



**King'oku v ABSA Bank Kenya PLC (Cause E647 of 2021)
[2024] KEELRC 2529 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2529 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E647 OF 2021
B ONGAYA, J
OCTOBER 18, 2024**

BETWEEN
AUGUSTINE NDEMANGE KING'OKU CLAIMANT
AND
ABSA BANK KENYA PLC RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated 06.08.2021 through Okongo Omogeni & Company Advocates. He prays for judgment against the respondent as follows:
 - a. A declaration do issue an order that the disciplinary hearing, the appeal thereafter and the termination of the claimant by the respondent grossly violated the provisions of Article 10 of *the Constitution* of Kenya 2010 thus null and void.
 - b. A declaration do issue that the disciplinary hearing, the appeal thereafter and the termination of the claimant's employment was unlawful without considerations of due process and all the tenets of natural justice are illegal, irregular and a violation of Article 47 of *the Constitution* of Kenya, 2010 and section 4 of the *Fair Administrative Action Act*, No. 4 of 2015 therefore, null and void ab initio.
 - c. A declaration do issue that the claimant was wrongfully, unlawfully and unfairly terminated from his employment.
 - d. A permanent injunction by the Honourable Court do issue restraining the respondent either by themselves, employees, servants and/or agents from changing and/or applying interest rates of the claimant's/applicant's loan facilities from 6% (on the Home loan facility) and 9% (on the Unsecured staff loan) to 13% and 14.5% respectively or any other interest rate.



- e. The Honourable Court do hereby order the respondent to pay the claimant 5 months' salary in lieu of notice of Kenya Shillings One Million, Two Hundred and Ninety Nine Thousand, Seven Hundred and Fifty (Kshs. 1,299,750.00).
 - f. The Honourable Court do hereby order the respondent to compensate the claimant for the unlawful and unfair termination, a sum of Kenya Shillings Sixty Two Million, Three Hundred and Eighty Eight Thousand (Kshs. 62,388,000.00) for the remainder of the years remaining before retirement (20 years).
 - g. The Honourable Court do order the respondent to pay the claimant bonuses for the year ending 31st December, 2021 of Kenya Shillings One Million (Kshs. 1,000,000.00).
 - h. The Honourable Court do hereby order the respondent to issue the claimant with a Certificate of service.
 - i. The Honourable Court do hereby order the respondent to pay the claimant General damages.
 - j. The Honourable Court do hereby order the respondent to pay the claimant exemplary damages.
 - k. The Honourable Court issues any other order that it deems fit in the circumstances herein to meet the ends of justice.
 - l. The respondent to pay the costs of this claim at court rates.
 - m. The Honourable Court do issue any other order it deems fit.
2. The claimant's case was that he started working for the respondent as Sales Manager Level B3 (standard personal banking segment) and rose through the ranks to Premier (top most personal banking segment) - where he was serving as a Relationship Manager, until the respondent unilaterally without any legitimate cause unfairly and illegally terminated his employment on 10.05.2021.
 3. It was the claimant's averment that the unlawful termination of his employment was preceded by an investigation received on 16.03.2021 from the Internal Forensics Investigators, who were tasked to investigate an incident where Bancassurance Sales Officers (BSOs) were allegedly being coerced by Premier Relationship Managers/ Personal Bankers to give them a percentage of their commissions earned every month for leads generated to them by the Relationship Managers for customers within their Portfolios.
 4. The claimant pleaded that the respondent issued him with a Notice to Show Cause letter dated 26.04.2021 accusing him of irregularly and unprocedurally soliciting for payments from sales commissions earned by Winnie Dabani and Francis Maina, in relation to sales referrals the claimant had given to them. He was therefore required to give a written explanation by 5:00 pm 29.04.2021 why disciplinary action should not be taken against him. He responded to the allegations and was then issued with a letter of notification of suspension from employment dated 28.04.2021 effectively suspending him for 30 days. The claimant thereafter received an email on 30.04.2021 inviting him for a disciplinary hearing scheduled to be held on 05.05.2021 and advising that he be accompanied by a colleague serving in the management cadre or a management staff association representative.
 5. It was the claimant's further case that even before the disciplinary hearing could commence the respondent arbitrary and unlawfully advertised for his job on 10.05.2021 and conducted internal and external interviews. He contended that the hearing was therefore just a formality and a sham as the decision to terminate his employment had been long made.



6. The claimant averred that he attended the disciplinary hearing accompanied by his representative, Catherine Odawa, who was however not allowed to participate in the hearing. That his representative was only permitted to make recommendations towards the end of the discussion, when she noted that the alleged claims against the claimant were unsubstantiated and expected to fail ab initio. He also noted that without reasons, the disciplinary committee never afforded him or his representative the right to cross-examine the witnesses that had given adverse evidence against him or who had contributed to his sick mother's medical scheme.
7. The claimant further averred that during the hearing, he denied having solicited for funds, explaining that he only supported Winnie Dabani in her sales and that Francis Maina sent money to help off-set the claimant's mother-in-law's hospital bill.
8. The claimant's further case was that after the disciplinary committee rendered its decision, he was informed of his right to appeal through the letter of termination dated 10.05.2021. He chose to appeal through a letter dated 13.05.2021 but during the appeal scheduled for 28.05.2021, the hearing panel similarly declined any request to cross-examine the respondent's witnesses. His representative was also yet again only allowed to comment and not to defend him during the appeal hearing. The appeal panel did not also provide any evidence in their possession against the claimant and never called for questioning the colleagues whom the claimant had named to have contributed towards his mother's medical scheme.
9. Further, the claimant pleaded that he stated at appeal that the termination of his employment was unfair and unlawful since no sooner had he signed the first hearing disciplinary minutes, than the respondent issued him with a termination letter on the same day as can be discerned from the minutes.
10. The claimant pleaded that having received the termination letter dated 10.05.2021 yet the appeal hearing was held on 28.05.2021, his appeal was not considered. Through a letter dated 18.06.2021, the respondent upheld his termination letter. His case was that his constitutional rights to fair administrative action were violated during the entire disciplinary process. Further, he was discriminated upon as other colleagues in other branches were given warning letters and Winnie Dabani never faced any disciplinary action. In sum, his case was that the respondent's decision to terminate his employment services was unlawful, unfair and wrongful.
11. The claimant alleges that the respondent has refused and neglected to pay him all his dues. He further pleaded that as a result of termination of his employment, he has consequently suffered loss and damage particularised as follows:
 - i. Inconvenience and lost job opportunities as the claimant has worked for the respondent for approximately 12 years and approaching retirement age.
 - ii. Failure to provide the claimant with a certificate of service.
 - iii. Character assassination of the claimant as the respondent, immediately after suspending him, called the claimant's customer base and informed them that the claimant ceased working for the Bank.
 - iv. The claimant has lost any opportunity to get another job since he applied for a job at Guaranty Trust Bank and was denied the opportunity because of his dismissal by the respondent.
12. The respondent's memorandum of response is dated 21.02.2023 and filed through Mohammed Muigai LLP. The respondent prays that:
 - a. The claimant's claim be dismissed with costs;



- b. The orders issued by this Honourable Court in the Ruling delivered on 6th July 2022 be discharged forthwith;
 - c. An order that the claimant refunds additional interest that the respondent was entitled to charge at commercial interest rates after the termination of the claimant's employment until repayment of his loan facilities.
13. The respondent's case was that the claimant discharged his duties as was expected of him until he committed acts of gross misconduct that resulted in the termination of his employment. That the claimant was subjected to a fair disciplinary process including being interviewed in a virtual meeting on 26.03.2021 as part of the investigation process. The Forensics Investigation Report dated 19.04.2021 concluded inter alia that there was plausible evidence that the Relationship Managers, including the claimant, were coercing the BSOs under them to give them part of their commissions. Further, the claimant was placed on suspension with full pay and benefits pending consideration of his response to the Notice to Show Cause, in accordance with the Bank's policy.
14. It was the Respondent's averment that the advertisement alluded to by the claimant was a regular advertisement to fill other vacancies within the respondent's organization and not the claimant's position. It also contended that the claimant never raised any issue on the alleged violation of his fair administrative action rights, which is therefore unsubstantiated and an afterthought. That the allegation that the solicited funds were for purpose of contribution to the medical treatment of the claimant's mother-in-law was also not substantiated.
15. The respondent pleaded that the minutes annexed by the claimant himself clearly indicate that his representative was allowed to contribute at the hearing and she rightly observed that the panel had been kind to the claimant. That the disciplinary hearing was conducted fairly, on account of valid reason and in accordance with policy and the law. The claimant was accorded an opportunity to be heard and later informed of the decision and outcome of the disciplinary hearing. Similarly, his appeal hearing was conducted fairly and impartially, with his representative contributing on his behalf.
16. The respondent also denied the allegation of discrimination. It averred that other employees adversely mentioned in the Investigation Report were subjected to disciplinary action as recommended in the Report and that some instituted proceedings before this Honourable Court.
17. The respondent further pleaded that it paid the claimant his final dues despite having committed acts of gross misconduct warranting summary dismissal. That it paid the claimant one month's retainer in lieu of notice together with his outstanding leave days as indicated in his termination notice.
18. As regards the loans issued to the claimant by the Bank, the respondent averred as follows:
 - i. At the time of termination, the claimant had a home loan of Kshs. 5,325,819.10 and an unsupported guarantee loan of Kshs. 1,775,099.25.
 - ii. By virtue of his employment contract, the claimant was enjoying staff interest rates on the said loans. This benefit automatically ceased to be available to the claimant upon termination of his employment. The respondent's policy is that upon leaving the service of the respondent, for whatever reason, any loan taken by an employee under preferential interest rates would be converted to commercial rates.
 - iii. The claimant was advised of the change of applicable interest rates in the termination letter as well as other benefits enjoyed by him as an employee. However, the claimant obtained an injunction from this Court barring alteration of the interest rates.



- iv. The claimant is not entitled to enjoy preferential interest rates that are exclusive to employees of the respondent after the termination of his employment, especially given the circumstances that resulted in termination of his employment.
 - v. The claimant's employment having terminated for justified reason and after a fair and lawful process, the respondent should be at liberty to enforce commercial interest rates on the claimant's loan facilities as he is no longer entitled to fringe benefits exclusive to employees of the respondent. That any benefit derived beyond the termination of the claimant's employment has thus been wrongfully accrued by the claimant.
19. The suit was referred to court annexed mediation before the mediator (Caroline Kagazi) under file No. MLM/MED/207/2023. The parties concluded a partial mediation settlement agreement dated 29.05.2023 and filed in court on the same date, settling part of the dispute as follows:
- a. The claimant was duly paid and confirmed receipt of one (1) month's salary in lieu of notice together with outstanding leave (9) days.
 - b. The claimant was issued with a certificate of service dated 24.05.2021 and confirmed the receipt thereof.
20. The parties further agreed that the trial court hears and determines the following issues:
- a. Compensation for unfair and unlawful termination.
 - b. Service pay.
 - c. Damages for discrimination.
 - d. Interest on outstanding loan to be at prevailing staff rates until payment in full.
 - e. Bonus payment for the year 2021 and costs of the suit.
 - f. The respondent to desist from issuance of adverse reports against the claimant to any prospective employers and to clear the claimant's name unconditionally.
21. The claimant testified to support his case and his witness (CW2) was Francis who had formerly worked for the respondent and terminated under similar circumstances as the claimant. The respondent's witness No. 1 (RW1) was Michael Kioko, the Senior Forensic Manager who undertook the investigation and, respondent's witness No.2 (RW2) was Vaslas Odhiambo, the Head of Employee Relations and Wellness. Final submissions were filed for the parties. The Court has considered the material on record and returns as follows on the agreed issues for determination as per the partial settlement agreement of 29.05.2023.
22. To answer the 1st issue, the Court returns that the claimant has not established that the termination was unfair. The evidence was that the claimant received the notice to show cause dated 26.04.2021, by notice dated 28.04.2021 he was suspended on full pay, he received invitation for disciplinary hearing dated 30.04.2021, he attended with a representative one Catherine Odawa, he received a termination letter dated 10.05.2021, he appealed the termination decision and he attended the appeal hearing with his representative one Duncan Muthusi. The Court finds that the claimant was notified the case that confronted him and he was accorded a fair procedure to exculpate through the disciplinary hearing panel and the administrative appeal stage. The Court finds that the respondent complied with section 41 of the *Employment Act*, 2007 on notice and hearing and section 45 of the Act on adopting a fair procedure. The claimant has not alleged that the respondent breached a procedural contractual or human resource provision.



23. The Court has considered the claimant's lamentation that he was not allowed to cross-examine Winnie Dabani who allegedly was the whistle-blower that the claimant had demanded and shared in her commissions as a BSO; and, Francis Maina who allegedly had given the claimant Kshs. 8,000.00 in the alleged bribery scam by Relationship Managers against the BSOs. The evidence is that the claimant asked to cross-examine the two witnesses at the appeal stage in circumstances that the appeal stage was not a re-hearing. The Court finds that the respondent properly declined the request. Parties were not in dispute that the appeal was not a re-hearing. In any event, the claimant had received the show cause notice dated 26.04.2021 and by the notification of suspension dated 28.04.2021, the respondent had conveyed to the claimant that he was being suspended on full pay in view of the matters emerging per the show cause letter and further, while the suspension was not a disciplinary action, the letter stated, "If you know of any documents, witnesses or information that you think will be relevant to the matters raised please let me know as soon as possible. If you require access to the premises or computer network for this purpose please let me know as we may agree to arrange this under supervision." The claimant failed to ask for information or to say he had witnesses until after the disciplinary hearing and the termination. It cannot be said that the respondent denied the claimant an opportunity to access information or documents. It appears to the Court that seeking to introduce witnesses for re-examination at the appeal stage in the instant case that parties knew the appeal was not a rehearing was an afterthought on the part of the claimant. Indeed an appeal would be based on the material at the initial hearing and nothing more. It is also true that administrative appeals in disciplinary cases in employment take the form of a review, that, the employee may introduce new evidence which was not available at the initial hearing or which, with due diligence, could not be availed at the initial hearing. In the present case, the claimant was specifically informed and reminded of his entitlement to access information and witnesses but he appears to have failed to take due diligence steps in that regard. It cannot be said that the procedure as adopted by the respondent in that regard was unfair and upon that account as urged for the claimant.
24. Turning to the substantive justice about the reasons for termination, the allegations in the show cause notice of 26.04.2021 where stated thus "1. That, in July 2020 or thereabout, you acted unprocedurally and against bank values when you solicited for payment from sales commission earned by Winnie Debnan (BSO) on education policy sales you had referred to her. 2. That in October 2020 or thereabout, you acted unprocedurally and against bank values when you solicited for payment from sales commission earned by Francis Maina (BSO) for various sales referrals you gave him. Subsequently, we note with great concern that a total amount of Kes. 8,000.00 related to the said commissions was sent to you by Francis Maina on 23rd October 2020 through MPESA." In his response dated 28.04.2021 the claimant admitted that the said Winnie had promised a lunch in appreciation of certain education policies which were not referrals but already closed business and for commissions of about Kshs. 200,000.00 posted to her account. The lunch promise appears to have been subject of certain text messages including one in the night in circumstances that the lunch could not materialise as Winnie's commissions in issue had been whipped out by a loan due to a shylock. Winnie had send a text message to the claimant to explain that she would not honour the lunch promise. In his rely of 28.04.2021 the claimant stated that he did not solicit to share in Winnie's commissions, the lunch never materialised, and, he never received a coin from Winnie. He further responded that on 23.10.2020 he had received Kshs.8,000.00 from Francis Maina being a fundraiser to offset medical bills for his mother-in-law.
25. The termination letter dated 10.05.2021 cited the two allegations as reasons for the termination. At the disciplinary hearing on 05.05.2021, the claimant confirmed about a text message from Winnie in issue and receiving Kshs. 8,000.00 from Maina. He had seen evidence of the text message and evidence of receiving the Kshs. 8,000.00 from Maina from the investigators. He denied the two allegations at the hearing. He admitted that he had not given Winnie sales that she had closed. When pressed, he stated at



the hearing that the lunch promise was a deal gone sour and a panellist quipped thus, “MK: So you are saying you are giving leads in exchange of something.” The claimant denied ever asking Winnie to pay him anything or a favour in view of his assisting her by giving her business. The Court has considered the hearing proceedings and particularly the text messages of 24.07.2024 at page 61 of the respondent’s bundle. Winnie wrote, “ Hello, I had a Shylock loan that had bothered me a while and they banked a cheque that whipped my ac and messed me up. That is why I couldn’t make it but will look for a way of paying, if we can manage a 420 or 891, all dues will be yours. Am sorry for the inconvenience caused.” The claimant replied on 25.11.2025 thus, “Not fair Winnie...not right...that’s not right at all. That’s not true. A salary of 200k? Surely.” The claimant testified that the 200k meant the Kshs. 200, 000.00 commissions paid to Winnie. The Court has considered all the material on record and the evidence and returns that on a balance of probability, the claimant was culpable of the allegation as particularised involving Winnie. As for the Kshs. 8, 000.00 to Francis Maina, the claimant failed to provide the evidence of contributions by MPESA and about hid alleged medical bill for the mother-in-law. The Court returns that the allegations was similarly established on the balance of probability. The Court returns that the reasons for termination were valid and existed as at the time of the termination as per section 43 of the Act.

26. While returning that the termination was not unfair in substance and procedure, the Court considers that the claimant has not shown a contractual or respondent’s policy provision that the termination letter could not issue promptly on the same day after the close of the disciplinary hearing. Further, the Court returns that nothing on record shows that such prompt issuance of the termination letter amounted to a predetermined termination because, in any event, the termination came after the conclusion of the disciplinary hearing. Further, it was true that the claimant’s representative spoke only once towards the end of the disciplinary hearing and there is nothing to show the representative was denied chance to speak more than once.
27. To answer the 2nd issue, the Court returns that the claimant has not established the contractual, policy or statutory basis for the claimed service pay and the same is declined.
28. To answer the 3rd issue, the Court returns that the claimant has not established discrimination. His case is that other Relationship Managers involved in the malpractice similar to the one that lead to his termination were not punished or mere warnings were imposed. The evidence to support that allegation was not provided. There was no material to show the other managers had similar cases and lesser punishment imposed as alleged. It appears to the Court that the claimant is admitting culpability but urging that disproportionate or discriminatory punishment was imposed against him. The Court finds that there is no evidence of graduated findings against the other managers as alleged and for want of a comparator discrimination has not been established at all. Further, the claimant lamented that Winnie ought to have been punished but the Court returns that there was no established basis to interfere with the respondent’s prerogative of designating Winnie as a whistle-blower and proceeding against the respondent as was done. Accordingly, no case has been shown for award of compensation for discrimination.
29. To answer the 4th issue, the Court returns that the issue of interest on the outstanding loan to be at prevailing staff rates until payment in full is unjustified or moot. It is moot because the claimant has submitted that he has since paid all the outstanding loans. It is unjustified because the claimant confirmed that he signed the loan contracts stating that the preferential interest rates would revert to market rates if he separated upon termination of the employment. The Court finds accordingly.
30. The 5th issue is on payment for the year 2021. The termination was on 10.05.2021. As submitted for the respondent, the policy was that employees under disciplinary action would be removed from the list of employees eligible for bonus. In the instant case, the claimant was dismissed. The policy applied and



bonus being an employer's discretionary benefit, the prayer will fail. It appears to the Court that even if the termination had been found unfair, the issue of lost bonus would only amount to an aggravating factor under section 49 of the Act in awarding compensation in that regard and the bonus would not be due at all.

31. The 6th issue is whether the respondent should desist from issuance of adverse reports against the claimant to any prospective employers and to clear the claimant's name unconditionally. It is that a tree lies where it falls. The duty of employers is to provide honest referrals to whoever requires the same. The Court finds accordingly and there is no justification in the present case to impose a duty that may lead the respondent to make untruthful referral reports about the claimant.
32. While making that finding the Court has considered opinion in *Peter Kimanthi Mbuvi v Mombasa Water Supply and Sanitation Company Limited* [2022] eKLR on the principle against unjustified or unqualified soft landing thus, "The Court has also considered its opinion against the principle of soft landing in *Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013* at Nakuru [2013]eKLR where in the judgment it was stated thus, "The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.
33. The Court returns that in the instant case it was not open for the respondent to conceal the alleged poor performance by invoking the cited termination clause 8 by paying in lieu of notice - but the respondent ought to have subjected the claimant upon a disciplinary process and in event of culpability, considered the soft landing as appropriate. Thus, the termination by payment in lieu of notice is found to have been improperly invoked on account of soft landing as was urged for the respondent."
34. The Court therefore holds that to defeat adverse referral in cases of terminations that are not unfair, the employer and employee will need to enter into such soft landing agreement and, failing, the employer is required to be truthful in making the referral report. In the present case, the parties had a chance to enter such an agreement during the Court Annexed Mediation. It therefore turns out that the termination having not been unfair, the parties are bound by their respective positions.
35. On costs, the Court has considered the partial settlement mediation agreement on record and further considered the margins of success after the hearing and each party will bear own costs.

In conclusion judgment is hereby entered for the respondent against the claimant with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 18TH OCTOBER 2024.

BYRAM ONGAYA,



PRINCIPAL JUDGE

