



**Oruo v Family Bank Limited (Employment and Labour Relations Cause 201 of 2017) [2024] KEELRC 535 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 535 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 201 OF 2017  
BOM MANANI, J  
MARCH 7, 2024**

**BETWEEN**

**KEVIN ORUO ..... CLAIMANT**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

**JUDGMENT**

**Background**

1. This dispute relates to the alleged unfair termination of the Claimant’s contract of service. It is the Claimant’s case that the Respondent’s decision to terminate the contract was without valid reason and in contravention of due process. On the other hand, the Respondent maintains that the decision was informed by valid reasons and was rendered in accordance with due procedure.
2. The Claimant was employed by the Respondent in the position of bank teller as from 24<sup>th</sup> June 2013. He worked in this position until 14<sup>th</sup> June 2016 when the contract was terminated.
3. On appointment, the Claimant’s gross salary was Ksh. 48,000.00 per month. However, at the time of exit from employment, this amount had risen to Ksh. 62,000.00.
4. The Claimant avers that on 5<sup>th</sup> February 2016, a customer asked him to withdraw Ksh. 40,000.00 from his (the customer’s) account and credit Ksh. 36,000.00 onto the customer’s Mpesa account. The customer collected the difference in cash.
5. The Claimant contends that the customer gave him telephone number 0723-170119 for purposes of crediting the Mpesa amount. According to the Claimant, when he completed the transaction, he noticed that the funds had been transmitted to one Rose Masimba. When he inquired whether this was the correct account, he learned that it was not.



6. The Claimant avers that he made frantic efforts to have the service provider reverse the transaction but to no avail. It is his case that the service provider informed him that the transaction had been meddled with by the holder of the phone number to which the funds had been wrongly credited. The funds were thereafter swiftly withdrawn thereby frustrating efforts to make recovery.
7. The Claimant believes that the bank customer whose account was affected was involved in a heinous scheme with a third party to steal the funds and thereafter lodge a claim against the bank. This belief is premised on the fact that the customer allegedly read out and confirmed the wrong phone number to the Claimant before he (the Claimant) completed the transaction. Further, the Claimant argues that the swiftness with which the funds were withdrawn by the wrong recipient from her Mpesa account points to a planned diversion of the funds.
8. The Claimant contends that he reported the incident to the police. However, by the time he was subjected to disciplinary action, the police had not acted on the matter. It is the Claimant's contention that he expected the Respondent to follow up the matter with the police but it failed to do so.
9. Instead, the Respondent allegedly instituted a disciplinary process against the Claimant. The Claimant avers that he received a notice to show cause on 12<sup>th</sup> May 2016 asking him to account for the incident. On 30<sup>th</sup> May 2016, he received an invite to a disciplinary meeting scheduled for 31<sup>st</sup> May 2016. He was thereafter dismissed from employment.
10. The Claimant contends that the decision to terminate his contract of service was without valid reasons. He contends that the loss of the funds in question was out of the customer's misdeeds. The Claimant avers that the customer read out his telephone number to him and thereafter confirmed it. The Claimant argues that he sent the cash to the said number and cannot be accused of having acted negligently in the circumstances.
11. The Claimant also avers that the Respondent failed to ensure due process in the manner it handled his case. First, he contends that he was served with the invitation for the disciplinary case hardly twenty four (24) hours to the session. According to him, this deprived him of sufficient notice to organize his defense and get his witnesses to attend.
12. Second, the Claimant points out that although the notice to show cause letter notified him of the charge relating to the loss of Ksh. 36,000.00, the Disciplinary Panel interrogated him over various previous incidents without prior notice. Thus, he was deprived of the opportunity to effectively respond to these new accusations.
13. On its part, the Respondent avers that the Claimant's contract was validly terminated. According to the Respondent, the Claimant's services were terminated because he credited a customer's funds onto the wrong Mpesa account. The Respondent avers that it was for the Claimant to have verified the customer's number before he completed the transaction. The fact that the money was credited on the wrong Mpesa account is evidence that the Claimant failed to follow this procedure.
14. The Respondent further contends that it observed due procedure whilst processing the Claimant's release from employment. The Respondent contends that the Claimant was issued with a notice to show cause, invited for a disciplinary hearing and attended the session before his fate was determined.
15. The Respondent denies that its decision was based on extraneous matters. According to it, reference to the Claimant's past misconduct was merely to demonstrate a pattern of behavior that warranted termination of his contract.



16. The Respondent avers that although the Claimant received the invitation for the disciplinary session on 30<sup>th</sup> May 2016, he did not complain that the time given to him was not sufficient to organize his defense. Therefore, he is not entitled to raise the issue now.

### Issues for Determination

17. After evaluating the pleadings and evidence on record, the following issues emerge for determination:-
- a. Whether the Claimant's contract of service was unfairly terminated.
  - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

### Analysis

18. On the first issue, it is now settled law that before an employer terminates a contract of service for an employee he must satisfy two conditions to wit the following:-
- a. He (the employer) must have a valid reason to support his decision.
  - b. He (the employer) must ensure that the termination is processed in accordance with fair procedure.
19. These requirements are anchored on the rights to fair labour practice and fair administrative action that are now entrenched in articles 41 and 47 of the *Constitution* of Kenya 2010. They are further fortified by the provisions of sections 41, 43, 45 and 47 of the *Employment Act* and section 4 of the *Fair Administrative Action Act*.
20. By virtue of section 41 of the *Employment Act*, the employer is required to inform the employee of the reason for the proposed decision and afford him an opportunity to be heard in response. Sections 43 and 45 of the *Act* place the burden of proving the validity of the reason to terminate a contract of service on the employer. Whilst section 47 requires the employee to demonstrate that the employer's decision was without valid basis, the burden imposed by this provision only requires the employee to present a prima facie case before the burden of proof shifts onto the employer to justify his decision.
21. That said, the burden on the employer to justify his decision to terminate a contract of service is not an infallible one. Under section 43 of the *Employment Act*, all that the employer is required to demonstrate is that he had a genuine belief that a valid reason to terminate the contract existed at the time that the decision was taken (*Kenya Revenue Authority v Rewel Waitbaka Gitahi & 2 others* [2019] eKLR).
22. In the instant case, there is evidence that the Claimant caused the Respondent's customer loss of Ksh. 36,000.00 after the cash was credited on the wrong account. Although the Claimant asserts that the loss was part of a fraudulent scheme by the customer to steal the cash through a third party, this remains mere speculation. There is no cogent evidence to support this theory.
23. It is the Claimant who completed the wrong transaction. According to the Respondent, the transaction went wrong because of the failure by the Claimant to counter-check the telephone number to which the cash was to be deposited.
24. The Claimant's response to the notice to show cause shows that he never suggested that he asked the customer to verify his telephone number before he (the Claimant) completed the transaction. On the contrary, he says he was hurried into completing the transaction suggesting that he may have overlooked some procedures in the process.



25. Before the Disciplinary Panel, the Claimant did not suggest fraud against the customer. As well, he did not suggest that he confirmed the customer's telephone number before he completed the transaction.
26. As a matter of fact, the proceedings before the Disciplinary Panel show that the Claimant confirmed that he credited the wrong telephone number. On being asked whether he had shown the customer the number, he responded in the negative.
27. In my view, the evidence before the Respondent's Disciplinary Panel provided a sufficient basis for the Respondent to entertain a genuine belief that the Claimant acted without due care in the circumstances of the case thereby occasioning its customer loss of Ksh. 36,000.00. Therefore and in terms of section 43 of the *Employment Act*, I am satisfied that the Respondent has demonstrated that it had a valid reason to terminate the contract between the parties.
28. As regards due process, the evidence on record shows that the Claimant received the invite for the disciplinary session scheduled for 31<sup>st</sup> May 2016 on 30<sup>th</sup> May 2016. He contends that this left him with only twenty four (24) hours to assemble his defense. In his view, this time was grossly inadequate.
29. The Claimant also raises the issue of being confronted with matters he had not been notified about during the disciplinary hearing. As a result, he contends that he was deprived of the opportunity to effectively respond to some of these matters which were apparently considered by the Respondent in rendering its final decision.
30. The transaction that resulted in the termination of the Claimant's employment involved payment of money to a wrong account through a third party (Safaricom Ltd). It is the Respondent's position that even after the Claimant realized that he had sent the cash to the wrong account, he did not take steps to reverse the process. However, the Claimant's position is that he promptly tried to have the transaction reversed by the service provider but to no avail.
31. Information regarding whether there were attempts at reversing the transaction could only have been provided by the service provider. To be able to get the service provider to clarify this issue, the Claimant required sufficient time. It is unlikely that he would have procured this evidence within the 24 hour window that the Respondent provided him with.
32. Although the Claimant did not raise this issue during the disciplinary hearing, this cannot be construed as having waived the Respondent's duty to ensure that the Claimant was accorded a fair disciplinary process. Having regard to the requirements of fair hearing as encapsulated under the various legislations mentioned earlier in this decision, I am unable to accept the Respondent's contention that the twenty four (24) hour notice to the Claimant to attend the disciplinary session, in the circumstances of this case, provided him with adequate time to assemble and prepare for his defense.
33. It is also apparent that in the notice to show cause, the Claimant was only notified of the infraction that related to the loss of the sum of Ksh. 36,000.00. However, the minutes of the disciplinary session disclose that he was extensively questioned about various other incidents. In the Respondent's letter of 14<sup>th</sup> June 2016 vide which the Claimant's contract was terminated, it is clear that the Respondent considered these past incidents in arriving at its decision.
34. There is no indication that the Claimant was notified that he will be interrogated on the past incidents during the disciplinary session in order to prepare to respond to them. Whilst the employer has every right to consider an employee's past record whilst making his decision on a disciplinary matter, the employee should have been given a fair opportunity to address such matters. In the instant case, this was not done.



35. This was in clear contravention of section 4 (3) (a) and (g) of the *Fair Administrative Action Act*. In the premises, I arrive at the conclusion that the Respondent failed to uphold due procedure in processing the Claimant's release from employment.
36. The next question for determination relates to whether the parties are entitled to the reliefs that they seek through their respective pleadings. The Respondent has prayed for dismissal of the Claim with costs to it. Having regard to the above findings, it is apparent that this request cannot be granted.
37. On his part, the Claimant has prayed for a plethora of reliefs. These include: a declaration that the loss of Ksh. 36,000.00 was due to the criminal conduct of one Rose Masimba; salary in lieu of notice to terminate the contract of service; compensation for wrongful termination equivalent to the Claimant's twelve months' salary; costs of the case; and interest.
38. The law that guides the court on the kind of reliefs to grant in an employment dispute is primarily set out in section 49 of the *Employment Act* as read with section 12 of the *Employment and Labour Relations Court Act*. At the same time, the court has discretion to decide which of the various reliefs it may grant (*Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment)).
39. In the instant case, the only reason why the Respondent's decision has been set aside is the failure by it to ensure due process. Otherwise, it is apparent that the Respondent had valid reasons to consider severing the employment relation between the parties.
40. Having regard to the foregoing, I do not think that the Claimant is entitled to payment in lieu of notice. This is because under section 44 of the *Employment Act*, negligence of duty is one of the grounds upon which an employee may be dismissed summarily without notice. As a consequence, I decline to grant the prayer for pay in lieu of notice.
41. I will however award the Claimant compensation for wrongful termination of his contract of service in view of the flawed process that resulted in the decision to summarily terminate his services. Under section 49 of the *Employment Act*, I am required to consider various factors in arriving at the quantum of compensation. These include the extent to which the employee contributed to his misfortune.
42. As indicated earlier, the Claimant's failure to exercise diligence in paying out the sum of Ksh. 36,000.00 was the primary reason why he lost his job. Therefore, he substantially contributed to his misfortune. Taking this fact into consideration, I am minded to award him compensation that is equivalent to his gross salary for three months, that is to say  $\text{Ksh. } 62,000.00 \times 3 = \text{Ks. } 186,000.00$ .
43. I award the Claimant interest on this sum at court rates from the date of this decision.
44. I also award the Claimant costs of the case.
45. The award is subject to the applicable statutory deductions.

### **Summary of the Award**

46. After evaluating the evidence on record and the applicable law, the court makes the following findings and award:-
  - i. Although the Respondent had a valid reason to terminate the Claimant's contract of service, it nevertheless failed to uphold due process in arriving at its decision. Consequently, the decision is declared unfair for want of compliance with fair procedure.
  - ii. The court declines to award the Claimant payment in lieu of notice to terminate his contract.



- iii. The Claimant is awarded compensation for unfair termination of his contract of service that is equivalent to his gross salary for three months, that is to say, Ksh. 186,000.00.
- iv. The Claimant is awarded interest on the amount at court rates from the date of this decision.
- v. The Claimant is awarded costs of the case.
- vi. The award is subject to the applicable statutory deductions.

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

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

