



**Kilumbi v Barclays Bank of Kenya Limited (Cause 2364 of 2017)
[2024] KEELRC 1263 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1263 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2364 OF 2017**

L NDOLO, J

MAY 16, 2024

BETWEEN

MICHAEL ALWEMA KILUMBI CLAIMANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. On 21st April 2010, a customer showed up at the Respondent’s Rahimtulla Branch, with a request to withdraw Kshs. 14,000,000 from his bank account which was domiciled at Bunyala Road Branch. The customer found the Claimant, Michael Alwema Kilumbi, who was then serving as Branch Manager at Rahimtulla.
2. The transaction amount stirred the Claimant’s suspicion, who immediately raised a flag of possible money laundering. The Claimant made a report to the Respondent’s Financial Crime Unit and thereafter, escalated the matter to the Money Laundering Reporting Officer (MLRO), Samwel Kipsegei Lasoi.
3. Following a thread of communication between the Claimant and Lasoi and in the midst of what the Claimant referred to as pressure from the customer, the funds were paid out. Immediately after the funds were released to the customer, it emerged that the account from which the funds were drawn was a suspected conduit of money laundering. Disciplinary proceedings were initiated against the Claimant and in the end, his employment was terminated.
4. The Claimant’s case is that he escalated the matter as required and that he acted in accordance with instructions and guidance from the MLRO. Conversely, the Respondent accuses the Claimant of proceeding on a frolic of his own and in the process, exposing the Respondent Bank to sanction by the regulator of commercial banks, the Central Bank of Kenya.



5. The Claimant's claim is contained in a Statement of Claim dated 24th November 2017 and filed in court on 29th November 2017. The Respondent filed a Memorandum of Response and Counterclaim dated 9th April 2018 and amended on 25th November 2022. The Claimant's reply to the Respondent's Response and Counterclaim is dated 25th July 2018.
6. At the trial, the Claimant testified on his own behalf and the Respondent called Samwel Kipsegei Lasoi and Vaslas Odhiambo. Both parties also filed final submissions.

The Claimant's Case

7. The Claimant was employed by the Respondent Bank on 20th December 1993 at an entry level of Junior Clerk. He rose through the ranks to the position of Branch Manager, at the time of leaving employment on 16th June 2016.
8. On 21st April 2010, a customer of the Respondent, by the name Lawrence Moturi Ocharo, went to the Rahimtulla Branch and placed a request for a cash withdrawal of Kshs. 14,000,000.
9. The Claimant states that he had suspicions about the transaction and upon inquiry, the customer informed the Claimant that the money was intended for expenditure to be incurred in a recruitment exercise for prison officers.
10. The Claimant claims to have made a call to the then Prisons Commissioner General, Isaya Osugo, who is said to have confirmed that Lawrence Moturi Ocharo worked for the Kenya Prisons and that the transaction was in order.
11. The Claimant also reported the transaction as suspicious via an email to the Respondent's Financial Crime Unit. He further escalated the matter by an email dated 21st April 2016, by which he sought advice from the MLRO, one Mr. Lasoi.
12. Lasoi responded to the Claimant by an email dated 22nd April 2016 at 0823 HRS, informing him to obtain as much information as possible. By a subsequent email of the same day at 1109 HRS, Lasoi asked the Claimant to serve the customer in the normal manner.
13. The Claimant states that he placed an order for the cash required by the customer, which was to arrive at the Branch by 1500 HRS, on 25th April 2016. The cash was delivered on that day at 1316 HRS and the Claimant notified Lasoi by email, adding that the customer was at the Branch. The Claimant proceeded to pay the customer at around 1330 HRS.
14. At 1426 HRS, Lasoi sent an email to the Claimant directing him not to pay the money to the customer. The Claimant called Lasoi to inform him that the funds had already been released to the customer.
15. By letter dated 28th April 2016, the Claimant was suspended from duty. He was subsequently summoned to a disciplinary hearing, which took place on 7th June 2016. The Claimant's employment was thereafter terminated by letter dated 16th June 2016.
16. The Claimant contends that the termination of his employment was unfair, un-procedural and a guise of avoiding declaring the Claimant redundant owing to the intended closure of his Branch and downsizing of employees.
17. The Claimant claims that there was no complaint from the Kenya Prisons, the Ethics and Anti-Corruption Commission or the Central Bank of Kenya. He further claims that the Respondent Bank did not lose any money as a result of the transaction.
18. The Claimant seeks the following remedies:



- a. A declaration that the termination of his employment was unlawful and unfair;
- b. Aggravated damages for unfair termination of employment;
- c. Kshs. 3,197,472 being 12 months' salary in compensation;
- d. Kshs. 3,197,472 being severance pay for 24 years;
- e. Kshs. 266,456 being one month's salary in lieu of notice;
- f. Certificate of service;
- g. Costs plus interest.

The Respondent's Case

19. In its Memorandum of Response and Counterclaim dated 9th April 2018 and amended on 25th November 2022, the Respondent admits the existence of an employer-employee relationship between itself and the Claimant.
20. The Respondent however denies the Claimant's allegations that his employment was terminated unlawfully. The Respondent maintains that the disciplinary action taken against the Claimant was justifiable and fair.
21. The Respondent states that in view of the anti-money laundering procedures mandated by law and the Respondent's regulator, the Central Bank of Kenya, such a large amount as the one forming the subject matter of this dispute, could not be withdrawn in cash without express authorisation from the Respondent's Head Office.
22. The Respondent points out that the request to withdraw the large amount of money in cash rightly triggered the Claimant's suspicion. The Respondent adds that the Claimant himself, by an email dated 21st April 2016, raised an issue regarding a transaction from the subject account by the customer to his son.
23. The Respondent avers that the express instructions given to the Claimant on 22nd April 2016, were to inform the customer to collect the cash at 3.00 pm on the following Monday. The Respondent adds that these instructions were followed up by telephone calls between the Claimant and his line manager.
24. The Respondent accuses the Claimant of failing to follow these specific instructions and instead going on a frolic of his own by placing an order for the cash despite the absence of lawful authorisation to do so.
25. According to the Respondent, where requests for large cash withdrawals were concerned, the normal way of dealing with such requests was to await approval/authorisation from Head Office before permitting such a withdrawal. The Respondent avers that the Claimant wilfully neglected the performance of his duties in regard to the transaction, fundamentally breaching the terms of his contract of employment.
26. The Respondent defends the Claimant's suspension as lawful and adds that the Claimant was subsequently invited to a disciplinary hearing via letter dated 31st May 2016 by which he was informed of:
 - a. The reasons for which the Respondent was considering disciplinary action;
 - b. The Claimant's right to be represented/accompanied at the hearing;



- c. The Claimant's right to make representations.
27. The Respondent states that the Claimant made representations at the disciplinary hearing, which were taken into consideration before the decision to terminate the Claimant's employment was made. The Respondent defends its decision to terminate the Claimant's employment and states that the Claimant was informed of his right of appeal, which he did not exercise.
28. The Respondent asserts that the Claimant acted against express instructions lawfully given to him, which amounted to gross misconduct. The Respondent adds that the Claimant's actions placed the Bank at the risk of a penalty by its regulator, for money laundering breaches.
29. The Respondent's case is that the termination of the Claimant's employment was lawful and fair. In this regard, the Respondent denies the Claimant's allegation that the termination was a disguised redundancy.
30. By way of counterclaim, the Respondent states that on account of his gross misconduct in acting contrary to lawful instructions, the Claimant placed the Respondent Bank at the risk of suffering a penalty from the Central Bank of Kenya in respect of anti-money laundering breaches.
31. The Respondent therefore prays for; a declaration that it is entitled to reimbursement from the Claimant on account of any penalty it may suffer due to the Claimant's fundamental breaches of his terms of employment.

Findings and Determination

32. There are three (3) 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;
 - c. Whether the Respondent has made out a proper Counterclaim against the Claimant.

The Termination

33. The Claimant's employment was terminated by letter dated 16th June 2016, stating as follows:

“Dear Michael,

TERMINATION

Reference is made to the investigations and disciplinary hearing conducted on Tuesday, 7 June 2016 regarding suspicious over the counter withdrawal on 25th April 2016 of Kes 14 million which you authorized against policy and procedures. You acted contrary to lawful instructions from your immediate line and MLRO (money laundering reporting officer) not to pay the customer. I am satisfied that you acted contrary to your terms and conditions of employment, bank policies and procedures.

In view of gross misconduct of which summary dismissal is appropriate, the bank is not prepared to have you continue in its service and with effect from 16th June 2016 you are terminated in accordance with your terms and conditions of service and policies of the bank with payment of one month's notice pay.

You have the following loans as at 15 June 2016, which now become repayable on leaving the services of the Bank:



TABLE

TR

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LOAN ACCOUNT

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LOAN TYPE

TC{style border: 1px solid #000; width: 20%}

BALANCE

TR

TC{style border: 1px solid #000; width: 25%}

2029424023

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Staff Personal Loan-Secure

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643,804.50

TR

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2035052073

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Staff Unsupported Guarantee Loan

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3,735,987.80

Credit Card Balance will be advised on exit if any.

Please note that upon ceasing to be an employee of the bank, you will not be eligible to enjoy the preferential staff rate on your loans/accounts. Accordingly, you are hereby notified that the interest rate on your loans will be adjusted to the prevailing customer rates after 30 days from your last working day at the bank as follows:

The interest rate on your home loan shall be adjusted to KBRR (currently at 9.87%) plus a margin of 4%-8%.

The interest rate on your personal loan shall be adjusted to KBRR (currently at 9.87%) plus a margin of 7%-12%.

Please note that these interest rates are variable and will change from time to time. Please contact the Collections Manager on the options available to you.

Attached is an exit interview form for your completion which kindly forward back to us at the earliest opportunity.



You will be required to return all Barclays property, e.g. mobile phone, lap-top, Company Barclaycard, before your leaving date and I will discuss arrangements for this with you. Please also remember that contractual conditions about protecting confidential Barclays information remain in place after your leaving date, details can be found in the Staff Handbook or Code of Conduct.

Please note that any terminal dues owed to you i.e. Salary including today's pay, allowances; leave pay of 10 days will be earmarked to facilitate completion of the exit process and payments of amounts owed to the bank where applicable. You will be required to ensure that...the Leavers Checklist has been duly completed and a copy of the form returned to Human Resources department in order for the earmark to be lifted. You will retain the original copy of the Leavers checklist to progress completion of Part B and signoff by respective accountable functions. The duly completed and signed off form must be returned to Human Resources within 2 weeks of your exit date.

As a member of the defined contribution pension scheme, you are also entitled to withdraw your current Pension benefits as per the scheme rules. To facilitate this, please complete the attached claim form and return back to ourselves.

You are entitled to appeal against the decision by writing to the HR Director, stating clearly the reason for the appeal within 10 working days of receiving this letter.

Please sign and return a copy of this letter to me as acknowledgement of receipt.

Yours sincerely,

(signed)

Francis Obosi

Head of Prestige Banking

34. The facts of this case are not in dispute. What falls for determination by the Court is whether the Claimant, in his capacity as the Branch Manager at the Respondent's Rahimutalla Branch at the material time, breached bank policies and procedures on handling of a suspected case of money laundering.
35. It was common cause that the Claimant was the one who first raised an issue with the subject transaction and therefore sought guidance from the Respondent's MLRO. It was also agreed between the parties that there was a thread of communication between the Claimant and the MLRO, from the time the customer showed up at Rahimtulla Branch up until the time it was established that the account from which the funds were paid was a suspected conduit of money laundering.
36. The Claimant claims to have made the decision to pay the customer on the instructions of the MLRO. In this regard, he relies on an email sent to him by the MLRO on 22nd April 2016 at 1109 HRS by which he was asked to serve the customer in the 'normal manner', which it would appear, the Claimant construed as instructions to pay. According to the Respondent, the Claimant's construction in this regard, was completely off the mark.
37. The Claimant claims to have been under pressure to process the transaction and goes ahead to refer to a telephone conversation between him and the then Prisons Commissioner General, Isaya Osugo, who is said to have confirmed that the customer who went by the name, Lawrence Moturi Ocharo, worked for the Kenya Prisons and that the transaction was in order. The Claimant testified that he was informed that the funds were meant for a recruitment exercise for prison warders and the reason for the rushed withdrawal was to curb corruption in the exercise.



38. The Claimant told the Court that Rahimtulla Branch did not have the required cash in its vaults and he therefore had to place an order for it, with an arrival date of 25th April 2016 at 1500 HRS. For some reason, the cash was delivered earlier at 1316 HRS, by which time the customer was already at the Branch and by 1330 HRS, the funds had been paid out.
39. The Court was perturbed; first, as to how such a large amount of public funds found its way into a personal bank account and second, the ease with which the funds left the Respondent Bank. Commercial Banks such as the Respondent, play a pivotal role in ensuring financial stability within the economy, and they must therefore be held to the highest degree of probity.
40. In determining whether an employer has a valid reason for terminating the employment of an employee, the Court applies the reasonableness test to the particular circumstances of the case. In its final submissions, the Respondent made reference to the decision in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR where it was held:
- “In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken...All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists...what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.”
41. In the present case, the Claimant, being aware of suspected money laundering involving a public agency, ought to have exercised more care; in fact, the Claimant himself appears to have been aware of this because in his first recorded statement, he states that he regrets making the payment. He began well by making a report to the Financial Crime Unit and escalating the matter to the MLRO but appears have crumpled under pressure to satisfy the customer. He thus failed the test of a steadfast banker and his employer had a valid reason for terminating his employment. With this finding, the Claimant’s averment that the termination was a disguised redundancy is rejected.
42. The next logical question is whether in effecting the termination, the Respondent observed the procedural fairness requirements established by Section 41 of the *Employment Act*. This provision provides as follows:
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 employer shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
 2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
43. There is evidence that the Claimant was asked to provide a written explanation on the payment made by him, after which he was suspended with full pay. In its submissions, the Respondent recognises



that the Claimant was not issued with a notice to show cause, citing Clause 5.3.1.2 of its Disciplinary Capability and Grievance Policy and Procedure which provides that a show cause notice is issued with respect to offences that do not warrant investigations. The Respondent maintains that the non-issuance of a show cause notice was in accordance with its internal policy.

44. Although issuance of a show cause notice prior to a disciplinary hearing is good human resource management practice, failure to issue one is not fatal. In every case, what the Court is concerned about is whether the employee had adequate notice of the charges against them, with enough lead time to prepare their defence.
45. In this regard, I am persuaded by the decision in Kenya Plantation Workers Union v Eastern Produce (K) Limited [2022] KEELRC 1302 (KLR) (21 July 2022) (Judgment) where it was held that a notice to show cause is not mandatory unless it is provided for under the applicable contract of service, collective agreement or the employer's Human Resource Policy and Procedures Manual. In the present case, I am satisfied that the procedural fairness dictates under Section 41 of the *Employment Act* were met.
46. Overall, I find and hold that the termination of the Claimant's employment was substantively and procedurally fair.
47. The claims for damages, compensation, severance pay and notice pay are therefore without basis and are disallowed.
48. In the end, the Claimant's entire claim fails and is dismissed with an order that each party will bear their own costs.
49. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MAY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Change for the Claimant

Ms. Ngige for the Respondent

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