



**Kinyanjui v Equity Bank (K) Limited (Cause 683 of 2019)
[2024] KEELRC 2133 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2133 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 683 OF 2019**

**JK GAKERI, J
JULY 29, 2024**

BETWEEN

ANTHONY MANGARA KINYANJU CLAIMANT

AND

EQUITY BANK (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim on 11th October, 2019 alleging unfair and unlawful termination of employment and non-payment of terminal dues by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent as a relationship officer-micro credit on the 26th July, 2010 on permanent terms.
3. The Claimant states that at the time of termination of employment, his gross salary was Kshs.98,280/= per month.
4. The Claimant further avers that on 20th May, 2016 he was issued with a suspension letter regarding a fraudulent asset finance loan. He states that later that day, the Anti-banking Fraud Police Unit arrested him and was held in custody for over 72 hours and released without any charges.
5. The Claimant alleges that he was issued with notices to show cause dated 3rd August, 2016 and 11th November, 2016 respectively and was subjected to disciplinary hearing on the 22nd November, 2016. The Claimant avers that during the hearing the allegations of fraudulent finance loan was not deliberated on and the hearing comprised general enquiries only.
6. The Claimant asserts that he was issued with a termination letter dated 10th January, 2017 that alluded to an irregular and un-procedural loan appraisal for a customer exposing the Bank to a potential loss of Kshs.5,180,000/=.



7. The Claimant further avers that he was not paid his salary for the 8 months he was on suspension. He states that he incurred expenses amounting to Kshs.52,500/= while reporting to the Respondents Human Resource office.
8. The Claimant avers that the Respondent ignored the findings of Anti-Banking Fraud Unit investigations that cleared him from the alleged fraud.
9. The Claimant appealed against the termination of employment vide a letter dated 16th January, 2017 which the Respondent replied on the 4th April, 2017 upholding the decision of termination of employment.
10. It is the Claimant's case that the Respondents did not lose any funds as the loan was fully secured and had been disbursed by the head office after independent verification.
11. The Claimant further avers that the Branch Credit Committee (BCC) was responsible for approval of the loan application and forwarded it to Head Office Credit Committee (HOCC) and procedure was duly followed.
12. It is the Claimant's case that the Respondent did not carry out investigations and acted maliciously in suspending the Claimant.
13. The Claimant avers that since his employment was terminated he has suffered mental anguish and is seeking reinstatement, re-engagement, withheld salary and terminal dues and benefits as bellow;
 - i. Compensation for unwarranted discrimination = Kshs.5,000,000/=
 - ii. Reasonable notice of 1 month $1 \times 98,280 = \text{Kshs.}98,280$
 - iii. Maximum compensation for loss of employment $12 \times 98,280 = \text{Kshs.}1,179,360/=$
 - iv. Leave days (Unutilized) $44/30 \text{days} \times 98,280 = \text{Kshs.}144,144/=$
 - v. 11 days off days $11/30 \times 98,280 = \text{Kshs.}36,036/=$
 - vi. Pro rata leave (4 months) $4/12 \times 7/4 \times 98,280 = \text{Kshs.}57,330=$
 - vii. Withheld salary during the suspension period 8 Months $\times 98,280 \text{Kshs.}786,240/=.$
 - viii. Travelling expenses to HR's office during suspension Kshs.52,500/=.
14. The Claimant prays for;
 1. A declaration that the Respondents letters dated 10th July, 2017 terminating the services of the Claimant from its employment is unlawful and hence null and void.
 2. A declaration that the Respondents action of terminating the Claimant's services lacked any facts and was therefore prejudicial and or discriminatory.
 3. The Respondent be ordered to reinstate the employee and treat him in all respects as if the Claimants employment had not been terminated; or
 4. The Respondent re-engage the employee in work comparable to that in which the Claimants was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

In the alternative to the demand for reinstatement of the Claimant demand for payment under

 1. Terminal dues enumerated under paragraph 20 above interest at Court rates from date of termination



2. Interests on paragraph 20(vii) at court rates from 10th January 2017 until payment in full.
3. Any other relief this Honourable Court may deem fit to grant in the circumstances.
4. The Respondent do issue the Claimant with certificates of services.
5. Costs of this suit.

Respondent's case

15. In its response dated on 31st August, 2020, the Respondent avers that it employed the Claimant as a Relationship Officer Micro Credit at a salary of Kshs.35,000/= and not Kshs.98,280/= as alluded by the Claimant.
16. It is the Respondent's case that the Claimant was involved in fraudulent processing of an asset finance loan by failing to conduct the proper loan appraisal as required by the Respondent.
17. The respondent denies the allegations of unlawful detention alleged by the Claimant.
18. The Respondent avers that it complied with the statutory provisions when it issued the Claimant with the notice to show cause dated 3rd August, 2016 and 11th November, 2016 in relation to the fraudulent asset finance loan appraised by the Claimant and he was subjected to a disciplinary hearing on the 15th December, 2016.
19. It is the Respondent's case that the Claimant was terminated from employment vide a letter dated 10th January, 2017 on the grounds of irregular and un-procedural loan appraisal of Kshs.5,180,000/=.
20. The Respondent avers that the termination of the Claimant's employment was valid and fair within the meaning of Section 41 and 45(2) of the *Employment Act*, 2007.
21. The Respondent further states that it prepared the Claimant's certificate of service on 28th January, 2017 which was yet to be collected.
22. The Respondent denies that it ignored the findings of the Anti-Banking Fraud police investigations and states that its investigations were independent and that the findings of Anti-Banking Fraud Police Unit did not in any way absolve the Claimant's violation of the Respondent's lending policies and procedures.
23. The Respondent states that termination of the Claimant's employment was fair as he was involved in an irregular loan procession appraisal and during the disciplinary hearing, it was established that there was no customer visit for business assessment. That the Claimant acted dishonestly by forwarding to the Respondent a Customer service report without actually visiting the Customer.
24. It is the Respondent's case that the Claimant appraised the customer's loan and disbursement begun before presentation of the supporting documents, or conducting customer visit which irregularities were solely attributed to the Claimant.
25. The Respondent denies that the Claimant is entitled to the payments contained in the memorandum of claim.
26. It is the Respondent's case that the Claimant's claim lacks merit and ought to be dismissed with costs to the Respondent.



Claimant's evidence

27. On Cross-examination, the Claimant confirmed that his salary was Kshs.65,520/= at the time of termination.
28. CWI confirmed that he was issued with two notices to show cause, subjected to a disciplinary hearing and terminated from employment vide a letter dated 10th January, 2017, for an irregular loan appraisal.
29. The witness admitted that he did not enter the house of the client and did not find the matatu in question.
30. The witness confirmed that he relied on the income schedule of the SACCO
31. On re-examination, the witness testified that the application was approved by the committee and there was no irregularity at all.

Respondent's evidence

32. RWI, Wycliffe Ontumbi, a Senior Manager Employee Relations with the respondent testified in defence of the respondent. The witness adopted his witness statement dated 25th July 2023 as his evidence in chief.
33. On cross-examination, the witness confirmed that the claimant was employed on the 26th July, 2010 earning a salary of Kshs.35,000/= but as at the date of termination of employment, he was earning Kshs.65,520/= per month.
34. RWI confirmed that the Claimant was earning ½ (half) salary during the time he was on suspension.
35. He testified that during the disciplinary hearing the Claimant was not notified of the sum of Kshs.1,726,007/= he was only notified of the total exposure of the Bank of Kshs.5.18 million.
36. The witness confirmed that the Claimant was paid his final dues amounting to Kshs.691,802.68 and was given a certificate of service upon clearance.
37. On re-examination, the witness maintained that due disciplinary process was followed.
38. The witness testified that the exposure was evenly distributed among those who were involved

Claimant's submissions

39. The Claimant's counsel distilled the following issues for determination;
 - i. Whether termination of the Claimant's employment was unfair and unlawful.
 - ii. Whether the Claimant was discriminated?
 - iii. What reliefs are available to the Claimant in the circumstances?
40. On the first issue, counsel submits that the Claimant exhaustively explained that he adhered to all the procedures pertaining the loan application to account number 0800566214114 for Kshs.5,180,000/=.
41. Counsel further submitted that the Respondent did not file any investigation report as envisaged in the suspension letter dated 20th May, 2016 contrary to Article 47 and 50(4) of *the Constitution* of Kenya, 2010.



42. According to counsel, the Respondent did not follow its own procedures and that the claimant was not issued with a warning and submits that there were no compelling reasons to terminate the Claimants employment.
43. Counsel further submitted that that the Respondent acted contrary to the rules of natural justice and fair hearing when it failed to disclose that there were other colleagues who were surcharged.
44. Counsel placed reliance on the decision in Peter Mutinda Ngei v Rentokil Initial Limited [2022] eKLR where the court held that there was no substantive justification to warrant the Claimant's dismissal and same was devoid of procedural fairness.
45. On the second issue, counsel submitted that it was the Claimant's uncontroverted evidence that he followed the laid down procedure at the Branch Credit Committee (BCC) and the Head Office Credit Committee (HOCC) which committee comprised of 3-5 members and for unknown reasons, their employment was not terminated which amounted to discrimination.
46. It was further submitted that the Respondent departed from its norm when it suspended the Claimant for 8 months without any pay instead of not more than three months with half a salary.
47. Counsel relied on the holding in Peter Kamau Mwaura vs Peter Njanja Njunguna v National Bank of Kenya [2020] where the court awarded the Claimant an equivalent of 12 months' salary compensation.
48. On the third issue, counsel submitted that the claimant is entitled to the reliefs sought in the memorandum of claim.

Respondent's submissions

49. Counsel for the Respondent highlighted two issues for determination;
 - a. Whether termination of the Claimant's employment was fair and lawful.
 - b. Whether the Claimant is entitled to the reliefs sought.
50. On the 1st issue, counsel submitted that the tenets of unfair termination of employment are provided for under Section 45 of the *Employment Act*, 2007.
51. Counsel urged that the reason for termination of the Claimant's employment was the irregular and unprocedural loan appraisal and thus exposing the Respondent to a loss of Kshs.5,180,000/= contrary to the banks procedures and policies.
52. Counsel submitted that the Respondent had a justified ground for termination of the Claimant's employment, which was fair and valid on a balance of probabilities.
53. Reliance was placed on the decision in National Union of Mineworkers & others v The Commission for Conciliation Mediation and Arbitration & 2 others JR 2910/08.
54. Counsel further submitted that the Respondent followed the right procedure in terminating the Claimants employment as set out in Section 41 of the *Employment Act*. That the Claimant was served with two notices to show cause dated 3rd August, 2016 and 11th November, 2016 respectively and was later subjected to a disciplinary hearing.
55. Counsel submitted that the Claimant was afforded a fair process leading to termination of his employment and the Respondent met the requisite criteria as provide for in the law.



56. Counsel submitted that the Claimant's allegations that he was discriminated was unfounded and unproven as the Claimant has not discharged the burden of proof and had not indicated why and how he was allegedly discriminated by the Respondent. Counsel relied on the holding in *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021]KESC 12 (KLR) to reinforce the submission.
57. It is the Respondent's submission that the Claimant is not entitled to the reliefs sought and counsel urges the court to dismiss the Claim with costs.

Analysis and determination

58. It is common ground that the Claimant was an employee of the Respondent from 26th July, 2010 to 10th January, 2017 when the employment relationship ended during which time the Claimant was earning Kshs.65,520/=.
59. While the Claimant argues that he was unfairly terminated from employment, the Respondent maintains that the Claimant's employment was fairly terminated.
60. The issues for determination are;
- i. Whether termination of the Claimant's employment was unfair and unlawful?
 - ii. Whether the Claimant was discriminated?
 - iii. Whether the Claimant is entitled to the reliefs sought?
61. Under the provisions of the *Employment Act*, 2007, for a termination of employment to pass the fairness test, it must be proved that;
- i. the employer had a valid and fair reason to terminate the employee's employment.
 - ii. the reason(s) related to the employee's conduct, capacity or compatibility or operational requirements of the employer and
 - iii. the employer used a fair procedure in the termination of employment.
62. On the first issue, parties have adopted opposing positions with the Claimant arguing that the termination of employment was unfair while the Respondent submits that it was substantively and procedurally fair.
63. Consistent with the provisions of the *Employment Act*, 2007, courts have held that for a termination of employment to pass muster, it must be proved that the employer had a substantive justification to terminate the employee's employment and he did so in accordance with fair procedure.
64. The foregoing is fortified by legions of decisions including *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where Ndolo J. held that it must be proved that the employer had a substantive justification to terminate the employment and conducted it in accordance with a fair procedure. The foregoing was also emphasized by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR.

Reason for termination

65. In the instant case the Claimant was employed by the Respondent on 26th July, 2010 as a Relationship Officer- Micro Credit and his employment was terminated on the 10th January, 2017 on the grounds of irregular and un-procedural loan appraisal exposing the Respondent to a risk of Kshs.5,180,000/= having worked for the Respondent for almost 7 years.



66. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
67. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, B.O. Manani J. states as follows;
- “In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.”
68. In his witness statement, the Claimant stated that he received a case from a fellow staff member and appraised it thoroughly. He stated that he met the client at the Railways Bus terminus where he had gone to deliver insurance stickers.
69. The Claimant testified that he asked for the relevant documents and the client informed him that he had a truck and two matatus that ply the Nairobi-Ngong route.
70. He stated that followed all the laid down procedures in appraising the loan and forwarded the same to the Branch Credit Committee where he presented the case and once approved the same was forwarded to the Head Office Credit Committee which also approved.
71. The Respondent’s witness on the other hand testified that the Claimant appraised a loan without conducting a proper Know Your Customer (KYC) checks to detect whether the supporting documents were genuine in line with the Respondents policies.
72. According to the Respondent, the irregularities included; attaching a customer visit report while the Claimant had not visited the customer, failing to issue written instructions for valuation and beginning the loan appraisal process before presenting it to the Branch Credit Committee and the Head Office Credit Committee for approval or decline.
73. On cross-examination, the claimant confirmed that he did not find the Matatu. He also confirmed that he relied on the income schedule of the SACCO. On re-examination, the Claimant testified that there was no irregularity and the application was approved both by the Brach Credit Committee and the Head Office Credit Committee.
74. From the evidence on record, it is discernible that the Claimant did not conduct a proper Know Your Customer and did not see the assets in question at all and the documents he relied on may not have reflected the true state of affairs and thus exposed the Respondent to risk of loss.
75. Based on the foregoing, the court is satisfied and finds that the Respondent has on a preponderance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant’s employment on 10th January, 2017.

Procedure

76. As emphasized by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, Section 41 of the *Employment Act*, 2007 prescribes an elaborate and mandatory process to be complied by the employer in effecting a termination of employment, to ensure procedural fairness.



77. The specific elements of procedural fairness have been elaborated in legion of decisions such as *Loice Otieno v Kenya Commercial Bank* [2013] eKLR by Radido J. and by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR among others
78. The tenets include; reason(s) for which termination of employment was being considered, explanation of the grounds of termination in a language understood by the employee, entitlement of the employee to the presence of another employee of his choice as well as hearing and considering the representations made by the employee and/or the person chosen by the employee.
79. Section 41 of the *Employment Act*, 2007 provides;
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 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.”
80. The Claimant was first issued with a suspension letter dated 20th May, 2016 to pave way for investigations. He was also issued with two show cause letters dated 3rd August, 2016 and 11th November, 2016 respectively and responded.
81. The Claimant was invited for disciplinary hearing on the 19th November, 2016 and was informed that he could attend the hearing with a fellow employee as witness but attended alone. The hearing was held on the 15th December, 2016 and the claimant was issued with a letter of termination of employment on the 10th January, 2017.
82. Based on the evidence on record, it is the finding of the court that the Respondent accorded the Claimant sufficient time to prepare for his defence and an opportunity to defend himself.
83. The Respondent has proved on a balance of probabilities that the procedure adopted in terminating the claimant’s employment met the threshold rendering the termination of the claimant’s employment procedurally fair.

Whether the Claimant is entitled to the reliefs sought.

a. Declaration

84. Having found that termination of the Claimant’s employment was substantively justifiable and procedurally fair within the meaning of the provisions of the *Employment Act*, the declarations sought are unmerited and thus declined.

b. Reinstatement and re-engagement

85. The remedy of reinstatement is provided for by Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 read with Section 49(3)(a) of the *Employment Act* and as held by the Court of Appeal in *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 2 others* the remedy is discretionary.



86. The court exercises its discretion on the basis of the parameters under Section 49(4) of the *Employment Act*, 2007 among others.
87. Although the Claimant expressed his wish to continue working for the Respondent, the remedy is unavailable as it can only be decreed within three (3) years of termination or dismissal from employment. The Claimant's employment was terminated on 10th January, 2017, more than 6 years ago. The remedy is declined.

c. Compensation for Discrimination

88. Having found that the Claimant has failed to set out or prove particulars of the alleged discrimination by the Respondent, the compensation sought is unmerited and is declined.

d. Leave Days, off days and pro rata leave

89. The Claimant prays for payment of unutilized leave days. However, neither the written witness statement nor the oral evidence adduced in court make reference to the number of days and when they accrued.
90. In the absence of relevant particulars, the prayer is declined.
91. Similarly, the prayers for off days and pro-rata leave lacks supportive evidence and are declined

e. Salary withheld during suspension

92. The Claimant seeks the salary for the 8 months he was on suspension. In its response, the Respondent stated that pursuant to the suspension letter dated 20th May, 2016, the claimant ceased to draw any benefits or allowances from the Respondent. It stated this was in accordance with its policy and guidelines.
93. As regards recovery of salary during suspension, the court is guided by the sentiments of Rika J. in *Sheikh Abubakar Bwanakai Abdallah v Judicial Service Commission & another* [2017] eKLR as follows;

“Regulations relating to suspension of Judicial Officers are onerous, and a fertile seed-bed, for unfair labour practices. Administrative suspension is not a disciplinary sanction. The Officer merely steps aside to allow his Employer, carry out investigations, and disciplinary process against him, without the possibility of the Officer interfering with the process. Suspension, in this context, is not a disciplinary punishment. It should not be applied as if it is a punishment.

Suspension Regulation is onerous in the extreme, as it allows, for an Officer to go on suspension without pay. The Officer remains an Employee, with mutuality of obligations. The contract of employment remains. A Regulation which allows an employee to go without any form of a salary while still under contract, is in breach of fair labour practices”.

94. The fact that the Claimant stepped aside for investigations and disciplinary process to take place did not stop his employment with the Respondent. Similarly, the letter of appointment is silent on the percentage of pay during suspension.
95. Consequently, the court awards the Claimant full salary for the period he was on suspension.



f. Travelling expenses during suspension

96. The Claimant tendered no verifiable evidence of receipts of payment of the alleged expenses as the visitors passes are insufficient evidence of the monies expended and having awarded full salary for the period of suspension, the prayer is declined.
97. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.
98. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Full salary during the period of suspension unless already paid.
 - b. Certificate of service.
99. In the circumstances of this case, parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF JULY 2024

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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 *Civil 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.

DR. JACOB GAKERI

JUDGE

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