and costs.

## **Defence**

10. In defence, the Respondent admit they had employed the Claimant and he was lawfully terminated from employment in accordance with his contract of employment, the Performance Management Policy Cause 4.7.2 and the Employment Act for reasons of poor performance where upon review the Claimant was rated as being of unacceptable performance, he was put on a performance improvement plan (PIP) and despite several discussions, there was no improvement. The Respondent applied section 36 of the Employment Act on the fact that the Claimant was entitled to one months' notice pay which the Respondent undertook to pay by its letter of 30<sup>th</sup> April, 2014.

11. The defence is also the Claimant was given a chance to be heard when several discussions were held with him and his supervisor on his performance and the Claimant participated in the preparation of the PIP. Upon a review, the Claimant was found to be of unacceptable performance and hence the reason for termination. The remedies sought are not due and the claim should be dismissed with costs.

12. In evidence, the Respondent called David Macharia Muraya at the time the Branch Manager, Molo in the Respondent bank. The witness has been with the Respondent for 22 years and knew the Claimant well. The Claimant was evaluated at the end of 2013 with a score card which he signed, the witness as his branch manager. The Claimant appealed against his termination on the grounds that at the time of his evaluation he was on the Sales roles in Business Banking Consultant (BBC) and after the evaluation he was transferred to Moi Avenue Branch. The Claimant became the branch manager, Moi Avenue.

13. On cross-examination, the witness testified that when the Claimant was evaluated and found to be of unacceptable performance, he was placed on PIP. Such was to be reviewed after a year, which ends in March. There is no evidence that the Claimant was evaluated in 2014 after moving to Moi Avenue Branch. The Claimant was terminated at 44 years and had many years to work as retirement age is 60

years based on the human resource manual of the respondent.

## **Submissions**

14. The Claimant submits that upon employment by the Respondent in 1992 he served diligently, was promoted and 27<sup>th</sup> February, 2014 was transferred to Moi Avenue Branch from Karatina Branch. This was a new branch and by 10<sup>th</sup> April, 2014 there was no branch manager and the branch operating manager was on training. The Claimant was asked to continue preparations in the opening of the new branch. The manager, Ms Teresa Muchira then informed the Claimant that she was exiting the Respondent employment and did hand over on 30<sup>th</sup> April, 2014. On this date the Respondent authored the termination letter but was never issued to the Claimant until 16<sup>th</sup> May, 2014 which reflects malice. The Claimant had just been transferred and allocated new duties and got handing over of the branch only to be terminated as this processes were on-going. This termination also coincided with letters of those employees who had opted to retire.

15. The Claimant was unfairly terminated vide letter dated 30<sup>th</sup> April, 2014 which was to take effect on equal date. There was no notice, hearing or valid and genuine reasons for the termination and the Respondent did not comply with section 36 of the Employment Act as the notice pay due were never paid. The reason given that the Claimant was of poor performance was never proved and the Claimant was not given a chance to argue his case. The Respondent witness Mr Muraya testified that he evaluated the Claimant in 2013 and was to be reviewed in 2014 but this was not done. Section 41 of the Employment Act requires that before termination on the grounds of poor performance, an employee be given a hearing which was not done in the claimant's case.

16. The Claimant also submits that his termination of the Claimant was procedurally unfair and there were no valid reasons. He is entitled to the remedies sought.

17. The Claimant relied on the cases of **Thomas Mita versus Kenya Commercial Bank Limited, Cause No.464 of 2012** and **Leonard Gethoi Kamweti versus National Bank of Kenya & 2 others, Cause No.273 of 2014**. The remedies sought are reinstatement, payment of salary arrears, damages for wrongful termination and in the alternative payment of all terminal dues; compensation and costs.

18. The Respondent submits that upon employment of the Claimant on 28<sup>th</sup> September, 2014 he worked in different capacities and following operational needs and exigencies on 29<sup>th</sup> October, 2013 he became the Business Banking Consultant. The Claimant was terminated on 24<sup>th</sup> June, 2014 following his unacceptable performance.

19. The Respondent also submits that the section 41 of the Employment Act and the Performance Management Policy allow the termination of an employee due to poor performance. In this case there was a reasonable justifiable cause for the termination as the Claimant demonstrated unacceptable performance. There was also due process and fair procedure followed. Upon evaluation the Claimant was placed on a PIP but he failed to improve his performance and despite discussions with his supervisor, there was no improvement. The employer has the prerogative to address poor performance as held **Alfred Nyngu Kimungui versus Bomas of Kenya [2013] eKLR**.

20. The remedies sought are not available to the Claimant as he was fairly terminated. The court cannot award that which is not available in law as held in **CMC Aviation Limited versus Captain Mohamed Noor, Civil Appeal No.199 of 2013**.

## **Determination**

21. The fact of the claimant's termination is hazy. On the one hand the Claimant was issued with termination letter dated 30<sup>th</sup> April, 2014 but this was not issued to him until 16<sup>th</sup> May, 2014. The Respondent in submission asserts that the Claimant was terminated on 24<sup>th</sup> June, 2014 following his unacceptable performance. As the employer such as the Respondent is the custodian of work records, I

take it that the claimant's effective termination date is as stated by the respondent, 24<sup>th</sup> June, 2014.

22. In the referenced letter dated 30<sup>th</sup> April, 2014 the Respondent wrote as follows;

*Re: Termination of Employment*

*This letter represents a formal notification to terminate our employment contract, effective 30<sup>th</sup> April, 2014. ...*

*Below is a summary of your performance over the past financial years:*

*1. ...*

*4. Finally, you still were rated as 1, unacceptable performance on your end of year performance review.*

23. Mr Muraya for the Respondent testified that he evaluated the Claimant in October, 2013 and a PIP was signed. That the review was supposed to be after a year but the Respondent years ends in March. He did not see the claimant's review for 2014. Then at what point was the claimant's performance *finally* found to be *unacceptable performance on your end year performance review*?

24. Section 41 of the Employment Act, and which provisions the Respondent has sought to rely upon refers and provides;

*(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) ...*

25. The procedural requirements to follow on the basis that an employee is of poor performance are set out. An employer is required, before effecting a termination on the grounds of poor performance to inform the employee the reason(s) for which *the employer is considering termination* to enable the employee attend at this explanation. In the case of **Kenya petroleum oil workers union v Kenya petroleum refineries Ltd [2013] eKLR the court held;**

*The essential requirements in brief are that the employer should explain to the employee in a language the employee understands the reasons for which the employer is contemplating terminating the services of the employee and hearing any representations to be made by the employee.*

*The employee is also entitled to be accompanied by a fellow employee or shop floor union representative and to be heard and his explanations considered. This is what is called procedural fairness in employment law and the rule of natural justice in administrative law. The rule is captured in the Latin maxim *audi alteram partem*.*

26. It is therefore imperative for the employer to demonstrate what measures were taken to address the case of a poor performing employee. The rationale is to be found in the findings of the court in the case of

*The subject of poor performance of an employee is a serious matter. Such requires thorough investigations before an employer can use such a reason as the basis for termination. The rationale is that an employee is hired for being competent for the job and upon confirmation; such an employee has been put to the test and passed. Where an employee works for long periods and suddenly declines in their performance, the root cause must be established. In **Tharratt versus***

**Volume Injection products (pty) Ltd [2005, 6 BALR 625]** an employee who was dismissed during the probation period for poor performance was found to have been unfairly terminated as the employer failed to investigate the cause of the poor performance. One best practice is as set out in the case in **Jane Wairimu Muchira versus Mugo waweru and Associates**, setting a performance appraisal process that is participatory to ensure an effective support to a poor performing employee. Such support is to be given with the clear knowledge of the employee that he requires to improve on his performance and gives his commitment to the agreed upon objectives, deliverable and purpose of the performance appraisal. The human resource policy or manual must anticipate such a process and set out modalities for it. This is to avoid the appraisal system for poor performance, incapacity or misconduct being subjective.

...

*[In] Internal disciplinary proceedings ... should be in good faith. It should not be held with a predetermined decision as this would be a sham. The steps set out under section 41 of the Employment Act are meant to ensure that the employee who is or is alleged to be of poor performance is given a hearing at the shop floor. That is the best place where all conditions are best for an employer to hear the employee in their defence as all evidence can be sourced at the work place. The practice by the Respondent to use a PIP in supporting the Claimant in his performance is a good practice. Such should be emulated as with it, the employee has clear targets and deliverables within a set time frame. However such should be commenced in good faith and ensure the active participation of the employee since he is the one to take and own the PIP and deliver on it. It cannot be for the employer to write the PIP and issue to the employee. The employee already has a contract of employment on which he should be delivering upon. The PIP is only meant to support the employee to give at his optimum which may have deteriorated due to a variety of reasons. [Emphasis added].*

27. In this case, the material leading to the evaluation, review and appraisal of the Claimant is not produced. Even where such existed and the Claimant was placed on the PIP, the context should be that he should and ought to have been reviewed on its targets so as to assess his improvement or lack of it. Upon such assessment, the provisions of section 41 of the Employment Act should have come to bear. Otherwise, to use a performance appraisal and evaluation process in place and instead of section 41 of the Employment Act, in my view this is to circumvent clear provisions of the law. Whatever internal mechanisms that exist within the Respondent to address performance, once these are put in motion and do not bear fruit, the Respondent as the employer, before taking a sanction against an employee should ensure the mandatory provisions of section 41 are followed.

28. To move outside the law, and the provisions of section 41 of the Employment Act, the resulting adverse action taken against the employee is devoid of procedural fairness. In this case, the Claimant had performed well and was moved to a new branch within a short time. He was acting manager at a key branch, Moi Avenue Branch as key officers were either away or had exited. To pay the Claimant for his hard work with a termination was most unfortunate. I find no genuine, just or justifiable cause that led to the summary action against the Claimant communicated retrospectively on 16<sup>th</sup> May, 2014 vide letter dated 30<sup>th</sup> April, 2014. Such I find to be contrary to section 45 of the Employment Act as being unfair.

## **Remedies**

29. The Claimant is seeking reinstatement without loss of his benefits; salary arrears for the entire period of employment; damages for wrongful termination; and in the alternative payment of lawful terminal dues; and compensation.

30. The remedy of reinstatement is available to an employee unfairly treated by the employer in terms of the parameters set out under section 49 of the Employment Act. Such a remedy is given in exceptional cases and in a situation where such would adequately address an employee who has been visited with grave injustice. In this case, the Claimant was terminated aged 44 years. He testified that he has not been able to secure new employment since but has made effort to start small businesses.

31. Section 12(3) of the Employment and Labour Relations Court Act read together with section 49 of the Employment Act; give this court power to order a reinstatement in appropriate cases. The claimant's case stands out as one such case where a reinstatement would be the best remedy to address the unfair termination of this employment. Such remedy would also address the claim for payment of due salaries for the period of July, 2014 to April, 2029 when the Claimant hope to retire at 60 years. See **Mary Kiptui Chemweno versus Kenya Pipeline Company Limited [2013] eKLR.**

32. On the basis of section 49 (1) of the Employment Act, the remedies available can issue in multiple forms and in single terms;

*(1) Where in the opinion of [the court] ... summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following— [emphasis added].*

33. I take note that the Claimant has pleaded alternative orders and remedies. Putting into account the circumstances that led to the termination of the claimant, the time lapse since 2014 which is 2 months short of 3 years, compensation should be at the maximum 12 months gross salary all assessed at Kshs. 2,332,956.00. In this context, notice pay is due for one month together with the leave due and salaries not paid up to and until the last day in service being 24<sup>th</sup> June, 2014.

In conclusion, judgement is hereby entered for the Claimant against the Respondent in the following terms;

- a) A declaration that the termination of employment was unfair;**
- b) The Claimant is hereby reinstated back to his position without loss of benefits and any lawful entitlements to be paid within 30 days;**
- c) The Respondent is at liberty to re-engage the Claimant in comparable terms similar to his last held position, skills and knowledge and putting into account (b) above;**
- d) The Claimant shall report back to work on 1<sup>st</sup> March, 2017 at 8.30 hours to the chief officer for deployment; and**
- e) Costs of the suit**

**In the alternative to the above;**

- a) The Respondent shall pay the Claimant salaries due for 3 years all being Kshs.6,998,868.00;**
- b) Compensation amounting to 12 months' salary at the last gross salary due on 30<sup>th</sup> April, 2014 and all being 2,332,956.00;**
- c) Leave days due at Kshs.44,742.00;**
- d) Salary for 24 days work in June, 2014 at Kshs.155,530.00;**
- e) Prorated leave May/June 2014 Kshs.639.50;**
- f) Notice pay Kshs.193,199.00; and**
- g) The Claimant is awarded costs.**

**Orders accordingly.**

**Dated, singed and delivered in open court at Nairobi this 22<sup>nd</sup> day of February, 2017.**

**M. MBARU**

**JUDGE**

In the presence of:

.....

.....