



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1279 OF 2014

SAMUEL NGURU MUTONYA CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGEMENT

1. On 9th June, 1992 the Claimant was employed by the Respondent bank as a Clerical Staff and was promoted to the position of Branch Operations Manager – Ruiru branch at the time of his termination on 30th April, 2014. The Claimant was earning Kshs.193,199.00 monthly pay.

2. The Claimant served in his role diligently. By a letter dated 7th February, 2014 the Respondent issued the Claimant with letter appointing him to take over the position of Branch Operations Manager Ruiru Branch. The Claimant complied and embarked on his duties until 21st May, 2014 when he was replaced with a new branch manager to whom he was instructed to hand over without prior notice.

3. The Claimant was thereafter issued with a termination letter stating that the letter was a notice of termination of employment with effect from 30th April, 2014 in terms of Clause 4.7.2 of the performance management policy. That the claimant's performance over the last financial years was that, during the HI review he was rated as 1, unacceptable performance; he was paced in a performance improvement plan requiring improvement of performance; several performance discussions were held with the Claimant and his supervisors; and that the Claimant continued to be rated as 1, unacceptable.

4. The claim is that this termination was with malice and in disregard to the claimant's rights. The Claimant had not been issued with notice of termination; there was no hearing; the Claimant was humiliated when the Respondent made false accusations against him without giving him adequate opportunity to defend self on grounds of poor performance; terminating the claimant's employment without justification; and transferring the Claimant from his position to a new position with underlying malice to set him up for termination. The Claimant thus suffered loss and damage.

5. The Claimant is seeking;

Pay in lieu of notice at Kshs.193,199.00;

Pay in lieu of balance of 3 days of leave Kshs.19,056.00;

Salary for the period of June, 2014 to January, 2031 Kshs.38,693,800.00; and

Damages.

6. That the termination was wrongful and unfair ad compensation is due.

7. In evidence, the Claimant testified that he a Banker by training and is currently unemployed. He joined the employment of the Respondent on 9th June, 1992 as a Clerk until 21st May, 2014. That in a period of 22 days he was promoted to the position of Branch Operations Manager, Ruiru Branch with duties to oversee customer service; evaluate employee; customer satisfaction; and a job description was issued that related to the role and position of the Branch manager.

8. Since employment, the claimant's performance was outstanding and was promoted through the ranks.

9. On 21st May, 2014 while the Claimant was at work he was managing the Ruiru branch as the then manager had exited and a new manager reported and directed the Claimant to hand over. The new manager then proceeded to issue the Claimant with a letter of termination. The letter was dated 30th April, 2014 but issued on 21st May, 2014 and was supposed to take effect on 30th pril, 2014.

10. The termination was on the reasons that the claimant's performance had been unacceptable since 2013. From January, 2013 to 30th December, 2013 the Claimant had been the Manager, Kenyatta University branch and his performance in this period was fine. The Claimant was then moved to Ruiru branch at the same level of manager. He was evaluated in September, 2013. There was no communication that the results were of poor performance.

11. The Claimant also testified that in the defence filed by the Respondent they allege that there were several meetings to discuss his performance but in September, 2013 he met the manager without any specific targets being set to be performed within a specified timeline. Upon the issuance of the termination letter, the contents were shocking. There was no prior preparation, notice or hearing. This was malicious. The salary due for days worked in May, 2014 was never paid.

12. The Claimant was ready to work for the Respondent until retirement. At the time he was 44 years and retirement age is 60 ears. Since termination the Claimant has not been able to get new employment due to the unfair termination, the due salaries to retirement should be paid. That he should be reinstated back to his job as there was no evidence of poor performance. The Respondent was not justified to use the reason of poor performance as the cause for termination.

13. In cross-examination, the Claimant testified that in 2008 he joined management and was issued with new terms of employment. On 19th April, 2012 the Respondent addressed the issue of performance in 2011 and upon review only the cost of living was adjusted as the performance for the entire branch was not good. There was no individual rating.

Defence

14. In defence, the Respondent admits that the Claimant is their former employee last serving in the Ruiru branch. The Claimant handed over his work without prior notice and by letter dated 30th April, 2014 the Respondent terminated his employment by giving the necessary notice upon which the Claimant handed over to the Ruiru branch manager on 21st May, 2014 long after termination of his employment. The Claimant was lawfully terminated from his employment in accordance with his contract of service; the respondent's Performance Management Policy clause 4.7.2; and the Employment Act for reasons of poor performance where at the review of the claimant's performance was rated as unacceptable and put on the performance improvement plan (PIP). Despite several performance discussions, the Claimant was still rated as having unacceptable performance.

15. The Respondent took cognisance of section 36 of the Employment Act and paid the Claimant one month notice as set out in the termination letter of 30th April, 2014. The Claimant had participated in the formulation of his PIP and he pledged to work on improving his performance. The performance did not improve and this led to the termination of the claimant.

16. In evidence, the Respondent witness was Upendo Mutave Wambua, the head branch sales and who has been with the Respondent for the last 3 years. The witness testified that the Claimant reported to the General Manager and reviewed his performance.

17. That the witness was with the Respondent when the Claimant was terminated which was purely based on his poor performance. The Claimant had set targets and end year review looked at what he had achieved which the Respondent found to be unacceptable performance. The Claimant signed a PIP in agreement with his line manager to turnaround the performance within the year. The PIP was agreed on 25th September, 2013. At the end of the year the Claimant was reviewed and found to be of poor performance and what followed was termination.

18. The Claimant lodged an appeal vide his letter dated 26th May, 2014 and the respondent's response was on 20th June, 2014 rejecting the appeal. By letter dated 19th June, 2014 the claimant's terminal dues were tabulated and paid.

Submissions

19. The Claimant submits that his termination by summary dismissal was unlawful and unfair. He had worked for the Respondent for 26 years and was recognised for his performance. The Claimant was terminated on 30th April, 2014 but the letter was handed to him on 21st May, 2014 indicating that the termination was to be applying retrospectively. There was no notice or hearing and the Claimant has challenged this termination by virtue of section 47(5) of the Employment Act.

20. The Claimant was shocked to receive a letter of termination that coincided with the letters of those employees who had opted to the Voluntary Early Retirement. Before the termination the Claimant had not received any evaluation of his performance to arrant the termination on the ground of poor performance. The Respondent relied on an evaluation of the Claimant for 2013 but no documentation to this effect was produced by the respondent. The evidence that the Claimant had been put on PIP was challenged as the same is not signed by the Claimant and hence no such material existed.

21. Section 41 of the Employment Act was not followed in its terms and procedures. The law requires that the employee be given a notice and hearing which was not the case for the claimant. The Claimant is therefore entitled to the remedies sought.

22. In the case of **Thomas Mwita versus Kenya Commercial Bank Limited, Cause No.464 of 2012** the Court held there was unfair dismissal of the Claimant after serving for 22 years and then alleged to be of poor performance. In **Leonard Gethoi Kamweti versus National Bank of Kenya & 2 Others, Cause No.273 o 2014**, the Court held that the Respondent had discriminated upon the Claimant in the retirement and awarded damages at Kshs. 8 million.

23. In this case, the Claimant is seeking;

Reinstatement;

Salary arrears for the entire period the Claimant has been out of employment;

Damages for wrongful and unfair termination;

In the alternative, payment of all the awful terminal dues set up in the claim;

Compensation; and

Costs and interest.

24. The Respondent submits that upon the claimant's employment on 9th June, 1992 he served in different

capacities in accordance with his employment contract and the respondent's human resource manual. On 7th february, 2014, owing to the respondent's operational needs the Claimant was transferred to Ruiru branch. The Claimant was terminated from his employment due to unacceptable performance and he was paid the notice period and salary earned.

25. The Respondent also submits that there was a reasonable and justifiable cause for the termination of the Claimant following unacceptable performance. Fair procedure was followed through performance appraisal tool which set out targets and despite being placed on a PIP the claimant's performance remained unacceptable. Under section 41 of the Employment Act the Respondent was entitled to terminate the Claimant based on his poor performance. In **Alfred Nyungu Kimungui versus Bomas of Kenya [2013] eKLR**; the Court held that the Employment Act does not intend that courts should take away managerial prerogatives from employers. The Claimant was terminated due to his unacceptable performance and on account of the Respondent exercising its managerial prerogative. The remedies sought are therefore not due.

Determination

26. The cause of action herein arose from the termination of the Claimant vide letter dated 30th April, 2014. The Respondent wrote to the Claimant that;

Termination of Employment

This letter represents the formal notification to terminate your employment contract, effective 30th aprril, 2014. Your termination is in accordance with the bank's performance management policy clause 4.7.1.

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

- 1. During H1 review you were rated as a 1, unacceptable performance;*
- 2. You were subsequently put on a performance improvement plan that required you to improve on your performance;*
- 3. Several performance discussions have been held between you and your supervisor(s);*
- 4. Finally, you still were rated as 1, unacceptable performance on your end of year performance review.*

27. The question of poor performance at work is specifically addressed under section 41 of the Employment Act which 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. [Emphasis added].

28. In **Alex Wainaina Mbugua versus Kenya Airways Limited, Cause No.430 of 2016**; the Court held that The right under section 41 of the Employment Act and under article 41 of the constitution read together with article 47 on fair administrative action require that a person faced with an adverse action must be supplied with an relevant materials, coaching, training, time and resources necessary to be able to prepare their defence, improve on their performance, build on their skills.

29. Where an employee is found to be of poor performance at work, the duty is upon the employer to demonstrate that before terminating the employee all efforts necessary were put in place to support the alleged poor performing employee. In **BIFU versus Barclays Bank of Kenya Ltd & another, Cause**

No.95 of 2014 the Court held;

On the question of performance while in employment, most contracts of employment make reference to the employer's right to terminate on the ground of poor performance. With this right, there are other set rights due to an employee such as the right to give notice before termination. Such rights go with responsibility. With regard to poor performance, an employer is now required by the law, other than the employment contract, the employer should give the employee notice, give a hearing, and give reason(s) for termination on such a ground. It is not only a contractual requirement, there exists a legal requirement that before termination on the grounds/reason of poor performance, there must exist genuine, valid and fair reasons. The subject employee must be given a hearing in the presence of the employee's representative and most fundamentally, there must be a written notice stating the reasons upon which the employer intends to terminate employment to enable the employee give their defence. This notice must be issued before an employer has made a decision to terminate employment. Upon the issuance of the written notice, the employee where unionised is at liberty to notify their union as held in Jane Samba Mkala versus Ol Tukai Lodge Ltd.

...

An employer can therefore not just rely of the grounds of poor performance to terminate an employee. The rationale is that, such an employee was hired and found fit for the job, any deterioration in performance must be interrogated and effort made to address it. It cannot be simply cited that the Claimant suddenly became of poor performance when all his quarterly performance appraisals were in the positive.

29. In defence the respondent's case at paragraph 9 of the defence is that;

... the Claimant was lawfully terminated from employment in accordance with his contract of employment, the respondents' performance management policy clause 4.7.2 and the Employment Act 2007 for reasons of poor performance wherein a the H1 review the claimant's performance was rated as unacceptable and subsequently the Claimant was put on a performance improvement plan to allow for improvement however despite several performance discussions between himself and his supervisors the claimant's performance was rated as unacceptable at the end of the performance review.

30. No material or evidence is attached to support these averments. The PIP, review that resulted in a finding of *unacceptable performance* or anything to suggest the Claimant was of poor performance and warranted termination on this basis is not attached. The evidence submitted by the Respondent is devoid of any material leading to any poor performance of the claimant.

31. Where the PIP was signed by the Claimant and dated 25th September, 2013 and as confirmed by the respondent's witness, Wambua this was to run for one (1) year where the Claimant was required to turnaround his unacceptable performance. Termination was with effect from 30th April, 2014. This is not the one year envisaged under the PIP. There is no evidence that before the termination, the Claimant was called again to have his performance reviewed vies-a-vies the PIP of 23rd septmeber, 2013. There is no material to show that the Claimant failed in his performance after the review leading to the PIP. In any event, even where there was a review of the PIP and the performance, section 41 of the Employment Act requires that upon the finding that an employee is of poor performance, such being a managerial issue, the employee must be issued with notice that he has been found a poor performer and there is intention of termination of employment. On such notification, the employee must be given a hearing and the procedures envisaged under section 41 followed.

32. In this case, despite what the Respondent has set out as being the reason for the claimant's poor performance, upon the review and issuance of a PIP, termination followed without notice or hearing of the Claimant on the basis that his poor performance had formed the basis for his termination. It is not sufficient that the Respondent as the employer was willing to pay in lieu of notice. Before the question of

notice payment became ripe, the Claimant should have been given a hearing when his performance was found to warrant a subject for his termination. To move and terminate without giving regard to section 41 of the Employment Act and its provisions, giving the Claimant a hearing in the presence of his representative, the termination became procedurally unfair.

33. As set out in the Case Jane Samba Mkala, cited above, the employer has the duty to demonstrate that upon the appraisal of the employee and there was a finding of poor performance, measures were taken to give the alleged poor performing employee training and timelines within which to show improvement. Even though the assessment of an employee is the prerogative of the employer as held in Alfred Nyngu Kimungui, cited above, a matter regulated in law such as the case of a poor performing employee and such has become the subject of litigation before this Court must be assessed and analysed on its merit and a finding made.

34. In this case, I find the Respondent terminated the employment of the Claimant without giving him the required notice, hearing and the reason used to issue the termination letter lacked fairness, was not just and not genuine. Had the Claimant been given a hearing and chance to argue in his defence, such put into account, the termination would have been unnecessary. The termination was therefore substantively unfair.

35. Further to the above, where an employer fails to abide with the procedural requirements of section 41 of the Employment Act, even where pay in lieu of notice is paid immediately, such does not cure the procedural unfairness visited upon the claimant. I find the Respondent failed to meet the provisions of section 45 of the Employment Act. The Claimant is therefore entitled to the remedies sought.

Remedies

36. On the finding that the termination of the Claimant was procedurally and substantively unfair, notice pay is due. The Claimant is awarded Kshs.193,199.00.

37. On the claim of 3 days earned in leave, I find no challenge to this claim. The Claimant is awarded Kshs.19,056.00 for 3 days leave due.

38. On the claim for salary due for the period of June, 2014 to January, 2031, the Respondent challenged this claim on the basis that the Court of Appeal in the case of **CMC Aviation Limited versus Captain Mohamed Noor, Civil Appeal No.199 of 2013** that the principles to be put into account in making an award are set out under section 49 and 50 of the Employment Act.

39. In this case, the Claimant had served the Respondent diligently for over 22 years. At his prime and aged 44 years, while serving as the Ruiru Branch, Operations and Service Team Leader, a position he had just applied for, interviewed and placed vide letter dated 7th February, 2014 and then soon thereafter on 30th April, 2014, barely two months later found to be of unacceptable performance, such being most severe and harsh on his career, a claim for salaries due until retirement would be most appropriate remedy. However, this Court is guided by the remedies available under section 12 of the Employment and Labour Relations Court Act and section 49 of the Employment Act to address a case of unfair termination of employment.

40. Section 12(3) of the Employment and Labour Relations Court Act gives the Court power to make orders as follows;

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) Interim preservation orders including injunctions in cases of urgency;

(ii) A prohibitory order;

(iii) An order for specific performance;

(iv) A declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

40. Section 49(1) of the Employment Act also provides that;

(1) Where in the opinion of a labour officer [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].

41. The remedies under section 12(3) of the Employment and Labour Relations Court Act are therefore available for the Court to order while the remedies under section 49 of the Employment Act can be issued in terms of any or all, in singly or in multiple. Such must be based on each case and particularly the factors leading to the unfair termination.

42. In his prayers set out in the memorandum of claim, the Claimant is seeking reinstatement to his previous position/job without loss of benefits; salary arrears; damage for wrongful termination; in the alternative, payment of terminal dues and compensations for wrongful termination. In the circumstances of this case, I find a reinstatement of the Claimant back to his previous position/job and payment of wage salaries and benefits due would best address the unfair termination of his employment adequately. This is putting into account the time served, his evidence that he has remained unemployed since his termination and that at his age of 44 he is unlikely to secure a similar job and position as he held with the respondent. In **Benjamin Langwen versus National Environmental Management Authority, Cause No.2046 of 2013** the Court order a reinstatement on the basis that this was the only effective remedy to address a case of unfair termination of employment. Similar findings were set out in the case of **Reuwel Waithaka Gitahi & Others versus KRA**.

43. A reinstatement of the Claimant and payment of back salaries and benefits will put him back to the position as he should have maintained with the Respondent had the unfair termination not taken place. I take it that at this time, and in terms of what the Claimant has submitted that on the 30th April, 2014 when his termination letter was authored the Respondent was retiring other employees, though this issue was not gone into, I take this into account and give alternative orders to the reinstatement.

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 entitlement to be paid within 30 days; and

c) The Claimant shall report back to work on 1st March, 2017 at 8.30 hours to the chief officer for deployment; and

d) 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.6,955,164.00;**
- b) Compensation amounting to 12 months' salary at the last gross salary due on 30th April, 2014 and all being 2,318,388.00;**
- c) Leave days due at Kshs.19,056.00;**
- d) Notice pay Kshs.193,199.00; and**
- e) The Claimant is awarded costs.**

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 22nd day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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