



**REPUBLIC OF KENYA**

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

**CAUSE NO 1536 OF 2012**

**PHILIP CHEGE KARANJA.....CLAIMANT**

**VS**

**MTN BUSINESS (K) LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by Statement of Claim dated 31st August 2012 and filed in Court on even date seeks compensation for unlawful termination of employment. The Respondent filed a Memorandum of Defence on 7th November 2012. The Claimant testified on his own behalf and thereafter called his former supervisor, James Chege Macharia. The Respondent called its former Managing Director, Tom Oyugi Omariba.

**The Claimant's Case**

2. The Claimant states that he was employed by the Respondent in the position of Credit Control Assistant effective 15th April 2004. The Respondent initially traded in the name and style of *UUNET (Kenya) Limited* and later changed its name to *MTN Business (Kenya) Limited*. On 1st December 2008, the Claimant was promoted to the position of Credit Manager, a position he held until the termination of his employment on 1st November 2011.

3. According to the termination letter, the termination was on the ground of poor performance. The Claimant states that prior to the termination, he was not given an opportunity to defend himself. He further states that two weeks before the termination, he had been informed by his immediate supervisor, James Chege Macharia that the Respondent's Managing Director, Tom Oyugi Omariba wanted the Claimant to resign due to insubordination, actions threatening company business and slow action on legal issues relating to debt collection. Prompted by this information, the Claimant wrote to the Managing Director on 14th October 2011 giving a detailed account of the accounts he was working on. The Claimant did not receive any response and on 1st November 2011, his employment was terminated.

4. The Claimant's claim is as follows:

- a. A declaration that the termination of his employment was unlawful
- b. One month's salary in lieu of notice.....Kshs.133,888.00
- c. Compensation for unlawful termination.....2,888,147.36
- d. Costs plus interest

**The Respondent's Case**

5. In its Memorandum of Defence filed on 7th November 2012, the Respondent admits that the Claimant's employment was terminated on grounds of performance. The Respondent states that the Claimant was given an opportunity to defend himself and the account of his duties was considered as the decision to terminate his employment was being taken.

6. It is the Respondent's case that the termination of the Claimant's employment was within the terms of the employment contract.

### **Findings and Determination**

7. There are two issues for determination in this case:

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

### **The Termination**

8. The Claimant's employment was terminated by letter dated 1st November 2011 which states as follows:

*“Dear Philip*

#### **Termination of Service**

*We regret to inform you that your employment with MTN Business is terminated with immediate effect by the payment of one month's basic salary in lieu of notice. The reason for your termination is in relation to your performance.*

*Verbal warnings were given but we have observed that there were no improvements. Your final dues which include any unpaid salary and unutilised leave will be computed and paid to you.*

*Please follow the exit procedures and commence the handover process to your department and all the Business Units.*

*I would like to take this opportunity to thank you for working for MTN Business.*

*Yours sincerely*

**Tom Omariba**

***Managing Director”***

9. From this letter, the reason for the termination of the Claimant's employment was related to his performance. In the course of the trial, some form of misconduct in the nature of insubordination was mentioned. It would however appear that at the time the termination was formalised, this ground had been abandoned. The Court will therefore restrict itself to the ground disclosed in the letter of termination.

10. While the law recognises poor performance as a valid ground for termination of employment, an employer relying on this ground to justify a termination, must not only prove its existence but must also demonstrate opportunities given to the employee to improve.

11. As held in ***Kenya Science Research International Technical and Allied Workers Union (KSRTAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)*** 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. The Respondent's witness, Tom Oyugi Omariba

testified that the Claimant had, for a long time, been one of the Respondent's best employees but his performance had declined in 2011.

12. Also testifying on the Claimant's performance, James Chege Macharia who was his immediate supervisor told the Court that the preceding performance appraisals had returned positive verdicts. In fact, Macharia was surprised when Omariba told him that he was unhappy with the Claimant's performance.

13. Even just taking the testimony adduced on behalf of the Respondent with regard to the Claimant's performance, it is logical to conclude that something went wrong in 2011. Once the performance of a consistently good employee suddenly dips, the employer is obliged to find out why and to assist the employee to take remedial measures.

14. The Claimant's termination letter made reference to some verbal warnings but no details were offered and the Court was therefore unable to assess their intended impact on the Claimant's performance. At any rate, a warning is itself a disciplinary action and not necessarily a remedial measure.

15. 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.

16. In my view, disciplinary action based on poor performance must be preceded by a capability hearing within the parameters set out in Section 41. There was no evidence that the Claimant was given an opportunity to respond to the allegations of poor performance or even misconduct.

17. Omariba told the Court that sometime in October 2011, Macharia told him that the Claimant was seeking to meet him but by this time the decision to terminate the Claimant, though not formalised, had already been made. It seems to me that this decision was taken without giving the Claimant the opportunity to defend himself.

18. Consequently, the Court finds that the termination of the Claimant's employment was devoid of any valid reason and was in contravention of the procedure set out in law and the Respondent's own Code of Conduct. The termination was therefore substantively and procedurally unfair.

## **Remedies**

19. In light of the finding that the termination of the Claimant's employment was unfair both substantively and procedurally I award him seven (7) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice.

20. Cumulatively I make an award in favour of the Claimant in the following terms:

a. 7 months' salary as damages for unlawful termination.....  
.....Kshs.937,216

b. 1 month's salary in lieu of notice.....133,888

**Total.....1,071,104**

21. Claimant will have the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

22. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS**

**26TH DAY OF FEBRUARY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Okeyo for the Claimant

Mr. Echesa for the Respondent