



**Boyi v Afya Co-operative savings and Credit Society (Petition
106 of 2018) [2023] KEELRC 207 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 207 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 106 OF 2018**

**J RIKA, J
JANUARY 31, 2023**

BETWEEN

DANIEL SAMMY OPWAPO BOYI PETITIONER

AND

AFYA CO-OPERATIVE SAVINGS AND CREDIT SOCIETY RESPONDENT

JUDGMENT

1. This is a simple claim for unfair termination, which has been converted into a Constitutional Petition, where multiple articles of the Constitution are alleged to have been violated, and where multiple declaratory orders under the Constitution and the Employment Act, are pleaded.
2. The facts are that the claimant was employed by the respondent as a Messenger on February 2, 2004. His initial salary was Kshs. 6,800 monthly.
3. He was dismissed by the respondent on August 16, 2018. The letter of summary dismissal explains that the claimant colluded with 2 other Employees of the respondent, Ian Mbote and Ambrose Ndumba, to defraud the respondent. He was blamed for failing to disclose the conspiracy. Dismissal was based on clause 9 of the prevailing CBA concluded between the Banking Union [BIFU] and the respondent. The claimant was advised to explain how he would pay back a loan amount of Kshs. 2,686, 726, he owed the respondent, at the time of dismissal.
4. He complains that he was not heard and was not involved in the alleged conspiracy to defraud. Instead of focusing on sections 41, 43 and 45 of the Employment Act, the claimant goes into a long discourse, citing verbatim articles 2, 10, 19, 20, 21, 22, 23, 25, 27, 30, 41, 43, 47, 50, 162, 165, and 259 of the Constitution. He then cites verbatim, sections 5, 41, 43, 44, 45, 47, 49, 50, of the Employment Act, and section 12 of the Employment, and Labour Relations Act.
5. The result is that the petition is full of unhelpful verbatim extracts of the above laws, and short on facts surrounding the Petitioner's dismissal.



6. The prayers sought are as follows: -
 - a. Declaration that the respondent's conduct against the Petitioner was discriminatory.
 - b. Declaration that the respondent's conduct and omissions are illegal, unfair and unconstitutional.
 - c. Declaration that the petitioner was forcefully and unfairly dismissed.
 - d. The petitioner be reinstated.
 - e. Damages for constitutional violations, loss of employment, injury to reputation and loss of future income.
 - f. Costs.
 - g. Any other suitable reliefs.
7. The petition is anchored on the grounds stated on the face of the petition, and a supporting affidavit, sworn by the petitioner on September 8, 2018.
8. The respondent entered appearance through the Federation of Kenya Employers, on May 7, 2019. There was however no response filed. The petition was referred to mediation, through a Notice dated November 4, 2020. The Mediator filed report on March 29, 2021, stating that there was no settlement reached between the parties.
9. On September 27, 2022, the petition was back in court for notice to show cause why the petition should not be dismissed for want of prosecution. The court declined to dismiss the petition, and directed that the respondent file its response within 14 days and thereafter, parties to file their closing submissions with 40 days.
10. On December 2, 2022, there was no response filed, and the respondent sought 3 more days to comply. The court granted 7 more days, but by December 9, 2022, the respondent still had filed nothing and the court declined further extension of time for the Respondent to file its Response and Submissions.
11. The Petition is therefore unopposed.
12. The issues are: whether termination of the petitioner's contract was based on valid reason or reasons; whether it was procedurally carried out fairly; and whether the Petitioner merits the remedies sought.

The Court Finds: -

13. The petitioner was employed by the respondent as a Messenger, on February 2, 2004. He was dismissed on August 16, 2018, on allegation that he was involved in a conspiracy with 2 other Employees, to defraud the respondent.
14. There is no evidence adduced by the respondent, in support of the reason for summary dismissal, stated in the letter of summary dismissal dated 16th August 2018. Details of the conspiracy are not before the court. There is no Investigation Report. The letter of summary dismissal does not contain information such as would lead any reasonable person, to conclude that termination was based on valid reason or reasons. The respondent did not meet the requirements of sections 43, 45 and 47[5] on justifying the reason or reasons for termination.
15. Procedure was glaringly flawed. There is only a letter of summary dismissal on record. There is no documentation of the processes leading to this letter. There is no letter to show cause. There are no



- charges. There is no notice inviting the Petitioner to any disciplinary platform. There is no record of a disciplinary hearing. It is just a letter of summary dismissal, dated August 16, 2018, through which the respondent informs the petitioner that the Board of Directors met the previous day, August 15, 2018, and determined that the petitioner is dismissed with immediate effect.
16. The procedure did not meet the minimum statutory standards of fairness, under sections 41 and 45 of the *Employment Act*.
 17. The court is satisfied that termination was unfair, on account of both lack of valid reason or reasons, and lack of a fair procedure, under sections 41, 43, and 45 of the *Employment Act*.
 18. The declaratory orders sought under the *Constitution* are not merited. As stated from the inception, this is a simple employment dispute, governed by the *Employment Act*. The violations sustained by the Employee are contemplated by the *Employment Act*, and there are adequate remedies under the *Employment Act*. The declaratory orders under the *Constitution* are rejected. If the *Employment Act* is not able to redress such a simple employment dispute, it would have been open to the petitioner to move the court to declare the *Employment Act* unconstitutional, to pave way for him to have direct access and assistance of the organic law.
 19. The petitioner worked for 14 years. He has been out of employment for over 3 years, and the court does not think reinstatement is a suitable order. Having been suspected by the respondent of conspiracy to defraud, although the allegation was not established, it is likely that there would be no trust and confidence in the parties' relationship. The Respondent is a finance Institution, where the values of trust and confidence, are held at a very high premium.
 20. The most suitable remedy is compensation for unfair termination. The petitioner worked for 14 years. There is no evidence that he was involved in other acts of misconduct in those 14 years. There is no evidence that his performance was lacking. His letter of appointment suggests that he was permanent and pensionable. He does not seem to have supplied the court with his last pay slip. While he pleads his starting salary, he did not make it clear what his last salary was. These are some of the small, but important details, that were lost in the petitioner's long detour into constitutional discourse. The court cannot therefore grant a definite sum in compensation, but awards that the respondent shall pay to the petitioner equivalent of 12 months' salary, based on his last gross monthly salary, in compensation for unfair termination.
 21. It is noted that the petitioner owed the respondent a loan amount at the time he left employment, so whatever is paid to him, is only likely to go into redressing his obligations to the respondent. He states at paragraph 4.10 [g] of his petition that, "The petitioner has huge loan liability of over Kshs. 2,686,726, which continues to attract market rate interest."
 22. Costs to the Petitioner.

In Sum it is Ordered: -

- a. It is declared that termination was unfair.
- b. The respondent shall pay to the petitioner equivalent of 12 months' gross salary, based on his last rate of monthly salary, in compensation for unfair termination.
- c. Costs to the petitioner.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY 2023.



James Rika

Judge

