



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

**CAUSE NO 2230 OF 2014**

**ELIZABETH OSICHE APWORA.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

**Introduction**

1. Elizabeth Osiche Apwora, the Claimant in this case worked for National Bank of Kenya, the Respondent herein from January 1996 until May 2014. She has brought this action seeking relief for unlawful termination of employment. Her claim is contained in a Statement of Claim dated 6<sup>th</sup> December 2014 and filed in Court on even date.

2. The Respondent filed a Memorandum of Reply on 3<sup>rd</sup> July 2015 and the matter proceeded to hearing with the Claimant testifying on her own behalf and Linet Anyika for the Respondent.

**The Claimant's Case**

3. The Claimant was employed by the Respondent as a clerical staff on 2<sup>nd</sup> January 1996. Her salary as at the time she left employment on 7<sup>th</sup> May 2014 was Kshs. 149,511.

4. She states that in January 2014, she was subjected to a performance appraisal by her line manager in the Reconciliation Department in which scored 3 out of a possible 5. Her score was however adjusted to 1 in March 2014.

5. The Claimant lays a nexus between the adjustment of her score and rejection of her application for a medical loan, on the ground of underperformance. She states that she made several inquiries as to how her score changed from 3 to 1 but she got no explanation. Instead, she was issued with a termination letter.

6. It is the Claimant's case that the termination of her employment was actuated by malice. She also alleges discrimination on account of her long illness. The Claimant now claims reinstatement without loss of benefits plus salary arrears or in the alternative:

- a) 12 months' salary in compensation
- b) 3 months' salary in lieu of notice.....Kshs. 448,553.00
- c) 15 days' leave pay.....74,755.50

- d) Salary for 7 days worked in May 2014.....43,607.00
- e) Salary for 10 years (May 2014-April 2024).....17,941.00
- f) Costs plus interest

### **The Respondent's Case**

7. In its Memorandum of Reply dated 30<sup>th</sup> June 2015 and filed in Court on 3<sup>rd</sup> July 2015, the Respondent admits having employed the Claimant on 2<sup>nd</sup> January 1996. The Respondent however denies that the Claimant's employment was unlawfully terminated.

8. The Respondent states that in the course of her employment, the Claimant was involved in another income earning occupation, contrary to clause 9 of her letter of appointment. The Claimant had also failed to account for her sick off days, on several occasions but the Respondent indulged her.

9. Regarding the Claimant's performance, the Respondent states that her rating for the year 2013 was 1 out of 5, which was an unacceptable performance. The Respondent avers that the Claimant was put on a Performance Improvement Plan but was rated 1 at the end of the year.

10. With regard to the Claimant's application for a medical loan, the Respondent states that it had, on several occasions, assisted the Claimant to pay her medical bills.

11. The Respondent's maintains that the termination of the Claimant's employment was lawful and fair and that she was heard on appeal.

### **Findings and Determination**

12. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

13. The Claimant's termination letter dated 30<sup>th</sup> April 2014 states as follows:

*"Dear Elizabeth,*

#### **RE: Termination of Employment**

*This letter represents a formal notification to terminate your employment contract, effective **30<sup>th</sup> April 2014**. Your termination is in accordance with the Bank's performance Management Policy clause 4.7.2.*

*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 were still rated as 1, **Unacceptable Performance** on your end of year performance review.

*In view of these circumstances, the Bank has had no alternative but to terminate your contract. You will be eligible to one month pay in lieu of notice, payouts of accrued leave or earned time off, as provided by Bank's policy, and deductions for any debts you may owe the Bank.*

*You have the right to appeal this disciplinary action within seven (7) days of receiving this disciplinary action as per the Human Resource Policy and/or Collective Bargaining Agreement.*

*(Signed)*

*Jared Raburu*

**DIRECTOR, HUMAN RESOURCES”**

14. According to this letter, the Claimant's employment was terminated on account of poor performance. Incapacity to perform is one of the grounds for termination of employment set out under Section 45 of the Employment Act, 2007. However, like all other grounds, it must be proved at the shop floor.

15. The Claimant testified and the Respondent's witness concurred that she was appraised by her Team Leader, William Lagat on 22<sup>nd</sup> January 2014 and rated 3 out of a possible 5. However, vide a handwritten endorsement on the appraisal form by the Operations Director, Thomas Gachie, the Claimant's rating was down-graded to 1. The endorsement dated 30<sup>th</sup> January 2014 states as follows:

*“Downgraded to one (1) since the number of days absent made it possible to achieve targets.”*

16. From the evidence adduced before the Court, it is this endorsement that led to the termination of the Claimant's employment on account of poor performance. The Claimant told the Court that she was not made aware of the circumstances leading to the downgrading of her rating from 3 to 1. She added that the Respondent used the revised rating to deny her a medical loan which she needed to manage her long term illness.

17. In ***Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR*** this Court held that an appraisal of the performance of an employee must of necessity involve the active participation of the employee. Further, in ***Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)*** it was held that once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and allow them reasonable time to improve. This is the procedure encapsulated in clause 4.5.2 of the Respondent's Human Resources Manual.

18. The Claimant denied the Respondent's assertion that she had been placed on a Performance Improvement Plan, prior to the termination of her employment. On her part, the Respondent's witness, Linet Anyika was unable to confirm the existence of any such plan. If indeed there was such a plan, the Respondent ought to have produced it in Court. In its absence the Respondent's averment in this regard remains unverified and of no probative value.

19. Regarding the downgrading of the Claimant's rating from 3 to 1, I have this to say; Section 41 of the Employment Act, 2007 which sets out the procedural fairness requirements in the handling of internal disciplinary cases covers poor performance. It is therefore not enough for an employer to state that an employee is a poor performer. Even where there is disagreement between an employee and an employer on the verdict of a performance appraisal, the disagreement must be documented to show that an appraisal did indeed take place.

20. In ***Lilian O. Ochang v Kenol Kobil Limited [2015] eKLR*** this Court held that disciplinary action based on poor performance must be preceded by a capability hearing, within the parameters set out in

Section 41 of the Employment Act. The Respondent was unable to explain how the Claimant's rating was downgraded from 3 to 1. What is clear is that the Claimant was not given an opportunity to defend her performance prior to the adverse verdict that led to the termination of her employment.

21. The effect is that the Respondent failed to establish a valid reason for terminating the Claimant's employment as required under Section 43 of the Employment Act. The Respondent also failed the procedural fairness test set out under Section 41 of the Act.

### **Remedies**

22. In light of the foregoing lapses, the Court finds that the termination of the Claimant's employment was substantively and procedurally unfair and therefore awards her twelve (12) months' salary in compensation. In making this award, I have considered the Claimant's length of service as well as the Respondent's conduct prior to the termination.

23. I further award the Claimant one (1) month's salary in lieu of notice as provided in her letter of appointment. In the absence of any leave records to the contrary, the claim for 15 days' leave pay succeeds and is allowed. The claim for salary for 7 days worked in May 2014 is also allowed.

24. No basis was laid for the claim for salary for 10 years from May 2014 to April 2024 which therefore fails and is dismissed.

25. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....	Kshs. 1,794,132.00
b) 1 month's salary in lieu of notice.....	149,511.00
c) 15 days' leave pay .....	74,755.50
d) Salary for 7 days worked in May 2014.....	<u>34,886.00</u>
<b>Total.....</b>	<b>2,053,284.50</b>

26. This amount will attract interest at court rates from the date of judgment until payment in full.

27. The Claimant will have the costs of the case.

28. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF AUGUST 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Guserwa for the Claimant

Mr. Chacha Odera for the Respondent