

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. 1295 OF 2018**

**BERNARD                      MUNANU.....**  
**CLAIMANT**

**VERSUS**

**EQUITY                                      BANK                                      (K)**  
**LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. For determination is the Claimant's Memorandum of Claim dated 6<sup>th</sup> August, 2018, and filed on 8<sup>th</sup> August, 2018. Under the claim, the Claimant seeks the following reliefs as against the Respondent: -
  - a) A declaration that his dismissal was unfair
  - b) 12 months' pay
  - c) 1 month's pay in lieu of notice
  - d) Order for damages for violation of the Claimant's right to privacy and confidential relationship with Equitel, and for unlawful dismissal.
  - e) Costs of this suit
  
2. The Respondent entered an appearance on 4<sup>th</sup> September, 2018, and filed a Response to Claim dated 5<sup>th</sup> September, 2018.

3. The Claimant's case was heard on 13<sup>th</sup> March, 2025, when he testified in support of his case, adopted his witness statement, and produced his list and bundle of documents as exhibits in the matter.
4. The Respondent's case was subsequently heard on 22<sup>nd</sup> September, 2025, when one Michelle Bakhita testified in support of the Respondent. She adopted her witness statement and produced the Respondent's documents as exhibits in support of its case.
5. Submissions were filed for both parties and have been duly considered.

### **The Claimant's Case**

6. The Claimant states that he was employed by the Respondent on 1<sup>st</sup> February, 2002, and rose through the ranks to the position of Growth and Development Manager by the time of his dismissal on 4<sup>th</sup> May, 2018.
7. He avers that he served diligently and without any disciplinary record, either verbal or written, for the period he worked with the Respondent. He states that he was transferred from Nairobi to Nkubu, Meru, in January 2018.
8. It is his case that on 19<sup>th</sup> April, 2018, he received a letter to show cause why disciplinary action should not be taken against him on allegations of being absent from work for more than four days, and which he was required to respond to within one day. The Claimant states that he responded to

the show cause and that a disciplinary hearing was held on 25<sup>th</sup> April, 2018, and 3<sup>rd</sup> May, 2018. He avers that he was informed of his right to have a union member present or another member of staff, as he was not a union member, and that he chose to proceed on his own.

9. The Claimant states that at the commencement of the proceedings he was compelled by the committee to disclose his equitel mobile number location, and without his consent proceeded to use the location to find out where he was on the days of his alleged absence, and again without his consent used the information to determine that he was not at the office at Nkubu for 4 days, a matter which he admitted.
10. The Claimant states that he had serious domestic issues and hence the reason for his absence, but despite this, the disciplinary committee on 4<sup>th</sup> May, 2018, decided to terminate his services and paid his salary and leave up to the date of termination.
11. It is his case that he was informed in the dismissal letter that he could appeal to the Managing Director within 14 days with evidence supporting the appeal, but did not, as he had already provided his evidence to the disciplinary committee.
12. The Claimant avers that, having worked for the Respondent for 16 years, he is aggrieved by the decision to terminate

his services, and contends that the termination is unfair and against the Employment Act.

13. The Claimant states that no consideration was given to his length of service and the fact that he had no previous disciplinary issues, warnings, or concerns about his performance.

14. It is his position that his defence was not considered.

15. The Claimant further avers that the Respondent violated his right to privacy by compelling him to supply cellphone numbers of his Equitel and Safaricom lines to establish his location on the material day without his consent. He contends that Safaricom declined to provide the location without a court order.

16. It is his case that his salary at dismissal was Kshs.138,682.50 plus a 10 per cent responsibility allowance, coming to a total earning of Kshs.152,748 per month.

17. The Claimant further states that had he not been unfairly dismissed, he would have earned his salary until his retirement at 65 years according to the Bank Regulations. He avers that he owed a bank loan of Kshs. 5,200,000/-, for which he was being charged 8 percent interest, but which, under the Bank Regulations, would now be charged at 13 percent due to the dismissal.

18. On cross-examination, the Claimant told the court that the reason for his termination was absence from duty. He

confirmed that he worked at a financial institution that demanded high integrity and that he was the branch manager.

19.The Claimant confirmed that, according to the Respondent's Policy, absence from duty for 3 days is a ground for summary dismissal. He further confirmed on cross-examination that he was absent from duty for 4 days and that he had no permission to be away.

20.The Claimant further told the court on cross-examination that he served the Respondent for 16 years without any disciplinary records and that the employer/Respondent should have given him another chance.

21.He confirmed that he was given an opportunity to explain his absence and that he lied that he was at work, though he was able to prove that he was only absent for 4 days and not 9 days as claimed by the Respondent.

22.It is the Claimant's testimony that he provided call logs for his Equite line but did not file suit for breach of privacy.

23.The Claimant prays that the court allow his claim and award him the reliefs sought.

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

24.The Respondent states that the Claimant was their employee employed on 1st February, 2022. It admits that

the Claimant was transferred to Nkubu but denies that he carried out his duties diligently.

25. The Respondent further states that on 19<sup>th</sup> April 2018, it issued the Claimant with a Notice to Show Cause, requiring him to explain why disciplinary action should not be taken against him for unlawfully being absent from duty on 12<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 26<sup>th</sup>, and 27<sup>th</sup> March, and on 4<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> April 2018. It avers that the show cause notice was legal and proper, as the Claimant was absent from duty without leave or permission from the Respondent.

26. The Respondent states that on 19<sup>th</sup> April 2018, the Claimant responded to the notice to show cause, stating that he had been at work and provided a schedule of his workstations for the dates in question.

27. It is the Respondent's case that it complied with all the legal procedures pertaining to disciplinary hearings.

28. It avers further that during the proceedings, the Claimant was found to have lied to the panel and ultimately admitted to dishonesty and unlawful absence from work.

29. The Respondent states that based on the disciplinary proceedings, the panel found the Claimant to be untruthful, unlawfully absent from work, and to have failed to seek the Respondent's support regarding his alleged difficulties. It states that the panel recommended termination of his employment for unauthorized absence.

30.The Respondent maintains that the Claimant's actions were in blatant disregard of the terms and conditions of his employment contract and the Respondent's work ethics.

31.The Respondent further states that on 4th May 2018, it issued the Claimant a termination letter effective that date, citing absconding from duty on 26th and 27th March and 9th and 10th April 2018, as well as misleading the disciplinary panel about his whereabouts, and in the same letter, informed him of his right to appeal, but he did not do so.

32.The Respondent states that the Claimant was paid all his dues and issued a certificate of service.

33.It avers that the Claimant was not compelled to provide his call logs and that he provided them of his own volition.

34.On cross-examination, the Respondent's witness (RW1) confirmed that the Claimant served the Respondent for 16 years by the time of his dismissal. She further told the court that the Claimant was not issued any letter of warning or dissatisfaction in the 16 years prior to his dismissal.

35.RW1 further told the court that the Respondent's Policy requires that a warning be given and that his misconduct is categorized as gross misconduct. It is her evidence that the minutes of the disciplinary hearing do not show that the Claimant's length of service was taken into consideration.

36.The Respondent finally avers that the Claimant's termination of employment was lawful, as he was accorded a fair and just hearing.

### **Analysis and Determination**

37.Upon careful consideration of the parties' pleadings, the witnesses' oral testimonies, and the rival submissions, the following issues arise for determination: -

- a) Whether the suit is fatally defective
- b) Whether the Claimant was unfairly dismissed
- c) Whether the Claimant's right to privacy was violated
- d) Whether he is entitled to the remedies sought.

### **Whether the suit is fatally defective**

38.The Respondent's position is that the suit herein is fatally defective and incompetent and ought to be struck out on the premise that the Memorandum of Claim is accompanied by a verifying affidavit sworn by a person other than the Claimant, and who purports to depone as the Claimant. It contends that the defect goes to the root of the proceedings, as the suit has not been verified by the proper party as required by law, rendering it incurably defective and incapable of sustaining the claim before the Court.

39.A glance at the said verifying affidavit confirms that the name at the opening paragraph is that of Chemutai Catherine Kirui, while the deponent is indicated as Bernard Munanu, the Claimant herein.

40. While it is evident that the verifying affidavit carries different names, it is now settled that errors in a verifying affidavit, such as a wrong name, misdescription, or clerical mistakes, do not by themselves render a suit incompetent, provided the identity of the deponent can be ascertained, and no prejudice is suffered by the opposing party. In ***Microsoft Corporation v Mitsumi Computer Garage Ltd & Another [2001] eKLR***, the Court of Appeal held that defects in a verifying affidavit are procedural irregularities curable by amendment and should not lead to striking out a suit unless they go to the substance of the claim.

41. Further in ***Research International East Africa Ltd v Julius Arisi & 213 Others [2007] eKLR***, the court emphasized that striking out pleadings is a draconian remedy and should only be resorted to in clear cases where the defect is incurable.

42. In the instant case, the court has already taken the Claimant's evidence on oath, which means that the identity of the deponent can, and has been, ascertained.

43. The court notes that this issue was not raised earlier, but was only raised through the Respondent's submissions, and the Claimant, having already filed their submissions, did not have an opportunity to respond.

44.The error in the verifying affidavit herein is ordinarily curable by amendment or by filing of a proper affidavit had the Respondent raised the issue earlier.

45.It is also not lost on this court that Article 159(2)(d) of the Constitution of Kenya, 2010, enjoins courts to administer justice without undue regard to procedural technicalities.

46.The Respondent, having raised the issue only in its submissions, the court is reluctant to strike out the suit on that ground alone.

#### **Whether the Claimant was unfairly dismissed**

47.A dismissal/termination is considered wrongful/unfair, where the employer fails to adhere to the twin tenets of fair procedure and the substantive justification test in dismissing/terminating an employment contract.

48.Section 41 of the Employment Act requires that an employer notify an employee of the charges against them and allow the employee an opportunity to respond, and further guarantees an employee's right to be accompanied by a shop floor steward or fellow employee during the disciplinary hearing.

49.It is not disputed that the Claimant was issued a Notice to Show Cause dated 19th April 2018. It is also agreed that the Claimant responded to the show cause notice in writing vide his letter of 19th April, 2018.

50. It is evident that the show cause letter is dated 19<sup>th</sup> April, 2018, and that the Claimant's response was expected on 21<sup>st</sup> April, 2018, just a day after the issuance of the show cause.

51. Although the Employment Act does not provide a specific number of days within which an employee must respond to a notice to show cause, Section 41 of the Act emphasizes procedural fairness, which, in my view, includes a reasonable period to respond to a show cause. Courts have variously held that extremely short periods of 1-2 days to respond to a show cause are unreasonable.

52. In ***Otieno v Unilever Kenya Limited, Cause 1730 of 2017, [2023] KEELRC 303 (KLR) (2 February 2023)***, the court held that where no specific timeframe was set in a policy, the employee still must be given a reasonable time, and found 2 days to be inadequate.

53. In the same breath, I find and hold that the 1 day given to the Claimant herein to respond to the show cause was inadequate and rendered the dismissal procedurally unfair, and so I hold.

54. The court record supports the Respondent's assertion that two disciplinary hearings were conducted on 25th April and 3rd May 2018, and that the Claimant was informed of his right to representation and that he elected to proceed without a representative. It is also evident that the

Claimant was informed of his right of appeal, which he chose not to exercise.

55. On the Claimant's contention that his length of service was not taken into account, it is not disputed that he gave the Respondent 16 years of unblemished service. RW1 further admitted that no prior warnings had been issued, and the disciplinary minutes do not reflect consideration of the Claimant's length of service. In ***Kenya Ports Authority v Fadhil Juma Kisuwa [2017] eKLR***, the Court of Appeal held that while an offence may amount to gross misconduct, an employer is still required to act proportionately and consider mitigating factors such as long service and a clean record.

56. Further in ***Walter Ogal Anuro v Teachers Service Commission [2013] eKLR***, the Court held that procedural fairness includes not only a hearing, but also a genuine consideration of the employee's defence and mitigating circumstances.

57. In the upshot, I find and hold that the Claimant's dismissal from the service of the Respondent was procedurally flawed on account of the time given to respond to the show cause notice and the Respondent's failure to consider the Claimant's long and clean record of service contrary to Section 45(5)(f) of the Employment Act.

58. On whether the Respondent had fair and valid grounds to dismiss the Claimant from service, the reason given for the

dismissal is absence from duty. Section 43(1) of the Employment Act, 2007, places the burden on the employer to prove the reason for termination, while Section 45(2)(a) & (b) demands that the reasons are valid, fair, and related to the employee's conduct, capacity, or compatibility.

59. Further, Section 44(4)(a) recognizes absence from work without leave or lawful cause as gross misconduct.

60. The evidence before the court is consistent and largely uncontested that the Claimant was absent from duty for at least four (4) days without permission. He admitted on cross-examination that absence from duty for more than three days constituted gross misconduct under the Respondent's policy, that he had no permission to be away, and that he misrepresented to the disciplinary committee that he was at work.

61. In my considered view, unauthorized absence, particularly by a senior managerial employee in a financial institution, goes to the core of trust and integrity. In ***Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others [2019] eKLR***, the Court of Appeal emphasized that dishonesty and lack of integrity constitute valid grounds for dismissal, especially where the employer operates in a high trust environment.

62. Similarly, in ***Bamburi Cement Ltd v William Kilonzi [2016] eKLR***, the Court held that absenteeism without

leave is a legitimate ground for summary dismissal under Section 44.

63. In my view, the Claimant's explanation that he had domestic challenges does not excuse failure to notify the employer or seek permission to be away.

64. In the end, I find and hold that the Respondent has proved a valid and fair reason for dismissing the Claimant within the meaning of Sections 43 and 45 of the Employment Act.

**Whether the Claimant's right to privacy was violated.**

65. The Claimant's position is that he was compelled to provide his Equitel and Safaricom numbers, and that his call logs and location were accessed and used in the disciplinary process without consent.

66. In his testimony, however, the Claimant admitted that he voluntarily provided call logs for his Equitel line and that he did not institute a separate petition on the alleged violation of his right.

67. On its part, the Respondent's witness denied compulsion, and there is no evidence that the Respondent unlawfully accessed the Claimant's location data. In ***Samuel Njuguna Githinji v Attorney General [2016] eKLR***, the Court held

that a violation of privacy must be specifically pleaded, proved, and supported by evidence of unlawful intrusion.

68. Further, in ***Mombasa Water Supply & Sanitation Co. Ltd v KWW [2019] eKLR***, the Court emphasized that consent, whether express or implied, negates a claim of privacy violation.

69. The upshot is that the Claimant failed to prove that his right to privacy was violated, and this claim is dismissed.

### **Whether the Claimant is entitled to the remedies sought**

70. The Claimant sought a declaration that his dismissal was unfair, 12 months' pay, one month's pay in lieu of notice, an order for damages for violation of his right to privacy and confidential relationship with Equitel, and for unlawful dismissal and the costs of this suit.

71. The finding that the Claimant was unfairly dismissed entitles him to compensation in accordance with Sections 49 and 50 of the Employment Act 2007 (See ***Benjamin Langwen v National Environment Management Authority (2016) eKLR***).

72. In ***Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR***, it was held that the measures of compensation should be guided by the statutory capping at the time of termination. Further in ***Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR***, the court pointed out that an award of the maximum of 12 months'

pay must be based on sound judicial principles, and that the trial judge must justify or explain why a Claimant is entitled to the maximum award.

73. Considering the Claimant's 16 years of service to the Respondent, I deem an award of 9 months' salary sufficient compensation for the unfair dismissal.

74. The final dues paid to the Claimant at dismissal included 30 days' notice pay; hence, his claim for one month's salary in lieu of notice is declined.

75. The claim for damages for violation of his right to privacy fails on account of the finding that he has not proved a violation.

76. In conclusion, the Claimant's claim succeeds in terms of the following orders: -

- a) A declaration that the Claimant's dismissal from service was unfair on account of procedure
- b) That the Respondent shall pay the Claimant 9 months' salary as compensation for the unfair dismissal at Kshs.1,368,000/-
- c) That the Respondent shall bear the costs of the suit and interests from the date of this judgment until payment in full.

71. Judgment accordingly.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF JANUARY, 2026.**

**C. N. BAARI  
JUDGE**

**Appearance:**

Mr. Mugu present for the Claimant

Mr. Mabeya present for the Respondent

Ms. Esther S - C/A

ORIGINAL