

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 123 OF 2019

FRANCIS NDUATI NDUNGU.....
.....CLAIMANT

VERSUS

**KINGDOM BANK LIMITED (SUCCESSOR
IN TITLE TO JAMII BORA BANK LIMITED)**
RESPONDENT

JUDGMENT

The Claimant filed suit on 27/2/2019 seeking the following reliefs against the Respondent: -

- i) Declaration that the summary dismissal of the Claimant was substantively and procedurally wrongful/unlawful/unfair.
- ii) The Claimant be reinstated and/or re-engaged to his former position or equivalent without loss of any benefits and/or break in years of service as the Claimant is young, energetic and the employer has several branches to post him.
- iii) The Claimant be paid twelve (12) months gross salary compensation for suffering wrongful/unfair termination totaling to Kshs. 1,034,820.00 i.e. (Kshs. 86,235 CBA rate x 12 months).
- iv) The Claimant be paid all the underpayments canvassed and as herein:
 - a) Basic salary and house allowance underpayments equivalent to Kshs. 1,400,622.00

- b) Compensation for 14 working annual leave day's unpaid equal to Kshs. 41,857.00.
- c) Compensation for annual leave allowance unpaid being 4 years x Kshs. 9,100.00 equal to Kshs. 36,400.00.
- d) The total claim for underpayment under iv(a) to iv(c) being Kshs. 2,599,934.00
- e) Interest from the date of filing the claim till payment in full.
- v) The Respondent to adjust the Claimant's terms and conditions of service as provided for in the Collective Bargaining Agreement.
- vi) Cost of the claim to the Claimant.

The Claimant testified under oath as CW1 and adopted a witness statement dated 21/2/2019 as his evidence in chief. The Claimant was employed by the Respondent bank by a letter dated 3/3/2013 as a Micro Loan Officer and posted to Kayole Branch. The Claimant earned a gross monthly salary of Kshs. 30,000.00.

The Claimant's role was to issue loans, monitor loans and recovery of loans from customers. The Claimant was employed on permanent and pensionable basis.

CW1 stated that his salary was reviewed upwards and earned Kshs. 44,875.00 per month as at January 2015. CW1 attributed this to his good performance.

CW1 said that on 20/8/2015, he was transferred from Kayole Branch to Koinange Street Branch in the Central Business District (CBD) as a

relationship officer. That his new role included customer growth; deposit mobilization; asset/loan book growth; customer service and default management. That he attended several in house training and was performing well.

On 2/8/2016 the Claimant was suspended from work pending investigations. The Claimant was paid half salary during the suspension. During that time, the Claimant was to report to the Audit office directly every Monday morning until the matter was finalized. The Claimant was not allowed to access any other department or office.

The Claimant testimony, was that he was not served with any statement of charge or notice to show cause (NTSC) while on suspension.

That the Claimant was not called to any disciplinary hearing and that the Claimant received a letter of summary dismissal.

CW1 testified that the summary dismissal was for alleged gross misconduct but no details of the said gross misconduct and breach of bank policies and procedures were given to the Claimant.

CW1 stated that the investigations involved a customer of the bank by the name Fly Eagles who had gone to seek finance in a different bank (NIC Bank) and had presented a statement for the Respondent bank. That a staff from NIC Bank visited Koinange Branch of the Respondent to verify if the said statement was genuine. That the statement of the said customer

was presented to the Customer service desk and same was transferred to the Claimant by one Annabel Nduta, a Customer Care staff.

CW1 said that the staff from the NIC Bank knew the statement was not genuine and the matter ended there. CW1 said it is normal banking practice in the banking industry to verify any bank statement presented from other banks and CW1 said he had gone to other banks for that purpose including to NIC Bank.

CW1 said on 2/8/2016, he was asked to record a statement with the head of audit and explained his side of the story.

On 14/9/2016 the Claimant was called to the office of the Head of Human Resources and was given the letter of summary dismissal which stated that the Claimant was guilty of gross misconduct and breach of Bank Policies and Procedures.

CW1 said the letter did not have any details of the alleged offence. Claimant said he was not aware of any breach of bank policy or procedure he had committed.

CW1 said his rights were violated since he was given no hearing before the summary dismissal. The letter did not contain any reason for the action taken by the Respondent. CW1 said he had enrolled for a Bachelor's Degree in Commerce at KCA University but was not able to continue due to the unlawful dismissal. CW1 said his career was ruined.

CW1 added that he was unionisable but was not paid in terms of Collective Bargaining Agreement in place in the banking industry.

CW1 seeks payment of underpayments set out in the statement of claim with regard to basic salary and house allowance. CW1 also claims payment of leave allowance not paid during the four (4) year's annual leave he had taken.

Claimant seeks one month notice pay, costs of the suit and interest.

Under cross-examination by Advocate Dechi for the Respondent, the Claimant said he was suspended by a letter dated 2/8/2016 to allow investigations to alleged sharing of company information with a 3rd party. That the letter of summary dismissal is dated 14/9/2016.

CW1 said he produced a CBA which entitled the Claimant to housing allowance per clause A2 at page 18. That the CBA is dated 10/9/2015. Claimant said he was a member of BIFU, union. That no union dues were deducted by the Respondent from his salary despite request.

That the CBA existed before the year 2015 and it binds the employer in respect of all unionisable employees. That his salary computation is from March 2012 and was for 2012, 2013, 2014 and 2015.

Defence

The Respondent called RW1 John Wamwati to testify in defence of the case. He testified that he was head of Human Resource Department. RW1 adopted a witness statement dated 16/5/2019 as his evidence in chief and

produced exhibits '1', '2' and '3' dated 16/5/2019 as part of his evidence in chief.

The Respondent filed a statement of defence and a counter claim in respect of which RW1 adduced evidence.

RW1 stated that the Claimant was at all material times aware of the particulars of his actions which amounted to gross misconduct and which had resulted to a fundamental breach of the bank's policies and procedure.

That the Claimant was given opportunity to be heard and had defended himself before a disciplinary committee, where he explained his misconduct, but the committee was not satisfied and made a decision to dismiss the Claimant from employment. That the Claimant had 10 days to appeal to the Chief Executive Officer of the Respondent but he did not.

With regard to the CBA, the Claimant did not inform the Respondent that he was a member of any union including the Banking Insurance and Finance Union (BIFU). That Claimant has produced no evidence that he was a subscribed member of the union and in particular no information was given to the Human Resource Department. That no union has ever written to the Respondent to notify that the Claimant was their member.

That no forms set out in the third schedule by dint of section 48 of the Labour Relations Act,2007 has ever been served upon the Respondent by either the Claimant or the union.

That the CBA, the Claimant relies on commenced on 10/9/2015 exactly one year before the dismissal of the Claimant from employment. The Claimant was employed on 18th March 2013, and seeks to have the CBA applied to his terms and condition of service retrospectively. That the CBA before court states under clause A2 that it was for a period of 24 months commencing 1st March 2015. That at the time the suit was filed, the CBA had lapsed.

That the Claimant had an employment Agreement with the bank and the Claimant earned a consolidated salary inclusive of house allowance and all other statutory deductions were made.

That the Claimant had only 15 leave days pending at the time of dismissal and the Respondent paid him in lieu of the leave days together with all other terminal benefits.

Counter Claim

The Claimant applied for a staff loan facility from the Respondent in the sum of Kshs. 225,000.00 for purposes of personal development and to pay off current loan balance. The loan agreement dated 6/1/2016 was entered into by the Respondent and the Claimant in which the Respondent offered the said loan facility to the Claimant.

That the loan was payable for a period of 48 months unless otherwise demanded by the bank.

That the Claimant defaulted in repayment of the said loan facility and as a result a sum of Kshs. 314,164.12 remained due and owing from the Claimant as at 8/5/2012 which sum continue to accrue interest at the rate of 14% per annum from 9/5/2019 until payment in full.

That the Respondent has made demands and request to the Claimant to pay the said loan in vain.

The Respondent therefore prays that the court award the Respondent judgment against the Claimant for repayment of Kshs. 314,164.12 as at 8/5/2019 with interest at the rate of 14% until payment in full. The Respondent also prays for costs of the suit.

RW1 produced the loan application letter and the loan offer made to the Claimant. In terms of the letter of offer, the loan was repayable at 15% per annum on reducing balance.

RW1 also produced the account statement of the Claimant for the period 1/1/2014 to 10/5/2019 indicating the loan balance as at 8/4/2019 of Kshs. 314,164.12.

The Respondent prays accordingly.

Under cross-examination by M/s. Kubai Advocate for the Respondent, RW1 said he was a stranger to the CBA produced by the Claimant. RW1 admitted that the Respondent bank was a member of BIFU and that Kenya Bankers Association (KBA) negotiated terms of service of all unionisable employees of the banks. RW1 said that the Respondent had not

implemented the CBA at the material time and that the Bank was in the process of doing so now.

RW1 said that the Respondent did not deduct union dues from its employees. RW1 admitted that no reasons for suspension were given. RW1 admitted that the Claimant was not issued with notice to show cause to respond to. RW1 admitted also that there was no record of notice to attend a hearing and none was held. RW1 said the Claimant was paid consolidated salary and BIFU was not a party to this suit. RW1 said that the letter of appointment did not mention house allowance and the Claimant was not housed.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with the evidence by CW1 and RW1. The issues for determination are: -

- (a) Whether the Respondent had a valid reason established vide a fair procedure to summarily dismiss the Claimant.
- (b) Whether the Claimant is entitled to the reliefs sought.
- (c) Whether the Respondent has proved the counter claim and entitlement to the reliefs sought.

A careful analysis of the evidence adduced by the Claimant against Respondent vis a vis that adduced by the Respondent has led the court to find that the following material facts set out by the Claimant and admitted by RW1 have been proved, on a balance of probability: -

That the Claimant was employed by the Respondent with effect from 18/3/2013 as a Micro Loan Officer at Kayole Branch and was later transferred to Koinange Branch. That as at the time of separation with the Respondent on 14/9/2016, the Claimant earned a monthly gross salary of Kshs. 46,875.00.

That the Claimant received a letter of suspension dated 2/8/2016. That the said letter did not provide any reasons for the suspension. The suspension pending investigation was effective on the same date. The Claimant was placed on half salary from 2/8/2016 up to the date of summary dismissal on dated 14/9/2016.

The letter of summary dismissal only gave the reason for the summary dismissal to be gross misconduct.

It has been proved that the Claimant was not specifically given any notice to show cause letter nor was he given any notice of charges facing him.

It has also been proved that the Claimant was not invited to any disciplinary hearing to answer to the charges and the Claimant received the letter of summary dismissal while still under suspension on half pay.

On these facts alone that have been proved, the Respondent violated sections 36, 41, 43 and 45 of the Employment Act, 2007.

The Respondent has not proved that it had a valid reason to summarily dismiss the Claimant, established following a fair procedure. The Claimant

was not given any fair hearing at all and this violated the rules of natural justice, that no person shall be condemned unheard.

It is mischievous for RW1 to state that the Claimant accepted the dismissal because he did not appeal the decision to summarily dismiss him. The Claimant came to court as he was lawfully entitled to do.

In the case of *Pius Machafu Ishindu versus Lavington Security Guards Ltd [2017] eKLR*, the court held,

“The employer must prove the reasons for termination/dismissal (section 43), prove the reasons are valid and fair (section 45), prove that the grounds are justified (section 47(5), among other provisions. A mandatory and elaborate process is then set up under section 41 of the Employment Act requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and Civil Procedure Act/Rules.”

The court is satisfied that the summary dismissal of the Claimant was therefore unlawful and unfair for violating sections 36, 41, 43 and 45 of the Employment Act, 2007.

Compensation

The Claimant is entitled to compensation in terms of section 49(1)(c) and (4) of the Employment Act, 2007. In this regard, the Claimant did not contribute to the dismissal, the Respondent having not proved any valid reason for the decision. The Claimant was not compensated for the

unlawful loss of employment and income he suffered. The Claimant had served the Respondent for only 3 years. His growing career in banking was nibbed in the bud. A summary dismissal in the banking industry almost ensures no further employment in the industry which is closely knit under the Kenya Association of Bankers which of necessity shares information in the industry. The Claimant had just started developing himself and had taken a loan from the Respondent which he was unable to pay due to the unlawful dismissal. The Claimant was blacklisted by credit bureau, was still unemployed and unable to service the loan that continued to grow at 14% per annum. The loss to the Claimant is immense.

The maximum award of compensation which the court grants the Claimant, being the equivalent of 12 months' salary is even not sufficient to mitigate the loss suffered by the Claimant.

The court has considered the prayer for reinstatement sought by the claimant and found it unsuitable considering all the circumstances of the case especially this being the banking industry where utmost trust between parties is of essence.

Terminal Benefits

RW1 in his testimony under cross-examination stated that although the Respondent was a member of the Kenya Bankers Association, (KBA) which has a recognition agreement with the Banking Insurance and Finance Union (Kenya), (BIFU) the Respondent had not started implementing the Collective Bargaining Agreement (CBA) negotiated by KBA and BIFU on behalf of its unionisable employees. RW1 stated therefore that the Respondent was not aware that the Claimant was a

member of BIFU and so did not apply any of the concluded CBAs between – KBA and BIFU to the Claimant.

The Recognition Agreement before court was entered into between KBA and BIFU on 3/10/2000.

The Claimant produced a CBA entered into between KBA and BIFU on 10/9/2015. At Appendix 'A' of the CBA at No. 31, is listed "Jamii Bora Bank Ltd" which bank employed the Claimant by a contract dated 11/3/2013 and the bank was later taken over by the Respondent, a fact not in dispute. The Agreement offered the Claimant "a consolidated salary" of Kshs. 30,000.00 which was increased from time to time. The agreement also stated,

"The cost of all statutory including income tax, NSSF and NHIF is included in the gross salary and shall be deducted from the monthly salary before payment to you."

It is therefore without a doubt that the Claimant was offered, and accepted payment of a gross salary that included his house allowance. The Claimant did not protest this remuneration until his separation with the Respondent. The Claimant did not also write to the Respondent indicating that he was a member of BIFU and that his remuneration should be aligned with that negotiated for staff of his cadre with KBA. The Claimant makes claims of underpayment from date of employment on 11/3/2013. This suit was filed on 27/2/2019.

The claims of underpayment of house allowance, if even were genuine in the first place are time barred. That dispute would have arisen from day one of the employment on 18/3/2013. The same was not raised by the

Claimant until his employment was terminated on 14/9/2016 more than three years later upon termination on 14/9/2016. That claim was not first raised by a letter of demand by the Claimant's Advocates dated 14/1/2019.

Accordingly, this claim is time barred by dint of section 90 of the Employment Act, which provides

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”

Therefore, a claim based on contract must be filed before court within 3 years from the date the cause of action arose. The three years had lapsed as at the date of summary dismissal on 14/9/2016.

Even if this cause of action is deemed to be a continuous injury within the meaning of the provision to section 90 aforesaid, the suit should have been filed on or before 14/9/2017 within 12 months period from the date of summary dismissal when the continuous injury ceased.

Accordingly, the claim for underpayment of house allowance from 18/3/2013 to 14/9/2016 is time barred and is therefore struck off for lack of jurisdiction to entertain the same.

Collective Bargaining Agreement

The under payments with regard to the application of the negotiated terms in the CBA from 18/3/2013 to 14/9/2016, is also time barred by dint of section 90 as stated above. In any event, this claim lacked merit having not been raised at all during the tenure of employment of the Claimant.

Payment in lieu of leave days per the CBA

Equally, this claim of payment in lieu of the extra days provided in the CBA being 28 working days, annual leave instead of 24 days provided in the contract of employment is also time barred by dint of section 90 of the Employment Act, 2007. This applies also to the claim for annual leave allowances set out in the memorandum of claim. These claims are struck-out for lack of jurisdiction to deal with them.

Notice pay

The Claimant was not given notice nor was he paid in lieu of notice. The Claimant is therefore entitled to payment of Kshs. 46,825.00 in lieu of notice.

Counter Claim

The Claimant has no defence against unpaid loan as at the date of the unlawful summary dismissal on 14/6/2016

The court has found that the unlawful and unfair summary dismissal grossly caused the Claimant loss of employment, income and livelihood. That he was still unemployed and had been blacklisted by the credit bureau

greatly prejudicing his chance of getting new employment or even doing any gainful business until he was cleared.

It would be inequitable and unconscionable for the Respondent to be awarded any interest earned from the principal loan amount from the date of the unlawful termination. The repayment of the loan was premised on the lawful employment of the Claimant and the trust that he would earn income from the Respondent to service the loan.

Accordingly, the court finds that, the Claimant is only entitled to payment of the loan amount as at the date of termination excluding any accrued interest by fact of default, attributable to the unlawful conduct of the Respondent. The court so finds.

Accordingly, the court makes the following final judgement: -

- (a) The Claimant is awarded the equivalent of 12 months' salary in compensation for the unlawful summary dismissal in the sum of Kshs. $(46,875 \times 12) = 562,500.00$
- (b) The claimant is awarded refund of half salary from the date of suspension to the date of dismissal, being 42 days in the sum of ksh. 40,362
- (c) The Claimant is awarded Kshs. 46,875.00 in lieu of one-month notice.
Total amount Kshs. 649,737
- (d) Interest at court rates from date of judgment till payment in full.
- (e) Costs of the suit

Counter Claim

- (i) The Claimant is to pay the balance of the loan amount that was due and payable as at the date of summary dismissal on 14/9/2016. The period from 14/9/2016 to date of this judgment is deemed as frozen for purposes of adding any accrued interest on the owed amount as at 14/9/2016.
- (ii) The decretal amount awarded to the Claimant is to be offset against the loan amount owed to the Respondent as at 14/9/2016.
- (iii) Interest of the sum owed as at 14/9/2016 to be reckoned @ 14% per annum on the balance if any upon offsetting the award to the Claimant against the owed loan as at 14/9/2016.
- (iv) The Respondent is entitled to the cost of the counter claim.

Dated at Nairobi this **20th Day of November 2025.**



Mathews Nduma

JUDGE

Appearance:

Mr. Kubai for Claimant

Mr. Dechi for Respondent

Mr. Kemboi – Court Assistant