



**Titus v Faulu Microfinance Bank Limited (Employment and Labour Relations Cause E474 of 2022) [2024] KEELRC 684 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 684 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E474 OF 2022**

**AN MWAURE, J  
MARCH 15, 2024**

**BETWEEN**

**JOHN NDOLO TITUS ..... CLAIMANT**

**AND**

**FAULU MICROFINANCE BANK LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Statement of Claim dated 27<sup>th</sup> June 2022.

**Claimant's Case**

2. The Claimant avers that vide a letter dated 13.01.2014, the Respondent offered him employment as a Relationship Officer and posted to Matuu Branch-Kitui Satellite. He was confirmed to permanent employment vide a letter date 06.11.2014 effective 01.11.2014.
3. The Claimant avers that at the time of termination, he was a Micro Loans Relationship Officer based at Matuu Branch.
4. The Claimant avers that on 23.11.2021, he received a show cause letter signed by the Head of Retail Banking, Branch Network and Bancassurance and Head of Capital alleging that:
  - “i. you failed to adhere to the retail buyout and loan process whereby you failed to do workplace verification of loans, which led to use of forged county officer's signature and fake stamp on the loan documents;



- ii. you knowingly allowed the sales consultants in the branch to undertake the loan verification process in Matuu branch contrary to the Retail buyout and loan processes.”
5. The Claimant avers that he responded and maintained that he had verified the loan applicant’s workstation at Matuu Sub County offices and confirmed by Catherine Mutuku that the loan applicant was a genuine employee of Machakos County Government. Further, the fake County Officer’s signature and stamps were not for the workstation he verified but Machakos County Payroll Offices beyond his mandate. The sale consultants were directly answerable to the branch manager and not the Claimant.
6. The Claimant avers that vide a letter dated 26.11.2021, he was invited for a disciplinary hearing on 30.11.2021. He attended the hearing and exonerated himself as it was confirmed that the loan applicants were employees of Machakos County and the signatures were not a forgery nor were the stamps fake. The Claimant made several requests to be provided with the minutes and the same have never been availed to him to date.
7. The Claimant avers that on 07.12.2021, he received a letter of termination on allegations of negligence in performance of duties by failing to perform due diligence during loan processing against the company policy. The termination was allegedly as per clause 7.2 of the Human Capital Manual.
8. The Claimant avers that he appealed against the termination and requested for fairness as the alleged negligence was regrettable, it was purely due to lack of a retail resources officer in the branch for close to two years. Hence it was not possible to effectively support all the 3 business segments on his own.
9. The Claimant avers that he appeared before the appeal disciplinary committee on 19.01.2022 and pleaded that the fact that the loans were disbursed is a clear indication that even though the branch manager sent a sales consultant to deliver the loan applications contrary to the loan processing policy, the lapse did not result in any errors or fraudulent loans being disbursed. He appealed for reinstatement.
10. The Claimant avers that the Respondent upheld its decision to terminate his services vide a letter dated 26.01.2022 which was in violation of the Human Capital Policy Manual. The manual provides for warning procedures and dismissal/termination after 2 warning letter have been issued, termination can only be effected after an employee commits a 3<sup>rd</sup> offence/misconduct within 12 months.
11. The Claimant avers that he did have any warning letter in his employment record before termination from employment.
12. The Claimant avers that at the time of the termination, he earned a gross salary of Kshs. 80,197.26.

### **Respondent’s Case**

13. In opposition to the Claim, the Respondent filed its response dated 18<sup>th</sup> November 2022.
14. The Respondent avers that the Claimant’s job description placed upon him the following particular responsibilities as a Relationship Officer:
  - a. To adhere to current procedures, processes, memos and circulars as may be issued from time to time in line with credit operations and other set guidelines within the bank; and
  - b. To monitor the portfolio on daily basis and to proactively institute remedial actions.



15. The Respondent avers that its Human Resource Capital Staff Manual (the HR Manual) provides that staff are required to display the highest level of integrity and trust in all their dealings.
16. The Respondent avers that prior to issuing the notice to show cause letter, it conducted investigations through its Fraud and Forensics Unit based on information that the staff at its Matuu Branch, where the Claimant was the Relationship Officer, had a Machakos County rubber stamp in their possession which was being used to fraudulently verify loans.
17. The Respondent avers that the investigation that the loan process outlined in its Retail Loan and Buyoff Policy was not correctly adhered to. Instead, the following process negligently and secretly took place:
  - a. The Clients made loan applications through the sales consultants;
  - b. The sales consultants conducted the work place verification at Machakos county instead of the Claimant;
  - c. The loan applications, booking acknowledgements and personal loan verification forms would then get fraudulently stamped with a fake Machakos County stamp and signed with a fake signature;
  - d. The Claimant negligently verified the loan applications without having conducted the work place verification; and
  - e. The Claimant would then return the fraudulently verified loan applications to the Branch Credit Committee.
18. The Respondent avers the investigation report also revealed that the Claimant's signature, name and staff number was apparent as the person who had verified loan applications, which were bearing fake Machakos County stamps and signatures. Therefore, the Claimant failed to adhere to the loan verification process as outlined in his job description and had also breached clause 2.3.2 of the HR Manual.
19. The Respondent avers that the Claimant's negligence in undertaking verifications jeopardized depositor funds being lent out. This led to the Respondent's complete loss of trust in the Claimant and issuance of the notice to show cause letter dated 23.11.2021.
20. The Respondent avers that the vide a letter dated 26.11.2022, the Claimant responded to the notice to show cause letter, however, the reasons outlined and the Respondent invited the Claimant to a disciplinary hearing.
21. The Respondent avers that the Claimant attended the disciplinary hearing held on 30.11. 2021 accompanied by his colleague, Johnstone Kavoi.
22. The Respondent denies that the Claimant exonerated himself at the hearing and states that he failed to explain the discrepancies noted in the loan application forms and failure to adhere to the verification process in the Respondent's policies.
23. The Respondent avers that the disciplinary committee therefore observed the Claimant was negligent in the loan verification process and recommended his termination in line with the HR Manual.
24. The Respondent avers that the Claimant was issued a notice of termination dated 07.12.2021 on grounds established through the investigation and hearing:



- a. The Claimant was negligent in the loan verification process by failing to conduct proper work place due diligence for Machakos County loan applications;
  - b. The Claimant negligently appended his signature confirming loan verification had been properly done which he knew was not true;
  - c. The Claimant negligently allowed sales consultants to undertake verification processes contrary to the Retail Buyoff and Loan Policy; and
  - d. The Claimant negligently mislead the Branch Credit Committee (BCC) by holding out that loan verification had been done properly.
25. The Respondent admits the Claimant appealed against his termination on 08.12.2021 and set up a committee to hear the appeal. The Claimant appeared before its disciplinary appeal committee, However, the committee observed the Claimant was negligent in handling the loan verification process and upheld the Claimant's termination.
26. The Respondent avers that the suspected forgery of Machakos County rubber stamps as established by the Forensics Units was a grave issue, it had to report the incidence to the Police in Matuu for investigation.
27. The Respondent avers that the Claimant was terminated under the provisions of clause 7.2 of the HR Manual, which reserves its right to terminate an employee for neglect of duty and gross misconduct.
28. The Respondent avers that it was not necessary to serve the Claimant with warning letters. This is a discretionary requirement as per clause 8.5.1 of its HR Manual, the Respondent has the right to terminate an employee on account of gross violation of its policies.

### **Evidence in Court**

29. The Claimant (CW1) adopted his witness statements dated 27.06.2022 as his evidence in chief and produced his documents marked JNT 1-JNT 10 as his exhibits.
30. CW1 testified that he was employed in 13.01.2014 and was posted in Matuu Branch was given a job description. he was relationship officer group.
31. CW1 testified that his job was to market and generate clients and rigorous calls and visits were his main responsibilities and was to deal with groups.
32. CW1 testified that there was another group of relationship officers dealing with salaries and loans and another with SMEs.
33. CW1 testified that the termination letter accused him of negligence in processing loans against company policy. The letter mentioned the show cause later dated 23.11.2021 which stated he failed to adhere to buy off loans processes and failure to verify loans.
34. CW1 testified that he was sent by the Manager and verified where the applicants worked and returned the loan forms to the branch manager who returned to the Machakos payroll officer. He is not supposed to do payroll and verification due to checks and balances.
35. CW1 testified that the sale consultants reported to the branch manager who supervised them. As a relationship officer, he was in charge of retail and group loans. There is no group loan policy and retail loans which were fully disbursed.



36. CW1 testified that he was neither given a copy of the investigation report nor availed minutes to the disciplinary hearing and appeal which he did not even sign.
37. During cross examination, CW1 testified that the job description provided he was to prepare loan form applications to present to RCC and do credit appraisals, present in meetings for future review and recommendations.
38. CW1 testified that he was to adhere to the Respondent's policies and procedures and he signed acceptance of the job description.
39. CW1 testified that the Respondent could amend or substitute his dues. He was employed from 2014 to 2021 and he was never given additional duties.
40. CW1 testified that the law requires employee deduction do not exceed 2/3 of the salary and one has to make sure the customer takes home 1/3 of his salary. One requires the payslip to be downloaded in the presence of the customer through the customer's phone.
41. CW1 testified that people are not always truthful hence the bank expects them to verify the documents and the customer payslips must not violate the 1/3 rules and ensure accuracy from the supervisor.
42. CW1 testified that the verification of loans was done and signed by himself at the work station. He did work station verification but payroll verification was done by somebody else.
43. CW1 testified that his undated letter of appeal, he admitted there was negligence in processing the loan. The branch manager sent the sales consultant and it was not his negligence as loans were not under his docket.
44. CW1 testified that he did not admit lapses in processing the loan, he had his segment and did work place verification as sent to do.
45. CW1 testified that he was a member of the branch committee, however, the issue of lack of a retail officer in the branch was under the manager who should have raised it.
46. CW1 testified that he admitted he was supporting the retail team. The issue of the fake Machakos stamp to verify loans was reported to the police. He did not refuse to record a statement and wrote an email to that effect.
47. CW1 testified that there is a loan verification form stamped with a fake stamp of Machakos county.
48. During re-examination, CW1 testified that the verification of the Machakos county payroll office was the duty of the branch manager. The payslips were to be verified by relationship officer retail which was being handled by the branch manager.
49. CW1 testified that in the absence of a relationship officer, the branch manager goes to the customer's workplace to confirm he is a genuine employee. After verification, they talk to the county payroll office Machakos and taken by the branch manager or relationship officer.
50. CW1 testified that the fake stamp was at Machakos payroll office not the work station.

## **Respondent**

51. The Respondent's witness (RW1), Wambui Kahiro, adopted her witness statement dated 26.04.2023 as the Respondent's evidence in chief and the attached bundle of as exhibits pages 1-170.



52. RW1 testified that the retail loan process can be done by any permanent staff not just the relationships officer. The sale consultants are not employees of the bank but are given commissions.
53. RW1 testified that verification is done by John, the immediate supervisor and the next by HRMO who work in the county offices. There are 2 verifications one by employer and another by a permanent employee of the bank.
54. RW1 testified that the employee goes to the work station to verify the applicant, the employee needs to sign and the signatories confirmed by the bank officer and the Claimant signed. The team leader would rely on the confirmation by the relationship manager, the branch manager does not need to visit the work station. This was the Claimant's duties.
55. RW1 testified that Claimant confirmed he verified the workplace details and got a fake stamp. He was to verify the person who applied for the loan and was qualified to do so but he got a stamp exposing the bank to potential risk. The Claimant did not visit the work station.
56. RW1 testified that the Claimant was unable to confirm why the sale consultants had to verify the loan instead of him.
57. During cross examination, RW1 testified that the letter of offer dated 13.01.2013 provided that the Claimant could be assigned other duties.
58. RW1 testified that was not in charge of sales consultants, they reported to the branch manager.
59. RW1 testified that the document from Machakos Payroll office was signed by one Peter, who he believes was the branch manager. The employees were at Machakos County, he cannot confirm they worked at Matuu.
60. RW1 testified that an internal forensic investigation was done and a report was presented.
61. RW1 testified that the payroll verification was done by the branch manager after the work place verification. There is a loan form with a fake stamp. The payroll office is not same as work station.
62. RW1 testified that there were several loans which were disbursed on the strength of the Claimant's verification. She however cannot confirm if the loans are being paid.
63. RW1 testified that the Claimant was given the minutes for the disciplinary hearing and the appeal but she does not have proof the Claimant received them.
64. RW1 testified that 3 people were present in the appeal hearing whose minutes was signed by the Head of Legal and Stephen Manambo. Stephen was also a member of the Branch Credit Committee together with the Claimant.
65. RW1 testified that among the members of the Branch Credit Committee, Peter Waweru faced disciplinary hearing but Cecilia Mwangi and Debis did not. When the forensic investigation was done Cecilia was not found culpable.

### **Claimant's Submissions**

66. The Claimant submitted that the issues which were subject of the disciplinary hearing are not the alleged grounds of termination from employment. The termination letter is general without any specificity of the alleged negligence of the company policy. It is not stated which section of the company policy was violated by the Claimant.



67. The Claimant further submitted that the allegations of forged county officer's signature, fake stamp and allowing the sales consultants in the branch to undertake the loan verification process in Matuu branch contrary to Retail buyoff and loan processes were dropped from the termination letter. There is no evidence before this court of any forged signature or fake stamp from a document examiner or compliant from the Machakos County Government.
68. The Claimant submitted that the termination of his employment was a violation of Section 12 of the *Employment Act* in so far as the Respondent did not adhere to its own Disciplinary Policy and Procedure. The Respondent is bound to follow its Human Capital-Staff Manual disciplinary procedures in respect to remedial sanctions in cases of alleged breach of company policy.
69. The Claimant submitted that the disciplinary policy and procedure must be complied with in terms with the requirements that the termination must have been proceeded by two warning letters and the second warning letter must be alive within 12 months and termination be on the 3rd misconduct. The Respondent failed to comply with this procedural policy requirement and therefore, the end result was the unreasonable outcome of terminating the services of the Claimant.
70. The Claimant submitted that failure by an employer to observe its own disciplinary procedure may amount to repudiation of contract, therefore, the claimant was unfairly and unprocedurally terminated from employment.
71. The Claimant submitted that re-instatement is the most viable remedy available to him as he is young, energetic and can be posted to any branch of the Respondent. He relied on *Telkom Kenya Ltd v. Paul Ngotwa* (2013) eKLR.

### **Respondent's Submissions**

72. It is the Respondent's submission that the Claimant has failed to demonstrate the termination was wrongful. On the other hand, the Respondent has discharged its burden of proving there were valid reasons to terminate the Claimant's employment.
73. The Respondent submitted that the Claimant admitted in trial that he failed to adhere to the loan verification procedure provided in the Respondent's Retail Loan and Buyoff Policy.
74. The Respondent further submitted that it has proved that it conducted a forensic investigation and produced the report, which revealed that the loan verification process was not correctly adhered to. The investigations established, the Claimant's signature, name and staff number was apparent as the person who had verified loan applications, which were bearing fake Machakos County stamps and signatures.
75. The Respondent submitted that the Claimant breached a fundamental condition of his employment and any reasonable employer, would be justified in finding that the circumstances in this case attracted significant suspicion and reasonable apprehension of breach of trust which led to the dismissal of the Claimant.
76. It is the Respondent's submission that the disciplinary process fully complied with Section 41 of the *Employment Act* as laid down in its memorandum of response.
77. The Respondent submitted that Claimant has not demonstrated any exceptional circumstances to warrant the grant of an order for reinstatement as sought. Further, the Claimant's conduct has caused it to lose trust and faith in him as an employee. The Claimant exposed the Respondent, and consequently depositor funds which belong to the public, to significant risk of fraud due to his failure to adhere to the loan verification process.



78. The Respondent submitted that the Claimant's negligence in failing to follow the laid-out loan verification procedure should persuade the court to decline to grant the award for 12 months' salary in compensation sought.

### **Analysis and Determination**

79. Having considered the pleadings, witness statements, submissions and the evidence of record, the first issue for determination is whether the termination was substantively justified.
80. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the court 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. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, 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.

Commenting on this question, the Court of Appeal in *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others* [2019] eKLR said as follows: -

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services. That is a partly subjective test.”

The court, relying on an extract from Halsbury's Laws of England went further to comment as follows:

“...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

81. Further, the Court of Appeal in *Naima Khamis v Oxford University Press (E.A) Ltd* [2017] Eklr held:

“.....we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2) (c) requires a termination be



done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.

In a claim for unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer (section 47(5) of the Act).

.....

.....

- 82 It is necessary to point out that reasons for termination of a contract are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract.

“For example poor performance, insubordination and lack of loyalty or commitment are some of the grounds that were alleged to have had an impact on the said contract of employment and which amounted to misconduct.”

83. The Respondent’s Retail Buy Off and Loan Process clearly sets out the one of the roles played by a Relationship Officer (the Claimant’s role) during the loan process at the branch:

“conducts verification at the customer’s workstation and verifies the details provided with the immediate supervisor ensuring accuracy.”

He was also to monitor the portfolio quality on daily basis and proactively institute remedial action.

83. Further, the Claimant’s job description provided one of his key responsibilities was to adhere to current procedures, processes, memos and circulars as may be issued from time to time in line to credit, operations and other set guidelines within the bank.

83. The Claimant was tasked to conduct verification at the customer’s workstation and verify the details provided. Indeed, during the disciplinary hearing and his appeal against the termination, the Claimant admitted his negligence and stated it occurred due to him being overwhelmed and lack of a retail resource in the branch. This is quite noteworthy considering he admitted he had worked in the bank from 2014 to 2021 so clearly he was experienced in his work.

83. The Claimant testified during cross examination also that the loan forms indeed bore a fake stamp from Machakos County.

83. Against this background, the Respondent has proved to this court that it dismissed the Claimant due to valid reasons which it genuinely believed to exist and which were tabulated in his notice to show cause letter dated 23<sup>rd</sup> November 2021. The same reasons were also confirmed in his termination letter dated 7<sup>th</sup> December 2021.

83. The 2<sup>nd</sup> issue for determination is whether the termination was procedurally fair. The Claimant submitted that the termination of his employment was procedurally unfair as it was a violation of Section 12 of the Employment Act in so far as the Respondent did not adhere to its own Disciplinary Policy and Procedure.



83. The Respondent's Human Capital-Staff Manual disciplinary procedures provided that termination must have been proceeded by two warning letters and the second warning letter must be alive within 12 months and termination be on the 3<sup>rd</sup> misconduct.

83. However, this court takes note of Clause 7.2 of the Respondent's Human Capital-Staff Manual which states:

“Faulu reserves the right to terminate an employee for reasons including but not limited to: Neglect of duty Misappropriation of funds Committing an act that constitutes gross misconduct Conflict of interest Poor performance

Disciplinary hearing shall be convened to deal with serious cases of indiscipline in order to protect the interests of the Bank and the staff involved.”

83. In view of the foregoing, the Respondent acted well within its own policies in due consideration of the seriousness of the situation. From the evidence before this court, the Respondent has proved that the Claimant's actions put itself and the funds it holds at risk and he was invited for a disciplinary hearing by a letter dated 26<sup>th</sup> November 2021. He was also informed that he was entitled to be accompanied by an internal staff to the hearing.

83. Section 41 of the Employment Act provides for procedural fairness 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 employee shall be entitled to have another employee or a shop floor union representative of his choice present during this 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.

83. The Claimant admits in his testimony and submissions that the disciplinary process was done in accordance with Section 41 of the Employment Act and he was even given a chance to lodge an appeal to the disciplinary committee's decision to terminate his employment. The minutes of the disciplinary meeting were produced in court and the said meeting took place on 30<sup>th</sup> November 2021. The invitation letter was dated 26<sup>th</sup> November 2021.

83. Having established that the disciplinary process was both substantively justified and procedurally fair, having considered the evidence and the pleadings and submissions of all the parties the court holds that the claimant's termination was lawful, fair and procedural.

83. The claim against the respondent dated 27<sup>th</sup> June 2022 is therefore dismissed.

83. However let each party meet their respective costs.

Order accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**



**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

