



REPUBLIC OF KENYA



KENYA LAW
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**Maitha v NCBA Bank Kenya PLC (Cause 187 of 2020)
[2024] KEELRC 13362 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13362 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 187 OF 2020
SC RUTTO, J
DECEMBER 6, 2024**

BETWEEN

JULIUS NDOLO MAITHA CLAIMANT

AND

NCBA BANK KENYA PLC RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim which was further amended on 6th December 2023, the Claimant avers that he was an employee of the Commercial Bank of Africa Limited prior to its amalgamation with NIC Bank Limited on 30th September 2019 to form the Respondent Bank. The Claimant avers that his working position was changed from the Records Department to SME Department sometime in the years 2005 and 2010, for which he was issued with various temporary contracts.
2. The Claimant avers that on 8th April 2014, the Respondent employed him as a Filing Assistant on a permanent and pensionable basis with a six-month probationary contract at a basic monthly salary of Kshs 52,688.00. Upon successful completion of the probationary period, the Claimant was confirmed into permanent employment on 28th November 2014 and deployed as a Filing Assistant.
3. It is the Claimant's case that whereas he was employed as a subordinate member of staff, his responsibilities were clerical in nature. It is the Claimant's contention that this wrong job placement resulted in him being grossly underpaid from 2011 to 2017.
4. According to the Claimant, he took up his tasks and effectively worked with the Respondent without any warning, suspension or complaint.
5. The Claimant avers that on or about 7th June 2017, the Respondent surprisingly deployed him to work in the Security and Investigations Unit on information that he had loaned Kshs 35,000/= to Kennedy Njuguna Ngaruiya of the Credit Administration Unit who then issued him with a cheque he could not cash due to insufficient funds.



6. Seemingly, this was to mark the beginning of the end of the employment relationship seeing that the Claimant was subsequently subjected to a disciplinary process which culminated in his termination from the Respondent's employment on 3rd November 2017.
7. It is the Claimant's contention that the Respondent's actions were in breach of the employment laws and his employment contract hence amounted to unlawful termination of his employment.
8. Against this backdrop, the Claimant has prayed for the following reliefs:
 - a. Payment in lieu of notice - Kshs. 86,001.
 - b. NSSF deductions made but not remitted from the year 2000 to 2011 - Kshs.49,200.
 - c. Underpayment of Kshs. 113,216/- from December 2009 to March 2011 (Kshs.7,076/-per month for 16 months).
 - d. Underpayment of salary from 2011 to 2017 of Kshs.757,173.00.
 - e. Underpayment of house allowance from 2011 to 2017 of Ksh. 185,495
 - f. Underpaid pension of Kshs.76,199.
 - g. Unpaid Airtime of Ksh. 91,600.
 - h. Unpaid leave of Ksh. 102,590.
 - i. Service pay of Kshs.1,462,017.
 - j. Employment contract benefits and the remainder of the contractual amount (sic)- Kshs.14,048.352
 - k. Damages for unlawful termination of employment amounting to 12 x 86,001=Kshs. 1,032,012/-
 - l. Certificate of Service.
 - m. Damages for defamation of character of Kshs. 2,000,000.
 - n. Underpayment of airtime as follows:
 - i. From 2009 to 2011 Ksh 600 x 36 months = Ksh21,600 and
 - ii. From 2012 to 2017 Kshs. 1000 x70 months = Kshs. 70,000
9. Opposing the Claim, the Respondent through its Amended Memorandum of Defence avers that the Claimant was employed as a subordinate member of staff and the responsibilities given to him were in line with his job grade. To this end, the Respondent has denied the Claimant's assertions that he was underpaid.
10. The Respondent further avers that the Claimant's termination from employment was on the basis that he had contravened the Respondent's policies which amounted to gross misconduct. In the Respondent's view, the termination of the Claimant's employment was fair and lawful. Consequently, the Respondent has asked the court to dismiss the suit with costs.
11. During the hearing which took place on 5th May 2024 and 15th July 2024, both parties called oral evidence.



Claimant's Case

12. The Claimant testified in support of his case and at the outset, adopted his witness statement, his initial list and bundle of documents as well as the supplementary list and bundle of documents to constitute his evidence in chief.
13. The Claimant stated that on 20th June 2017, the Respondent issued him with a letter reassigning him to the Security and Investigations Unit on a full-time basis in order to facilitate investigations.
14. On 3rd October 2017, the Respondent sent him a letter inviting him to a disciplinary meeting and detailing its concerns that he had engaged in shylocking by lending Kshs. 35,000/= to Kennedy Njuguna Ngaruiya in April 2016 at an interest rate of 30% per month.
15. The Respondent further alleged in the letter that he had received interest from the said Kennedy Njuguna Ngaruiya amounting to Kshs.88,500/= as at 9th May 2017 excluding the principal amount.
16. On 5th October 2017, he was invited to a disciplinary hearing vide the said letter dated 3rd October 2017 leaving him with only two days to prepare for the disciplinary hearing.
17. The Claimant averred that the Respondent did not furnish him with the results of the investigations allegedly conducted to enable him adequately prepare for his defense.
18. That on 3rd November 2017, the Respondent issued him with a letter terminating his employment with immediate effect. In the termination letter, the Respondent cited gross misconduct and contravention of its policies on his part. The Respondent further committed to pay him one month's salary in lieu thereof as well as any other unpaid dues.
19. He appealed the decision and was accorded a hearing on 14th December 2017. Following the appeal, the Respondent vide a letter dated 21st November 2018 upheld the decision to terminate his employment.
20. The Claimant averred that the panel conducting the appeal hearing did not factor in his points of appeal and did not make a just decision.
21. In the Claimant's view, the panel conducting the initial hearing and the appeal hearing were biased with a preset mind to terminate his employment and there was no fair hearing.
22. The Claimant further stated that the Respondent never paid him terminal dues following the unlawful termination.
23. He further averred that the Respondent never remitted the deductions in respect of NHIF and NSSF despite debiting his salary account.
24. That further, the Respondent unlawfully underpaid him for a considerable period of time between the years 2009 and 2014. As such, he claims underpayment.
25. The Claimant further averred that he was not involved in shylocking as alleged by the Respondent.

Respondent's Case

26. The Respondent called oral evidence through its Legal Counsel, Mr. Simon Mwangi, who testified as RW1. Similarly, RW1 adopted his witness statement, the initial list and bundle of documents as well as the supplementary list and bundle of documents filed on behalf of the Respondent, to constitute his evidence in chief.



27. RW1 told Court that on 7th June 2017, the Claimant reported to the Respondent's Security and Investigations Unit that a cheque he had received from Kennedy Ngaruiya, a co-worker, had been returned on being presented for payment due to insufficient funds in the account.
28. The Claimant further disclosed that sometime in the month of April 2016, he had loaned Kennedy Ngaruiya a sum of Kshs. 35,000/= and the cheque he received from Kennedy Ngaruiya was payment for the loan amount.
29. To facilitate investigations into the Claimant's complaint, he was reassigned to the Securities and Investigations Unit for a period of one month. He was expected to cooperate and assist with the investigations to enable the Respondent get to the root of his complaint.
30. Upon a review of the Claimant's complaint against Kennedy Ngaruiya and the underlying facts and circumstances of the issue, it became apparent to the Respondent that the Claimant might have contravened his contract of employment terms and the Respondent's policies.
31. On this basis, the Respondent invited the Claimant to a disciplinary committee hearing through a written notice dated 3rd October 2017, laying out a summary background of the allegations facing the Claimant.
32. RW1 further averred that having been reassigned to the Security and Investigations Unit to assist with the investigations, the Claimant was aware of all the aspects of the investigations and the two days' notice issued to him was sufficient. That in any event, the Claimant did not raise any objection to the Notice and the scheduled disciplinary hearing date.
33. Based on the outcome of the disciplinary hearing and upon internal deliberations, the Claimant was served with a termination letter dated 3rd November 2017.
34. RW1 stated that the Claimant's employment was terminated on the basis that he had contravened the Respondent's policies which amounted to gross misconduct on his part.
35. The Claimant appealed the decision to terminate his employment and the Respondent established an Appeal Committee to hear the Claimant's appeal.
36. The Claimant's appeal was heard on 14th December 2017 and he was given ample opportunity to present his case.
37. The Appeal Committee gave due consideration to the Claimant's submissions on the set-out grounds of appeal.
38. The Appeal Committee upheld the decision of the Disciplinary Committee on the basis that the Claimant did not provide or furnish additional information at the hearing to warrant overturning of the decision of the Disciplinary Committee.
39. In RW1's view, the Appeal Committee observed that the Claimant's termination was substantively justified and procedurally fair.
40. Upon his termination, the Claimant was paid all his terminal dues at the time of his separation from the Respondent.
41. That further, the Claimant's NHIF and NSSF payments were duly remitted.
42. With respect to the Claimant's allegation that the Respondent unlawfully underpaid him, RW1 stated that the Claimant has not laid a premise for his claim. According to RW1, the Claimant has not



- explained where the underpayment arises from, whether in relation to a gazette notice or minimum wage notice or a Collective Bargaining Agreement (CBA) between the Respondent and a labour union.
43. As to the CBA dated 19th August 2013 entered into by the Kenya Bankers Association and Banking Insurance and Finance Union (Kenya), RW1 stated that the Claimant has not shown by way of evidence that the Respondent was a party to the same.
 44. That further, the Claimant has not shown the period for which the CBA was applicable and the manner in which the same applied to him; and the extent to which the terms and conditions of the CBA are applicable and binding upon the Respondent.

Submissions

45. It was the Claimant's submission that the allegation against him remains unproven. It was his position that investigations were never concluded in the course of his employment and neither was an investigation report produced to indicate the findings of the investigation if at all concluded.
46. The Claimant further submitted that he was never issued with a notice to show cause as a formal charge by the Respondent detailing the reasons why it was contemplating termination. That therefore, he was not accorded an opportunity to show cause why disciplinary process should not be instituted against him.
47. It was the Claimant's further submission that he received an invitation to a disciplinary hearing dated 3rd October 2017 at 5:00 pm, inviting him to a disciplinary hearing scheduled for 5th October 2017. That as such, he had less than 24 hours to prepare a defense as he was still a full-time employee of the Respondent.
48. The Claimant further submitted that the termination letter failed to inform him of his right to appeal the said decision in accordance with the Human Resource Guideline at clause 2.6. That further, the Respondent communicated the outcome of the appeal on 21st November 2018, a few days shy of a year.
49. According to the Claimant, the procedure was fundamentally flawed and he urged the Court to hold as much.
50. On its part, the Respondent submitted that the minutes not only confirm that the process leading up to the Claimant's termination was fair, but that he was accorded every opportunity to ask questions and give responses and/or clarifications.
51. The Respondent posited that the Claimant was subjected to due process, was heard, accorded a second chance of appeal and notified of the reasons for the termination of his services in accordance with the Act.
52. With respect to substantive justification, the Respondent submitted that the Claimant went as far as admitting his role in the shylocking arrangement by admitting that the funds were sent to him, that he charged a fee of 30%, and made some interest payments on Kennedy's behalf.
53. The Respondent contended that it was therefore disingenuous of the Claimant to now argue in his submissions that he was a mere conveyor belt in the transactions. In the Respondent's view, there was no ambiguity regarding his role in the shylocking process.
54. The Respondent further submitted that pursuant to its Policies and the Claimant's Appointment Letter, the Claimant was prohibited from engaging in any activity that was in conflict with the Bank's business such as borrowing or lending money as was the case in this instance.



55. Placing reliance on the case of *Nazareno Kariuki v Feed the Children Kenya* [2013] eKLR, the Respondent submitted that any reasonable employer faced with the same facts, where an employee has on several occasions contravened a policy and admitted to the contravention, would have terminated the employment of the Claimant.

Analysis and determination

56. Flowing from the pleadings, the evidentiary material on record as well as the rival submissions, the following issues stand out for determination:
- i. Whether the Respondent had a valid and fair reason to terminate the employment of the Claimant;
 - ii. Whether the Claimant's termination was in accordance with fair procedure.
 - iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason

57. Section 43 as read together with Section 45 (2) (a) and (b) of the *Employment Act* (Act) are the key statutory provisions in determining this issue. In this regard, Section 43 requires an employer to prove the reasons for termination while Section 45(2) (a) and (b) provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
58. In the case herein, the Claimant was terminated from employment on grounds of conflict of interest. In this regard, the Claimant was alleged to have engaged in shylocking by lending the sum of Kshs 35,000/= to his colleague Kennedy Njuguna Ngaruiya in April 2016 at an interest rate of 30% per month and in return, received an interest amounting to Kshs 88,500/= as at 9th May 2017 excluding the principal amount.
59. The Claimant has maintained that he was not involved in shylocking. As per his submissions, he was a mere "conveyor belt" and did not lend any money to his colleague.
60. The record bears that the Claimant has admitted that he assisted his colleague Kennedy Njuguna Ngaruiya to secure financial assistance from a third party who was known to him. According to the Claimant, he agreed to act as "security" for Kennedy as he was not known to the third party who was the lender in this case.
61. To this end, the third party advanced Kshs 35,000/= to Kennedy with interest at 30%. It is also uncontroverted that the repayments were being channeled through the Claimant. This is evident from the fact that the disciplinary process against the Claimant was triggered by a bounced cheque which had been drawn by Kennedy in his favour.
62. The Claimant denied that the third party who lent his colleague Kennedy the money was a shylock. He described him as his friend and distant neighbour who does taxi business. In my view, the title or description assigned to the third party is irrelevant. What counts is the fact that the said third party lent the Claimant's colleague the sum of Kshs 35,000/= at an interest rate of 30% at the behest of the Claimant.
63. It is not in doubt that the Respondent is a bank licensed to carry out banking business pursuant to the *Banking Act*. Section 2 of the *Banking Act* defines banking business to include the employing of



money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money.

64. Accordingly, it goes without saying that the Respondent is engaged in the business of money lending.
65. The Black's Law Dictionary, 10th Edition defines conflict of interest to mean: "A real or seeming incompatibility between one's private interests and one's public or fiduciary duties."
66. Clause 9.2.9 of the Respondent's Group Human Resources Management Policy Guideline addresses the issue of conflict of interest as follows;
- "All employees should avoid any situation that might give rise to an actual conflict of interest or even the appearance of a conflict of interest"
67. In light of the foregoing, it becomes apparent that the Claimant's action of facilitating a third party to lend money to a colleague at an interest rate amounted to conflict of interest on his part.
68. In as much as the Claimant denied engaging in shylocking, by his own admission, he played a central role in which a third party ended up lending money to the Claimant's colleague at an interest. This was the same business the Respondent was licensed to undertake.
69. It did not matter that the Claimant was not the principal lender as he has maintained. The bottom line is that he played a central role in a transaction that was in conflict with the interests of the Respondent Bank.
70. Further, it is notable that the Claimant's letter of appointment dated 8th April 2014, provides under the General Standing Orders as follows: "You will be expected to live on your salary and on it becoming known to the Bank that you are borrowing or lending money, you will be liable to have your employment terminated."
71. As such, by facilitating the lending of money to his colleague by a third party, the Claimant was in breach of his contractual terms. He did not have to be the principal lender for him to be liable.
72. Needless to say, the Claimant by his own conduct, availed to the Respondent a valid and fair reason to terminate his employment.
73. In so finding, I am mindful of the standard of proof applicable in employment cases. As was held by the Court of Appeal in the case of Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others [2019] eKLR:
- "The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services."
74. Applying the standard of proof to the case herein, I am satisfied that the Respondent has proved that it had a valid and fair reason to terminate the Claimant's employment contract on grounds of conflict of interest.
75. In light of the foregoing, I find and hold that the reason for the Claimant's termination from employment was fair, valid and related to his conduct, within the meaning of Section 43 as read together with Section 45(2) (a) and (b) of the Act.

Whether the Claimant's termination was in accordance with fair procedure



76. The requirement of fair procedure is generally provided for under Section 45(2) (c) of the Act. The details of the specific requirements are well encapsulated under Section 41. These requirements are with respect to notification and hearing. Specifically, an employer is required to notify the employee of the allegations he or she is required to respond to and thereafter grant him or her the opportunity to make representations in response to the said allegations, in the presence of a fellow employee or shop floor union representative of his own choice.
77. Through a letter dated 3rd October 2017, the Claimant was invited to attend a disciplinary hearing which was scheduled for 5th October 2017. Through the said letter, the Claimant was notified of the venue, date and time of the disciplinary meeting. He was also informed of his right to be accompanied by a representative.
78. Impugning the disciplinary process, the Claimant has averred that he was only given two days to prepare for the hearing. In his view, this was insufficient.
79. On this issue, the Respondent has averred that the Claimant was aware of the aspects of the investigations and that the two days' notice issued to him was sufficient.
80. The Court of Appeal in considering the issue of the adequacy of the notice period in the case *Nebert Mandala Ombajo vs Institute of Certified Public Accountants of Kenya (ICPAK)*, Nakuru Civil Appeal No. 62 of 2018, reckoned that disciplinary proceedings are a grave matter for an employee as the consequences may be catastrophic to the employee's life. The learned Judges of Appeal proceeded to hold that in that case, the complaints against the employee were serious, and there is no doubt that he needed sufficient time to prepare psychologically, and if need be, get the best advice that he could.
81. Similarly, in this case, I do not doubt the Claimant's assertions that the timeframe given, was not sufficient to allow him prepare for the disciplinary hearing. Indeed, it is highly probable that this impaired his defense and his level of preparedness for the disciplinary hearing. This is further considering the gravity of the offences leveled against the Claimant and the implication on his career.
82. In any event, the Respondent stood to suffer no prejudice by allowing the Claimant sufficient time to prepare for the disciplinary hearing.
83. For the foregoing reasons, the Court finds that in terminating the Claimant's employment, the Respondent did not act in accordance with justice and equity hence did not entirely comply with the requirements of procedural fairness.

Reliefs

84. As the Court has found that the termination of the Claimant's employment although for a fair and valid reason was not in accordance with procedural fairness, the Court will award him compensatory damages equivalent to three (3) months of his last salary. This award has taken into account the length of the employment relationship which spanned 14 years as well as the Claimant's own contribution to the termination of his employment.
85. The claim for notice pay succeeds for the reason that despite the Respondent advising the Claimant that the same would be paid as part of his terminal dues, there is no evidence confirming that such payment was made to the Claimant. As a matter of fact, the Respondent did not dispute the Claimant's assertions that he was not paid terminal dues as advised in his letter of termination.
86. The Claimant has further sought to be compensated for unpaid leave in the sum of Kshs 102,590/=. The Claimant avers that he did not proceed on leave from 2005 to 2011. Opposing the Claim, the



Respondent has averred that the Claimant was entitled to take leave in accordance with his contract and the law which leave was neither denied or refused.

87. The Respondent did not exhibit the Claimant's leave records to challenge his assertions that he did not proceed on leave during his employment. Under Section 74(1) (f) of the Act, the Respondent has a statutory obligation as the employer to maintain all leave records in respect of its employees.
88. As there is no evidence in the form of the Claimant's leave records, it follows that his assertions that he did not proceed on leave, were not controverted by way of evidence. As such, he is entitled to payment in lieu of untaken leave. However, in line with Section 28(4) of the Act, this award is limited to 18 months preceding the termination of the Claimant's employment.
89. The claim for service pay is declined as the Claimant's letter of appointment confirms that he was a member of a pension scheme. Therefore, this places him within the ambit of the exclusions under Section 35(6) of the Act.
90. With respect to the claim for underpayments, the Claimant pleaded that he was employed as a subordinate staff but was given responsibilities that were clerical in nature hence was underpaid from 2011 to 2017. In support of his case, the Claimant relied on email correspondence between 13th September 2013 to 29th September 2013. It is this court's view that this alone does not constitute sufficient evidence to prove a complete shift of the Claimant's roles so as to justify a claim for underpayment.
91. The claim with respect to unremitted NSSF deductions is denied as the same cannot be issued in the form of an award being statutory deductions in nature. In this regard, it would be prudent for the Claimant to liaise with the Respondent for purposes of reconciliation of his remittances for the period in question.
92. The claim for payment of the Claimant's contractual benefits for the remainder of his contractual term is denied for the reasons that the same is an anticipatory relief. As was held by the Court in *Engineer Francis N. Gachuri v Energy Regulatory Commission* [2013] eKLR, there is no provision for payment of damages to the date of retirement because employment like any other contract provides for exit from the contract.
93. The claim for defamation is denied as there has been no finding on the same.

Orders

94. The total sum of my consideration is that Judgment is entered in favour of the Claimant and he is awarded:
 - a. One (1) month's salary in lieu of notice being the sum of Kshs 86,001.90.
 - b. Compensatory damages in the sum of Kshs 258,005.70 which sum is equivalent to three (3) months of his gross salary.
 - c. Unpaid leave in the sum of Kshs 90,301.60 being equivalent to 18 months.
 - d. The total award is Kshs 434,309.00.
 - e. Interest shall apply on the amount in (d) at court rates from the date of Judgment until payment in full.
 - f. The Claimant shall also have the costs of the suit.



95. As the employment relationship has been admitted, the Claimant is entitled to a Certificate of Service in light of Section 51(1) of the [Employment Act](#). This shall issue within 30 days from the date of this Judgment

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Achola instructed by Mr. Nyasimi

For the Respondent Ms. Wameyo

Court Assistant Millicent

