



**Waiyego v HFC Bank Limited (Cause E008 of 2023)  
[2024] KEELRC 727 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 727 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E008 OF 2023  
ON MAKAU, J  
APRIL 5, 2024**

**BETWEEN**

**JOHN CHEGE WAIYEGO ..... CLAIMANT**

**AND**

**HFC BANK LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent as a Management Trainee on 6<sup>th</sup> December 2010 and rose through the ranks to become Branch Operations Manager at Thika. He worked until 19<sup>th</sup> April 2022 when he was served with a summary dismissal letter for gross misconduct. He then brought this suit accusing the employer of unfair termination and prayed for the following:-
  - a. General damages for unfair termination.
  - b. Salary due and owing.
  - c. 3 months salary in lieu of notice being Kshs.297,000.
  - d. Leave due.
2. The respondent admitted that it employed and later dismissed the claimant for misconduct. It averred that the claimant failed to declare outside business interests, acted in conflict of interest, operating outside business during office hours, exposing the respondent to potential anti money laundering breaches, and breaching Cash Management Controls. It further averred that fair procedure was followed before the dismissal and therefore it prayed for the suit to be dismissed with costs.

**Evidence**

3. The claimant testified as CW1. He stated that his sister Anne Wangari Waiyego lost her employment in 2020 due to Covid-19 Pandemic and he opened Agency Banking and Mpesa Business for her. He



- provided starting capital and took a licence on her behalf from Cosin Business Systems Limited and Operated as the Hub. The Business was operated by her sister full time.
4. He testified that his sister was buying Mpesa float from the respondent using his number which was lawful and the respondent benefited from sale of float. He never assisted his sister to run the business during his working hours. He contended that his performance in the bank was outstanding. In October 2021, his sister got a job at Safaricom and they sold the business.
  5. He testified that on 7<sup>th</sup> March 2022 he was asked to explain some credits in his bank account and he did so but on 10<sup>th</sup> March 2022 he was suspended. On 8<sup>th</sup> April 2022 he was served with a show cause letter and on 13<sup>th</sup> April 2022 he attended disciplinary hearing which was virtual. After the hearing he was summarily dismissed and he appealed. The appeal was also dismissed. Another person was appointed to replace him even before his appeal was determined.
  6. On cross-examination he testified that the Hub was an unregistered business name which he sold in December 2021 at Kshs.450,000.00 and the money paid via RTGS on 6<sup>th</sup> December 2021. The Sale Agreement was dated 16<sup>th</sup> December 2021 between himself (seller) and Emmanuel Kimondo (buyer). He had obtained a Single Business Permit in his name being Serial Number 1566XXXX dated 19<sup>th</sup> February 2021. He reiterated that he gave his sister capital of Kshs.400,000.00 to start the business and helped her open an account at the respondent bank. The business was under his name. He used his KRA Pin and National Identity Card to deposit cash to obtain licences.
  7. He further testified that he used to collect money from the sister's business after work and deposit in his Mpesa line and then transfer to his personal Account No.2000008XXXX at the respondent bank then buy Mpesa float the following morning. He contended that he transacted for her sister before opening of the official banking time at 8.30am.
  8. He clarified that Cosin Business Systems Limited was an Mpesa Dealer who had assigned one of its lines to his sister. He admitted that, as Operations Manager, he was obliged to check out for any fraudulent transactions. He further admitted that he was served with a show cause letter and thereafter he was heard by a disciplinary committee and an Appeal panel. He further admitted that he was served with dismissal letter indicating three reasons for the dismissal.
  9. The respondent called its HR Business partner Ms Gloria Lilechi as RW1. She adopted her written statement and 18 documents as her evidence in chief. In brief she admitted that claimant worked for the respondent from 2010 as a Management trainee and rose to become Branch Operations Manager.
  10. She testified that during a routine monitoring and inspection by the respondent's Fraud Monitoring Unit, suspicious transaction and activities between January and March 2022 were noted in the claimant's salary Account No.2000082XXXX. The claimant explained that he was transacting a business on behalf of his sister trading as Cosin Business Systems Mugoiri. However, the source of the money was found to be a business called THE HUB which had been sold as at the time of the inquiry.
  11. A search at the Government Virtual Portal (E-citizen) confirmed that the said two businesses were not registered. However, the investigators confirmed that the business had a Business permit issued in the name of the claimant. The investigation revealed that the claimant had breached the staff code of conduct which led to his suspension and disciplinary process.
  12. The claimant was then served with a show cause letter dated 7<sup>th</sup> March 2023 and he responded on 8<sup>th</sup> March 2022. He was thereafter invited to a disciplinary hearing with a fellow employee of his choice but he attended alone. He was given an opportunity to tender his oral defence and the minutes were recorded. However, the committee returned a verdict of summary dismissal on ground of breach of



- Employee code of conduct by failing to declare existing business interests (operating Mpesa Business); transacting his business during working hours contrary to the laid procedures and requirements and conflict of interest for transacting for his business during official working hours.
13. The claimant appealed and he was heard by a different panel which upheld the dismissal. Therefore, she testified that the termination was fair and prayed for the suit to be dismissed with costs.
  14. On cross examination, RW1 stated that the claimant was asked to explain a deposit of Kshs.22 million in his account after a red flag was raised by the respondent's Fraud Monitoring Team. He gave unsatisfactory explanation and he was served with a show cause letter. She admitted that it was not wrong for a staff to have a business but clarified that the staff is supposed to declare the business every month of January from the time he provided start-up capital.
  15. She contended that the claimant was operating the Mpesa business called THE HUB since the business permit found by the investigators was registered in the claimant's name. the claimant also produced a sale agreement indicating that he was the owner of the business. He also provided the start-up capital for the business.
  16. RW1 further contended that it was misconduct for the claimant to buy Mpesa float from the respondent who was selling Mpesa float, without declaring that he was operating Mpesa business. She contended that if at all the business was for his sister, she ought to have been the one buying the float and not the claimant.
  17. RW1 however, admitted that the respondent made profit when the claimant bought Mpesa float from the bank. She further admitted that the bank never suffered any financial loss from the purchase of Mpesa float by the claimant. However, she clarified that there was risk of reputational damage through money laundering which could expose the bank to penalties.
  18. RW1 contended that no teller can pay or transact until the till opens at 8.30Am. she maintained that the claimant was depositing money from his business during working hours and he was captured by CCTV doing that and as such there was conflict of interest.

### **Submissions**

19. The Claimant submitted that the employer did not do proper investigation and further failed to accept his explanation about his involvement in his sister's business. He maintained that, despite the business name bearing his name, the business belonged to his sister. He maintained that the Business was Operating in a shop christened The Hub but operating under the name Cosins Business Systems Limited. He clarified that he had no interest in the said Limited Liability Company.
20. He further submitted that the suspension was for the reasons of "suspicious or irregular credits" but after explaining the same, he was dismissed for a different reason. He contended that section 6.1 of the Code of Conduct deals with conflict of interest from competing with the employer while still in employment. He contended that the respondent has admitted that the bank benefited from the transactions he made. Therefore, he maintained that the reason cited did not justify his summary dismissal since there was no misconduct at all.
21. For emphasis, he cited several authorities which were never availed to the court for consideration.
22. The respondent on the other hand submitted that the summary dismissal of the claimant was lawful because the reasons for the termination was justifiable and he was taken through a fair disciplinary process before the dismissal. It contended that its witness adduced solid evidence to prove that the Mpesa business in issue belonged to the claimant and that he was accorded a fair hearing in the first



instance and on appeal. It contended that the KRA PIN and National Identity card for the claimant was used to obtain Business Permit in his name yet he failed to declare the business to the employer as required.

23. It maintained that the claimant was transacting business for Cosin Business Systems Limited without any documentary evidence of the relationship with the said company. He further transacted on behalf of the company during his official working hours as demonstrated by RW1 in her evidence. Consequently, it submitted that it had fully discharged the burden of proof of the reason for the dismissal in line with the Court of Appeal decision in Pius Machafu Isindu v Lavington Security Guards Limited (2017) eKLR and prayed for the suit to be dismissed with costs.

### **Issues for determination**

24. There is no dispute that the claimant was employed by the respondent as Branch Operations Manager Thika and that he was dismissed on 19<sup>th</sup> April 2022. The issues falling for determination are: -
- a. Whether the termination was unfair and unlawful.
  - b. Whether the reliefs sought are merited.

### **Unfair termination**

25. Section 45 (1 & 2) of the *Employment Act*, 2007 provides that:-

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
- (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - i. related to the employee’s conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”

26. In this case, the reasons for the termination were communicated by the termination letter dated 19<sup>th</sup> April 2022, thus:-

“ 19<sup>th</sup> April 2022

Ref:STF/C.1220

John Waiyego

C/O HFC

Retail Banking

Dear John

Termination from the Bank’s Service



We refer to the Disciplinary policy, and the Bank's Code of Conduct. We invited you to a disciplinary hearing on 13<sup>th</sup> April 2022 at the HF Group Head Office (via MS Teams) to accord you an opportunity for fair hearing. From your explanation, the panel noted the following shortcomings on your part:-

1. You breached the Bank's code of Conduct by failing to declare an existing outside business interest during the annual returns.
2. Conflict of interest- you engaged on an outside business during working hours.
3. You provided misleading information when requested to provide a written explanation- while you informed the Bank officials that you operated the business on behalf of your sister, investigations revealed that the business in question is registered in your name.

Your actions amount to gross misconduct on your part. This action is contrary to your employment contract, Staff Code of Conduct Section 6.1 (a) (b) and section 6.3, Regulation and Rules for contract staff and the Employment Act Section 44 (3). As a result, we regret to inform you that the Bank has taken a decision to terminate your employment with effect from 22<sup>nd</sup> April 2022 under the provisions of your employment offer letter.

You will be paid your final dues as follows:-

1. One month's salary in lieu of notice
2. Salary earned up to and including 21<sup>st</sup> April 2022.
3. Any leave days earned but not taken by 21<sup>st</sup> April 2022.

You will be paid your final and lawful dues, after successful completion and return of the attached Clearance Form to the Human Resource Department. Please arrange to hand over all company property in your possession to your Line Manager to facilitate preparation of your final dues.

You have the right to appeal against this decision within 5 working days of receipt of this letter. If you wish to appeal, you must do so in writing to the HR Director or Group Chief Executive Officer stating the grounds of appeal.

Kindly acknowledge receipt of this letter by signing the attached copy and return the same to us for our records.

Yours faithfully

Tom Shivo

Human Resource Director

I.....confirm receipt of this Termination letter.

Date... signature.....”

27. Section 43 (1) of the Employment Act, 2007 provides that: -

- “1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the



employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45”.

28. The respondent called its HR Business partner as RW1 who testified that the reason for dismissing the claimant was valid because he violated section 6.1 (a) of the Employee Code of Conduct. The said section provided that: -

“6. 1 Conflict of Interest

Members of staff must not engage directly or indirectly in any business activity that competes or conflicts with the Company’s interests. These activities include but are not limited to: -

- a. Outside financial and/or business interest: Staff are not to get into any situation where their personal interests conflict or appear to conflict with the interest of the Company or its customers. This applies within and outside the official business hours. Engagement in business or employment outside the Company is considered a conflict of interest if it is conducted during the business hours. Where the acquisition of any business or participation in any business activity outside the Company premises and outside office hours demands excessive time and attention from the member of staff, thereby depriving the institution of the employee’s best efforts on his/her job, a conflict of interest is deemed to exist. Where members of staff have a financial interest in a business, whether as a sole proprietor, partner, shareholder, creditor or debtor where a conflict of interest exists, such interests must be disclosed immediately to the Human Resources Director and written approval sought. If there are any doubts about the issue of conflict of interest, it is best to seek written clarification from the Human Resources Director as early as possible.”

29. The claimant admitted in evidence that he helped his sister to start Mpesa Agency business, he provided the start-up capital of Kshs.400,000.00, he obtained Single Business Permit in his own name using his KRA PIN and his National Identity Card. He actively participated in the business by collecting proceeds of the Mpesa business, depositing in his own Mpesa line, and also depositing cash in his own bank account, and thereafter buying Mpesa float from the respondent. Finally, the claimant sold the business as the owner vide a written sale agreement. The claimant admitted that he never declared the business to the employer as required by section 6.1 of the Employee Code of Conduct.

30. He maintained his denial that he was not the owner of the Mpesa Business and that he had no interest. However, having considered the evidence on record, I am satisfied that the respondent has proved on a balance of probabilities that the Mpesa Business, christened THE HUB, using a line assigned by Cosin Business Systems Limited, belonged to the claimant, or he had interest in it.

31. He provided the start-up capital, he obtained Single Business Permit in his name using his KRA PIN and National Identity Card, he actively participated in its management of its funds and purchase of Mpesa float, and finally he sold off the business under a sale agreement which described him as the owner of the Agency banking and Mpesa operating as The Hub. Therefore, he had an obligation to declare the business to the employer by dint of Section 6.1 of the Code of Conduct.



32. However, he acted in conflict of interest by failing to declare to the employer the business he was operating, contrary to the provisions of section 6.1 (a) of the said Code of Conduct. He further acted in conflict of interest by carrying out tasks for the outside business during his official working hours.
33. Finally, I am satisfied that the respondent has proved that the claimant provided misleading information about his Mpesa business by alleging that the business belonged to his sister. There is evidence that the business belonged to him and therefore his allegation that it belonged to his sister was indeed misleading to say the least. Consequently, I find and hold that the reasons cited for the dismissal were valid and the respondent was entitled to dismiss the claimant summarily under section 44(3) of the Employment Act which provides that: -
3. “Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”
34. As regards the procedure followed, there is evidence that the claimant was informed of suspicious credit of his salary account and he was given a chance to explain himself. Thereafter he was suspended and investigation was done which revealed that the business from where the suspicious credits enunciated belonged to him.
35. He was served with a show cause letter and he responded. Thereafter, he was invited to a disciplinary hearing and allowed the company of another employee of the bank. He attended the hearing alone and made his representations. Thereafter he was notified of the decision to dismiss him vide letter dated 19<sup>th</sup> April 2022. The letter cited the reasons for the dismissal and gave him the right to appeal.
36. He appealed and he was invited to a hearing in the company of another employee but he attended alone. He argued his appeal but the same was unsuccessful. Although he alleged that the termination was based on different reason from the ones leading to his suspension, I see no prejudice because the employer had the right to charge him with any other offences discovered after the investigations.
37. In this case, the employer discovered the offences in issue and notified the claimant vide the letter dated 8<sup>th</sup> April 2022 by which he was invited for the disciplinary hearing. Having so observed, I find and hold that the procedure followed before dismissing the claimant was fair and inconsonance with section 41 of the Employment Act which provides that: -
- “(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.”
38. Having found that the respondent has proved on a balance of probabilities that the reasons for the dismissal were valid and that fair procedure was followed, I hold that the dismissal of the claimant vide the letter dated 19<sup>th</sup> April 2022 was fair and lawful.





## **Reliefs**

39. In view of the foregoing holding, the claimant is not entitled to compensation for unfair termination. However, he is entitled to the benefits offered vide the termination letter being salary in lieu of notice, salary earned up to 21<sup>st</sup> April 2022 and leave days earned but not taken by 21<sup>st</sup> April 2022. Since the salary for the claimant and the outstanding leave days were not pleaded, I direct the respondent to compute the said dues as contemplated in the termination letter or on the basis of claimant's employment records and pay him upon clearance with the bank as directed in the termination letter. Since the suit has failed, save for the above claims which were already offered by the respondent before filing of the suit, I direct each party to bear own costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 5TH DAY OF APRIL, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

Order

**This judgment has been delivered to the parties via Teams video conferencing with their consent, 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.**

**ONESMUS N MAKAU**

**JUDGE**

