

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**ELRC CAUSE NO. 43 OF 2020**

**MAHMOOD ADAM MOHAMED.....CLAIMANT**

**VS**

**AFRICAN BANKING CORPORATION.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent, contending that at all material times he was their employee, whom they summarily and unfairly dismissed after serving them for more than 24 years, and sought the following reliefs against them;

- a) A declaration that the termination of his employment was unlawful and illegal.
- b) Payment of severance pay of KShs. 1,920,000.
- c) Payment of overtime [extra] pay of KShs. 4,800,000.
- d) Payment of 3 months' salary in lieu of notice, KShs. 540,000.
- e) Costs of the suit and interest.

2. The Respondent entered appearance and opposed the claim via a Reply to the Claimant's Memorandum of Claim. They contended that the dismissal of the Claimant was fair, and that he is not entitled to the reliefs sought.

3. At the hearing, the parties adopted their respective witness statements filed herein as part of their evidence in chief, and tendered in evidence the documents filed under their various lists of documents, as their documentary evidence.

**The Claimant's Case**

4. It was the Claimant's case that he first entered the employment of the Respondent on 24th August 1994, as a Cashier cum Clerk, with effect from 1st August 1994. He rose through the ranks to the position of Operations Manager, a role he held until he was summarily dismissed. Throughout his employment, he worked diligently and without fault.

5. On 26th April 2018, the Respondent served him with a show cause letter alleging that he had contravened the Branch Operations Procedural Manual and Human Resource Policy. Two specific accusations were levelled against him in the letter: a) Irregular reversal of bank charges;

That he had initiated and sanctioned the reversal of 139 bank charges amounting to KShs. 14,300.00 for the accounts of MMA -A/c No. 003102000010521 and MTI- A/c

No. 003105000010098, without proper approval, thus contravening Operations Policy, section 11.1. b) Payment against uncleared effects; That he approved the payment of KShs. 53,000.00 to Sajjad Ali and USD 1,000.00 to Interplanet, which exceeded the approved limits of KShs. 50,000, set out in the bank's credit policy.

6. By his letter dated 30th April 2018, he responded to the show cause, asserting that the reversal and payment of the uncleared cheques were done in good faith and within his profile system rights.
7. On 25th June 2018, the Respondent dismissed him from employment, notwithstanding the explanation he had tendered. His appeal against the decision to dismiss him was subsequently dismissed.
8. He asserted that there was no sufficient reason to warrant a summary dismissal against him. As such, the dismissal was unlawful and in contravention of the Provisions of the Employment Act.
9. Cross-examined by Counsel for the Respondent, the Claimant testified that he had executed the Respondent's Service Rules and Regulations. The Regulations under Part 1, Clause 5 set out prohibited conduct, including not engaging in any business whatsoever for his benefit or that of his family.
10. Prior to the issuance of the show-cause letter, the Respondent had placed him under an investigatory suspension in respect of the two accusations mentioned in the letter. The show-cause letter was issued following the completion of the investigations.
11. He further testified that, in response to the allegation of irregularly reversing bank charges, he admitted having effected the reversals and acknowledged that this was contrary to the bank's operational procedures. Additionally, he admitted to the second accusation and confirmed that he acted in breach of the Credit Policy.
12. By his letter dated 14th May 2018, he was invited to a disciplinary hearing. In the letter, the Respondent expressly informed him of the date of the hearing, the accusations against him, and that he was at liberty to request any documents he deemed necessary for the hearing. He attended the hearing on 15th May 2018. Following the disciplinary hearing, the Respondent dismissed him from employment. The decision was communicated through the letter dated 25th June 2018.
13. The Service Regulations under clauses 7 [a] and [b] set out conduct that could attract summary dismissal. Summary dismissal could be without notice. The stipulation further provided one month's salary in lieu of notice, not three months as sought in his pleadings.
14. He testified that by his letter dated 19th November 2018, he asked the bank to use his terminal dues to offset his outstanding loan. In their document dated 24th May 2019, the Respondent did put forth a tabulation of his terminal dues. However, they have never given him a statement showing that the dues were applied to the loan repayment. He has never asked the bank to supply him with the same.

15. In his evidence on re-examination, the Claimant stated that the accounts affected by the reversal transactions belonged to his wife and daughter. He was a signatory to both accounts. As such, they were staff accounts, which were exempt from charges. Therefore, the reversals were justified in the circumstances.
16. All the sums that were paid against uncleared effects were recovered.

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

17. The Respondent presented one witness, Julius Muhia, its Human Resources Manager, to testify on their behalf. The witness stated that the Claimant was employed by the Respondent through a letter of appointment dated 24th August 1994, as a Cashier/ Clerk at a basic salary of KShs. 3,500 and a house allowance of KShs. 1,500 per month.
18. On 9th October 2015, the Claimant was appointed by the Bank as an Operations Manager on clearly defined terms of engagement.
19. The witness further stated that the Claimant, during his employment with the Bank, was on a number of occasions called upon to account for and explain to the Respondent Bank certain questionable dealings, including,
  - I. On 15th September 2005, the Bank sought an explanation from him on his action of opening a crossing to allow encashment of a Bankers' cheque for KShs. 37,550,000.00 in favour of one Ali Khan Nizar, splitting the payment to two different parties contrary to Banking Regulations.
  - II. On 28th October 2014, he was asked to show cause why disciplinary action should not be taken against him for authorising the Bank's Wetlands Branch to pay KShs. 1,850,000 to one N Robert Njagi without ensuring due diligence in verifying the customer, which had not been conducted in line with the Bank's laid-down procedures, resulting in the loss of KShs. 1,850,000.
20. As a result of this case, a disciplinary hearing was held against the Claimant. Ultimately, he was cautioned against further misconduct in a letter dated 9th October 2015.
21. Further, through a letter dated 26th April 2018, the Claimant was instructed to show cause over the allegations mentioned hereinabove.
22. A disciplinary hearing was subsequently held against the Claimant in relation to the allegations. Following the hearing, the Respondent decided to summarily dismiss the Claimant from employment. At the time of dismissal, he was earning a salary of KShs. 160,000.
23. Prior to his dismissal;
  - I. By a letter dated 21st March 2018, the Claimant was suspended from duty in order to pave the way for investigations into the irregularities.
  - II. By a letter dated 26th April 2018, the Claimant was invited to show cause why disciplinary action should not be taken against him for the allegations levied against him.
  - III. By a letter dated 30th April 2018, the Claimant responded to the Bank's Show Cause letter dated 26th April 2018, giving reasons for his actions.
  - IV. By a letter dated 11th May 2018, the Claimant was invited to a disciplinary hearing scheduled for 15th May 2018. On 15th May 2018, the disciplinary hearing

was conducted, and the Minutes of the same were shared with the Claimant. He acknowledged receipt of the same.

v. By a letter dated 25th June 2018, the Claimant was dismissed from employment with effect from 25th June 2018, and his final or separation dues tabulated in line with his contract, being one month's salary in lieu of notice and prorated leave days.

24. After the dismissal, the Claimant appealed against the decision. The appeal was subsequently dismissed.

25. Cross-examined by counsel for the Claimant, the witness testified that the letter dated 9th October 2015 related to a transaction of October 2014.

26. The witness further stated that he was not involved in the investigations regarding the

Claimant's alleged infractions. The investigation was conducted by a relevant Department within the Respondent Bank.

27. During the disciplinary hearing, he was allowed to call a witness. The minutes reflect this.

28. Though the Respondent did not file any before this court, the Claimant was furnished with the investigation report mentioned in the suspension letter.

29. The Respondent has not placed forth documentary evidence to show that the terminal dues were paid to the Claimant.

30. Out of the reversals, the Respondent suffered a loss.

#### Analysis and Determination

31. Before I delve into identifying the issues for determination, I find it necessary to point out at the outset that, considering the Claimant's pleadings, it is clear that his complaint was that the summary dismissal was without reasonable or justifiable grounds. As such, the dismissal was destitute of substantive fairness.

32. Counsel for the parties have extensively submitted on the procedural statutory aspect of the dismissal. Yet, in my view, that aspect did not emerge as an issue in controversy from the parties' pleadings and/or evidence in court. Further, from the proceedings, it cannot be said that it was an issue left for the Court to determine, notwithstanding that it was not pleaded.

33. With the foregoing in mind, I have carefully considered the pleadings, evidence and submissions by the parties, and the following issues emerge for determination;

i. Whether the summary dismissal against the Claimant was substantively unfair.

ii. Whether the Claimant is entitled to the reliefs sought.

34. Section 47[5] of the Employment Act provides;

"For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer."

35. It is now trite that this provision establishes a reverse burden of proof. The employee must initially discharge the burden of proof before the evidential burden shifts to the employer. Under the provision, the employee is required to place forward a prima facie case that the termination or summary dismissal was

- not in accordance with the requirements of procedural and/or substantive fairness [depending on the circumstances of the case, whether both are in issue or only one]. Only after that does the burden shift to the employer to justify the grounds for termination of employment or wrongful dismissal.
36. Inarguably, therefore, where the employee fails to discharge the legal burden contemplated under the provision, his or her case shall fail at that hurdle. In this case, I have no hesitation in concluding that the Claimant did not discharge the legal burden.
  37. I have carefully considered the Claimant's evidence, including his responses under cross examination, where he admitted that the reversals he made and the transactions he authorised concerning the uncleared effects were contrary to the Respondent's policies, the business realm in which the Respondent operates, and the role he held at the material time. Consequently, I hold that it cannot be concluded that he has prima facie demonstrated that the summary dismissal was substantively unjustified.
  38. In the upshot, I find the Claimant's case lacking in merit. It is hereby dismissed. Each party to bear its own costs.

**READ, SIGNED AND DELIVERED THIS 9TH DAY OF APRIL 2026.**

**OCHARO KEBIRA  
JUDGE**