2026 March | EMPLOYMENT

EMPLOYERS MUST PROVIDE PERFORMANCE IMPROVEMENT SUPPORT BEFORE TERMINATING EMPLOYMENT ON GROUNDS OF POOR PERFORMANCE

National Bank of Kenya v Mutonya [2019] KECA 404 (KLR)

1. Background:

1.1. The Respondent, Samuel Mutonya, was employed by the Appellant, National Bank of Kenya, as a clerical officer and rose through the ranks to the position of Branch Operations Manager. On 21 May 2014, the Bank terminated his employment with effect from 30 April 2014 on grounds of poor performance.

1.2. Following the termination of his employment, the Respondent filed a claim before the Employment and Labour Relations Court (ELRC) challenging the termination on the basis that the Bank failed to accord him a fair hearing before terminating his employment and failed to re-evaluate his performance in 2014 prior to the termination.

1.3. The Respondent further alleged that the termination was malicious and procedurally unfair. In particular, he claimed that the Bank failed to give him notice of the intended termination, failed to provide him with an opportunity to respond to the allegations of poor performance, and transferred him to another position with the intention of setting him up for termination. He also denied being informed of his performance ratings prior to the termination of his employment.

1.4. In its defence, the Bank acknowledged that the Respondent had been its employee prior to the termination. The Bank stated that, following a review of his work performance in 2013, the Respondent had been rated as having unacceptable performance. Consequently, the Bank placed him on a one-year Performance Improvement Plan (PIP). The Bank maintained that the Respondent failed to demonstrate improvement during the PIP period and was therefore terminated in accordance with his contract of employment, the Bank's performance management policies, and the relevant provisions of the Employment Act.

1.5. The Employment and Labour Relations Court held as follows:-

- the Bank terminated the Claimant's employment without giving him the required notice and without affording him a hearing;

- the reason given for the termination was not fair, just or genuine; and
- failure to comply with the procedural requirements under **section 41 of the Employment Act** renders a termination procedurally unfair, and the payment of salary in lieu of notice does not cure such procedural unfairness.

1.6. The Court therefore ordered that the Claimant be reinstated to his previous position. The Court further ordered that the Claimant be paid the wages and salaries that would have accrued from the date of termination until the date of reinstatement, so as to place him in the position he would have been in had the unfair termination not occurred. In reaching this decision, the Court noted that the Claimant had been employed by the Respondent for 22 years and had remained unemployed since his termination. The Court further observed that, at 44 years of age, the Claimant was unlikely to secure employment comparable to the position he previously held with the Bank.

1.7. The Bank appealed the Employment Court's decision to the Court of Appeal.

2. Court of Appeal's Determination

The Court of Appeal held as follows:

2.1. Whether the Bank Adopted the Correct Procedure When Terminating the Respondent's Employment

- Section 45 of the Employment Act provides that an employer shall not terminate the employment of an employee unfairly. A termination is deemed to be unfair where the employer fails to prove that the reason for termination was valid and fair, and that the termination was related to the employee's conduct, capacity, compatibility, or was otherwise carried out in accordance with justice and equity.

- Section 41 of the Employment Act requires an employer, before terminating an employee on grounds of misconduct, poor performance, or physical incapacity, to explain to the employee, in a language that the employee understands, the reasons for which termination is being considered. The employer must do so in the presence of a fellow employee or shop floor union representative chosen by the employee and must hear and consider any representations made by the employee in response.

- The Court found that the Bank failed to comply with the procedural requirements set out under the Employment Act before terminating the Respondent's employment.

2.2. Whether the Reason Advanced by the Bank for the Termination of the Respondent's Employment Was Valid

- The reason advanced by the Bank for terminating the Respondent's employment was poor performance. In assessing this issue, The Court adopted the principles set out in **Jane Samba Mukala v Ol Tukai Lodge Limited**

Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September 2013) the court held as follows:

- Where poor performance is shown to be a reason for termination, the employer is placed under a high level of proof as outlined in section 8 of the Employment Act. The employer must show that, in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

- The employer must show what measures were in place to enable them to assess the performance of each employee and, further, what measures they had taken to address poor performance. Once a policy or evaluation system has been put in place, it will not suffice to merely state that an employee was terminated for poor performance; the effort leading to that decision must be established.

- Beyond having such an evaluation measure, and before termination on the ground of poor performance, the employee must be called and an explanation of the poor performance shared, so that the employee is allowed to defend themselves or given an opportunity to address their weaknesses.

- In the event that a decision is made to terminate an employee on the basis of poor performance, the employee must be called again and, in the presence of a fellow employee of their choice, the reasons for termination shared with the employee.

The Court held that an appraisal ought to have been conducted on the Respondent's work performance in 2014 to confirm whether he had improved on his 2013 performance rating before the termination of his employment. In the absence of such proof, the termination was found to be unfair.

2.3. Whether the Remedies Awarded to the Respondent Were Justified

- The remedy for reinstatement is provided for under section 49 (3) (a) of the Employment Act.

- The factors to be considered by a court when determining whether reinstatement is an appropriate remedy for an aggrieved employee are set out under **section 49(4)(a) to (m)** of the Act.

- The trial court's rationale for awarding reinstatement was as follows:

  "Section 12(3) of the Employment and Labour Relations Court 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 his employment."

- The Court of Appeal was satisfied with the reasoning of the trial Judge and agreed that the circumstances of the case warranted an order of reinstatement. In particular, the Court noted that the fault lay with the Bank in failing to re-evaluate the Respondent's performance in 2014, as had initially been planned, before terminating his employment based on what the Bank described as unacceptable performance

- However, the Court held that the trial court erred in awarding the alternative remedy of back-payment of salary. Once the court granted the primary remedy of reinstatement, it had no mandate to also award the alternative relief of backdated salary payments.

Key Contacts

Anne Muema
Advocate / Managing Partner

Email: amutheu@mutieadvocates.com

Maureen Kubai
Associate

Email: mkubai@mutieadvocates.com

About Mutie Advocates

Mutie Advocates is a Nairobi-based law firm with a strong focus on legal compliance, data protection and privacy law, complemented by a broad range of legal services. Built on a foundation of legal excellence, the firm provides expert support in corporate and commercial law, employment and labour relations, intellectual property, litigation, dispute resolution and regulatory compliance. Known for its practical and client-centered approach, Mutie Advocates helps organizations navigate complex legal and regulatory landscapes through data audits, policy development and strategic legal advisory. The firm serves a diverse clientele, including individuals, corporates, non-governmental organizations and public institutions, delivering timely, effective and solution- oriented legal services.

Website: www.mutie-advocate.com
Phone: +254 768 042 180
E-mail: info@mutieadvocates.com
Address: Assi Centre, School Lane, Westlands
P O Box 211-00621, Nairobi

Disclaimer:

The views expressed in this article are for general guidance and should not be interpreted as legal advice. Mutie Advocates shall not be held liable for any reliance placed on this information without formal legal consultation. Always seek professional advice tailored to your situation.