



**Gachukia v Equity Bank (K) Ltd (Cause 307 of 2015)  
[2024] KEELRC 564 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 564 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 307 OF 2015  
MA ONYANGO, J  
MARCH 7, 2024**

**BETWEEN**

**JOSEPHAT GACHUKIA ..... CLAIMANT**

**AND**

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

**JUDGMENT**

1. The Respondent is a commercial bank incorporated in Kenya under the [Banking Act](#) Cap. 486 of the Laws of Kenya and a member of Kenya Bankers Association.
2. The Claimant was until 5<sup>th</sup> July 2012 an employee of the Respondent having been employed by letter dated 28<sup>th</sup> May, 2008 as a Bank Clerk at a starting salary of Kshs. 30,000.
3. The Claimant was in addition to the salary entitled to annual leave of 21 days, and leave allowance of Kshs. 3000 per year, in-patient cover of Kshs. 500,000, and out-patient cover of Kshs. 50,000 per year.
4. The Claimant's salary was increased to Kshs. 37,500 from 1<sup>st</sup> January 2009; to Kshs. 40,000 from 1<sup>st</sup> January 2010; to Kshs. 42,200 from 1<sup>st</sup> January 2011 and to Kshs. 46,274 by letter dated 4<sup>th</sup> May 2012.
5. The Claimant was posted to the Respondent's Kimathi Branch in June 2008 as a bank clerk. In January 2009 his designation was changed to Relationship Officer–Operations. As Relationship Officer the Claimant's duties entailed receiving customer deposits and withdrawals. The Claimant was later transferred from operations to Credit within the same Department. As Credit Officer his duties were assessing customers for credit and managing credit accounts.
6. It was the Claimant's case that while working as credit officer, one of the Banks customers who had a business loan approached him with a proposal to buy a car which was part of security for a loan. The customer's loan was non-performing meaning that the customer was in arrears. The Bank had retained



the log book for the car as security. He stated that he met the customer while following up on her non-performing loans.

7. It was the Claimant's case that the customer approached him to look for a buyer for the car and he decided to buy it himself. That at the time the loan balance was Kshs. 350,000. He paid a deposit of Kshs. 180,000 into the customer's account and made other payments through cash deposits and Mpesa.
8. Upon the Bank learning of the transaction between the Claimant and the customer the Claimant was suspended from duty by letter dated 22<sup>nd</sup> May 2012. The suspension letter stated that the same was to facilitate further investigations.
9. Before suspension the Claimant was asked to explain his involvement with the customer which he did by letter dated 18<sup>th</sup> May 2012 as reproduced below:

Josephat Gachukia Maina

Po Box 103559-00101

Nairobi

Tel:+254 721 548 164

18<sup>th</sup> May, 2012

Micro Imara Quality Champion,

Equity Bank Limited,

P.o box 75104-00200

Nairobi

Dear Sir,

Re: Agnes Nyawira Njeru t/a Nesru Enterprises

During the month of January 25<sup>th</sup> as the credit officer I was following up my arrears, went to Agnes Njeru's shop but I didn't get her at her shop along Kirinyaga Road.

I called her and we met in the bank. My agenda was to get facts why she was not repaying and servicing the loan in time.

She explained how she had tried to sell the car which was not getting a willing buyer in the market. I had to confirm the condition of the car and she took me to where she had parked behind Barclays Plaza The car was good and infact I had Ksh 150,000 which I had saved and was tempted to buy it.

I paid Ksh 80,000 that day and the rest sent to her through M-pesa. We did a sale Agreement of 400,000 against the car whereby I took over the car and promised to clear the balance within one month upon which she could have released the relevant documents to me. I was disposing off my asset \*didn't materialize. I communicated to her in time in the month of March that I was unable to be deadline. Through mutual agreement we met and did a revocation and had returned the car to her on 25<sup>th</sup> April 2012 by 4.00pm.

Since the loan had not been serviced since October I had to push her to repay back what she owed the bank through auctioneers. She kept on promising she was expecting cash from overseas to settle her debt.



signed

Yours faithfully,

Josephat Gachukia

10. The customer also wrote a statement which is filed as Exhibit “E” of the Respondent’s list and bundle of documents. According to the customer, the Claimant had agreed to take over the loan from the customer after taking possession of the car but did not. The customer reported the incident to the bank three months later after learning that the Claimant had not transferred the loan after taking possession of the car as agreed between her and the Claimant.

11. While reporting the incident to the Respondent, the Claimant’s supervisor wrote as follows:

From: Benard W. Wanjala

Sent: Thursday, May 17<sup>th</sup> 2012 10:42 AM

To: Josephat G. Maina

Cc: Joseph N. Kanugi

Subject: Agnes Nyawira Njeru.

As you had requested for a comprehensive report over the case, the following findings had been found:

1. the m/v that was used as security was not joint registered until when I questioned, the confirmation was hurriedly pursued and was delivered yesterday dated 16<sup>th</sup>.
2. the case is secured by M/V and no demand letter or repossession had been issued until we intervened together with the credit adm.
3. the client was operating his personal a/c as usual transacting large amount which doesn’t relate with the amount recovered towards the loan(see April 10<sup>th</sup>)
4. I have never been taken to visit the customer, officer claim the client relocated it has emerged that the m/v used by the client as security was to be bought by the loan office, they agreed that the officer pay the loan as part of the payment. on sending auctioneer, the client was shocked because the m/v in question was with the officer. yesterday, the instruction were withdrawn and client made a commitment to pay Sh. 2000 per day-despite of the fact that I was in the branch, I was not in the picture at all. I recommend that you intervene so that we proceed with repossession.

Regards

Benard wanjala

12. The Respondent summarily dismissed the claimant by Letter Dated 5<sup>th</sup> July 2012 which is reproduced below:

Our Ref: EBL/HR/07/12/1788/PF. 4002

5<sup>th</sup> July 2012



Mr. Josphat Gachukia Maina,  
PO 76635-00508,  
Nairobi.

Dear Mr. Maina,

Re: Summary Dismissal

This is to inform you that you have been summarily dismissed from the services of Equity Bank Limited with effect from 22<sup>th</sup> May, 2012. The decision to dismiss you is a result of contravening the Banks' Policies and Procedures in your loan transactions as Relationship Officer — Micro Credit at Kimathi Branch, for which you were put on suspension to pave way for further investigations. The investigations revealed that you effected some irregular loan disbursement thereby exposing the Bank and you were also involved in a conflict of interest case whose details you are well aware. As a result of this therefore, we regret to inform you that your integrity and credibility have been severely compromised and Equity Bank has lost confidence in you as an employee. The decision to dismiss you is in accordance with the [Employment Act](#) 2007.

You will be paid up 10 and including 22<sup>nd</sup> May, 2012, which was your last date of service.

Please organize to hand over any company property in your possession to the Business Growth and Development Manager — Kimathi Branch. In addition, ensure that you have cleared with all the departments and hand over the duly completed clearance form to the Payroll Accountant, after which your final dues will be payable on the next payroll date.

Yours faithfully,

Signed

John N. Wamwati

Human Resource Manager

CC. Business Growth & Development Manager — Kimathi

Director - Credit

Group MD & Chief Executive Officer Personal File

13. Aggrieved by the summary dismissal the Claimant instituted the instant suit by Statement of Claim dated and filed on 4<sup>th</sup> March 2015. He seeks the following remedies:
  - a. This Honorable Court is therefore prayed to find and award that the summary dismissal of the Claimant by the Respondent was wrongful and unlawful.
  - b. This Honourable Court be pleased to award that the Claimant is entitled to compensation by the Respondent for wrongful/unlawful dismissal and award him the compensation allowed by the law of not less than 12 months gross pay calculated using the correct last pay of Kshs.73,1191= per month x 12 months = Kshs.877 4281=
  - c. This Honourable Court is also prayed to be pleased to award the Claimant against the Respondent one (1) month's gross pay in lieu of notice of Kshs.73 1191=



- d. This Honourable Court is prayed to be pleased to award to the Claimant against the Respondent the total underpayments in respect of basic salary and house allowances as shown in 4.4 (i) — (v) herein tabulated to total Kshs.803 4791=
- e. This Honourable Court is prayed to be pleased to award the Claimant against the Respondent pay in lieu of untaken leave days calculated in 4.2(a) herein as
- f. Kshs.165 9241=
- g. This Honourable Court is prayed to be pleased to award to the Claimant against the Respondent the difference in leave allowances between actual Kshs.6130/= p.a and Kshs.3,000/= given by the Respondent for four (4) years as being Kshs.12 5201= as shown in 4.2 (b) herein.

Costs of this

- 14. The Respondent filed a Reply to Statement of Claim dated 21<sup>st</sup> April 2015 denying the averments therein and stated that the summary dismissal of the Claimant complied with the *Employment Act*.
- 15. When the case was set down for hearing the Claimant testified on his behalf led by his advocate. The Respondent called Winfred Mwendu Kyalo its Senior Officer, Employee Relations who testified on its behalf. Both parties reiterated the averments in their pleadings as summarized above. The parties thereafter filed and exchanged written submissions.

#### **a. Analysis and Determination**

- 16. I have considered the pleadings, evidence and submissions. The issues that arise for determination are whether the summary dismissal of the Claimant was justified and if he is entitled to the prayers sought in his claim.
- 17. The threshold for fair termination is provided for in section 45 of the *Employment Act* which states that termination of employment is unfair if not grounded on valid reason and/or fair procedure as was stated in the case of *Walter Ogal Anuro v Teachers Service Commission* where the court stated:
 

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer to effect the termination”
- 18. It is the Claimant’s case that the reasons given in the letter of termination are not valid as the Claimant did not irregularly disburse a loan as alleged. That the Claimant was tasked with following up loan repayments by Ms. Agnes Njeru who had taken a loan from the Respondent.
- 19. It is further submitted for the Claimant’s that he was not aware of any conflict of interest as alleged by the Respondent as the same has not been demonstrated.
- 20. For the Respondent it is submitted that the decision to terminate the Claimant’s employment was arrived at after a culmination of several events. That investigations were carried out which established that the Claimant was involved in fraudulent activities which were against the terms of the Claimant’s contract of employment and the Bank’s recovery policies and procedures.
- 21. It submits that despite being aware of the Respondent’s rules of operation, the Claimant committed the following acts of gross misconduct: The Claimant had agreed to purchase the motor vehicle from Ms. Agnes Njeru a customer who had defaulted on her loan. The agreement between the Claimant



and the customer was that the Claimant was to deposit the money into the customer's bank account to be used to service her loan held with the Respondent. However, the Claimant never used the loan as agreed. The Claimant issued other irregular loans to Crimson General Supplies of Account Number 0260xxxxxxx and Massnet Logistics of Account Number 0260xxxxxxx.

22. It was the Respondent's case that its witnesses demonstrated to the how the Claimant's acts constituted fraud and gross misconduct as he used his position as a credit officer to mislead a customer into irregular agreement on repayment of a loan.
23. It was further the Respondent's case that the Claimant confirmed during the hearing that indeed he was interrogated by investigators and therefore participated in the investigations. Thereafter, the process for termination was started as required by his terms of employment.
24. It was the Respondent's submission that the Claimant was employed in a sensitive industry which requires utmost good faith. That the Respondent was justified in treating such fraudulent activities on the part of the Claimant as good ground to trigger the termination.
25. The Respondent submitted that it discharged the burden placed on it by Section 43 of the *Employment Act* that requires an employer to demonstrate a valid reason for terminating the employment of an employee. It relied on the decision in *Paul Waigiri Muriuki v Nairobi Water v Sewerage Company Ltd* [2015] eKLR, where the court observed that:

“There is now firm jurisprudence from this Court that the burden placed on an employer under Section 43 of the Act is to show, on a balance of Probability, the existence of a valid reason that would move a reasonable employer to terminate the employment of an employee (see *Jessy Olukutukei v Feed the Children Kenya* [2014] eKLR and *Abraham Nyambane Asiago v Barclays Bank of Kenya Ltd* [2015] eKLR...when the Court sits it does not ask itself what it would have done had it been in the position of the employer. What it asks is whether given the facts and circumstances of the particular case, the employer acted lawfully and in a reasonable manner”(emphasis supplied)

26. It was the Respondent's submission that the circumstances that the Respondent found itself in relation to the services of the Claimant was such that the reasonable way out was to terminate the Claimant's services to avoid putting itself and its client's fund's at risk.
27. Section 41 of the *Employment Act* provides for the procedure for termination of employment while section 43 provides for proof of reasons for termination. As provided in section 45(2) of the *Act*, no employer may terminate the employment of an employee unfairly and a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid; that the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility; or that the termination is based on the operational requirements of the employer and that the employment was terminated in accordance with fair procedure.
28. In the instant case the Claimant admits that he bought a motor vehicle that had been used as security for a loan from the Respondent from by the customer. The customer stated in her hand-written statement at Annexure “E” of the Respondent's bundle of documents that the Claimant offered to buy the motor vehicle for Kshs. 400,000. Out of this money the Claimant was to clear the balance of the loan of Kshs. 273,000 as at 25<sup>th</sup> January 2012. The difference was to be paid to the customer. The Claimant however did not settle the loan and the customer reported the matter to the Respondent hence the disciplinary process against the Claimant.



29. The conduct of the Claimant would by any standards amount to conflict of interest. Instead of collecting outstanding funds from a client which was his duty as a credit officer of the Respondent, the Claimant used his position for personal benefit. Conflict of interest is defined in *Black's Law Dictionary*, 10<sup>th</sup> Edition as "A real or seeming incompatibility between one's private interest and one's public or fiduciary duty". The Claimant's conduct in this case was incompatible and therefore conflicted with his duties both to his employer, the Respondent, and to the customer.
30. I therefore find that the Respondent had valid reason to terminate the employment of the Claimant on grounds of conflict of interest.
31. On the second limb of fair termination the employer is required to prove fair procedure. Section 41 of the *Employment Act* provides that:

Notification and hearing before termination on grounds of misconduct

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.
32. There is no evidence that the Respondent complied with the provisions of section 41. There is no mention of a hearing. All that the Respondent did was ask the Claimant to explain what happened which he did in the letter dated 18<sup>th</sup> May 2012, the day he was suspended. Suspension was to give room for investigations which apparently the Respondent did. However, after investigations it did not give the Claimant a hearing as envisaged in section 41 of the Act. it instead summarily dismissed the Claimant.
33. For these reasons, I find that there was no procedural fairness.
34. Section 45(2) requires that an employer complies with both procedural and substantive fairness for termination to be fair. In view of the fact that the Respondent did not comply with procedural fairness the termination was unfair. I declare accordingly.

## Remedies

35. The Claimant prayed for several remedies. He prayed for pay in lieu of notice. Having found the termination unfair, he is entitled to one month's gross pay in lieu of notice which I award him.
36. The Claimant further prayed for compensation. Having found that there was valid reason and that it is only fair procedure that the Respondent did not comply with, and taking into account the factors in section 49(4) especially the circumstances in which the termination took place including the extent, if any, to which the employee caused or contributed to the termination, I award the Claimant nominal compensation of 3 months' salary.



37. The Claimant further prayed for underpayments in the sum of Kshs. 803,479 on account of both basic pay and house allowance. The amount is based on the salary in the negotiated in the CBA between Kenya Bankers Association and Banking Insurance and Finance Union. According to Appendix “A” of the CBA between Kenya Bankers Association and Banking Insurance and Finance Union at page 043 of the Claimant’s bundle, the Respondent was a member of the Kenya Bankers Association.
38. It is however clear from the pay slips of the Claimant annexed at pages 009 to 016 of the Claimant’s bundle of documents that the Claimant did not pay union dues and was therefore not a member of the union. The Claimant has not given any justification why he should benefit from the CBA of a union that he was not a member of.
39. I have further noted that Clause A1 of the CBA set out the subject matter as follows:

Clause A1

This Agreement shall apply to all Section Heads (Supervisors), Check Clerks, Clerical Staff, Copy Typists, all Technical Staff and all Subordinate Staff, Head Messengers, Watchmen, Drivers, Chauffeurs, employed by the Employer and covered by the terms of whatever Recognition Agreement is in force between the Association and the Union.

The provisions of the *Labour Relations Act*, 2007 which provides for payment of Agency Fees for non-union members shall apply. This Agreement upon registration by the Industrial Court of Kenya shall get specific gazettment of the Agency Fee legal notice from the Minister of Labour

40. The Claimant’s designation as set out in both the Claim and the letter at page 005 of the Claim was Relationship Officer – Operations. This position does not exist in the CBA. I find that the Claimant is not entitled to the terms and conditions set out in the CBA as he was neither a member of the union nor were his terms of service based on the CBA.
41. The Claimant further prayed for the difference of leave allowance between what the Claimant was paid being Kshs.3000 and what was provided for under the CBA between Kenya Bankers Association and Banking Insurance and Finance Union which provided for leave allowance of Kshs. 6,130 p.a. Having not been a member of the union, he is not entitled to the same.
42. The Claimant did not prove that he had any outstanding leave. The prayer for pay in lieu of untaken leave is dismissed for want of proof.
43. In summary, I award the Claimant the following:
- i. 1 months’ salary in lieu of notice Ksh.46,274
  - ii. Compensation (3 months’ salary) Ksh 138,822.
  - iii. I have noted that the letter of dismissal is dated 5<sup>th</sup> July, 2012 but states that it is effective from 22<sup>nd</sup> May, 2012. A letter of termination takes effect from the date it is received by the employee. The Claimant is therefore entitled to pay between the date of suspension and the date of summary dismissal if the same was not paid to him.
  - iv. The Respondent shall pay Claimant’s costs.
  - v. Interest shall accrue at court rates from date of the Judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7<sup>TH</sup> DAY OF MARCH 2024**



**MAUREEN ONYANGO**  
**JUDGE**

