



**Kimaiyo v Central Bank of Kenya Ltd (Cause 22 of 2017)  
[2023] KEELRC 437 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 437 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 22 OF 2017  
NJ ABUODHA, J  
FEBRUARY 20, 2023  
FORMERLY NAKURU 95/2015**

**BETWEEN**

**DAVID KIMAIYO ..... CLAIMANT**

**AND**

**CENTRAL BANK OF KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim filed on 31<sup>st</sup> March 2015 the claimant pleaded in the main that:
  - a. The claimant was employed by the respondent on the 21<sup>st</sup> Day of June, 2007 and confirmed on the 11<sup>th</sup> Day of September, 2008 as “assistant Bank Officer II (Security Assistant)” which duties he performed skillfully and dutifully till the respondent terminated his services without any lawful or plausible reasons.
  - b. The claimant avers that the termination of his employment by the respondent on allegation fraudulent activities or misconduct occurred while on duty.
  - c. The claimant avers that the termination of his employment by the respondent is unlawful, unprocedural and unfair for the reasons that:-
    - i. The claimant was not given a fair hearing before being terminated.
    - ii. The respondent dismissed the claimant without considering the claimant’s written defence, verbal representation and assertions of gross misconduct.
    - iii. No investigation was conducted to justify the allegations.
  - d. The claimant was earning a monthly salary of Ksh.87,384.10/= before deduction of NSSF, NHIF and other deductions.



- e. The claimant thus seeks declaration that his termination from employment is contrary to the prevailing employment law and amounts to breach of employment contract and more particular not in consonance with the Staff rules and regulations, Rule 6.21 and 6.26 respectively.
- f. The claimant's claim against the respondents is for a total sum of Ksh. 5,505,193/= plus cost and interest being damages for wrongful termination as particularized herein below:-
  - i. Three (3) months in lieu of notice  
(Ksh. 87,384.10 x 3) – Kshs. 262,153.30/=
  - ii. Damages for unfair termination of dismissal (Ksh. 87,384 x 48 months) – Kshs. 4,194,432/=
  - iii. Severance pay (Ksh. 87,384 x 12) – Kshs. 1,048,608/=

Total - Kshs. 5,505,193/=

2. The respondent filed a defence and pleaded in the main that:

- a. In further response to paragraph 3 of the memorandum of claim, the respondent avers that the claimant was employed by the respondent with effect from 9<sup>th</sup> July 2007 until 21<sup>st</sup> December, 2012 when his employment was terminated for breach of trust, misconduct and willful negligence in the performance of his duties.
- b. In response to paragraph 4 of the memorandum of claim, the respondent admits the same save to add that the dismissal of the claimant was not based on allegations as stated thereunder and puts the claimant to strict proof thereof.
- c. In further response to paragraph 4 of the memorandum of claim, the respondent avers that taking into account the claimant's position at the bank and the respondent's sensitive nature of business, it is mandatory that the respondents employees integrity to be high standard and beyond reproach.
- d. The respondent further asserts that after conducting its own independent investigations and having confirmed the allegations leveled against the claimant, it lost confidence in the claimant and was not satisfied as to the trustworthiness of the claimant or that the claimant would execute his duties diligently, faithfully and honestly.

Particulars of dishonesty, conspiracy, negligence, breach of trust and misconduct

- i. Obtaining money through false pretense of being able to secure the victims jobs with the respondent.
- ii. Using the names of senior staff members to solicit for favours.
- iii. Dishonestly collecting Ksh. 20,000/= from one Dorcus Cheruto in the pretense of securing her a job with the respondent.
- iv. Dishonestly collecting Ksh. 30,000/= from one Joseline Jemutai Kemboi in the pretence of being able to secure her a job with the respondent.
- v. Giving false and misleading information to the respondent's disciplinary committee.
- vi. Breaching the respondent's policies and procedures on institution security, image and reputation.



- vii. Obtaining benefit/advantage through illegal, irregular and unprocedural transactions at the expense of the respondent.
  - viii. Failing to carry out his duties as expected of him having regard to his position at the bank.
- e. In further response to paragraph 5 of the memorandum of claim, the respondent avers that on diverse dates in the years 2011 and 2012, the respondent received complaints against the claimant from two individuals that he had fraudulently obtained cash from them in pretext that he would secure them a job with the respondent.
  - f. That in further response to paragraph 5, the respondent did undertake its own investigations and filed a Criminal Miscellaneous Application No. 13 of 2012 at Chief Magistrates Court at Meru requesting for an order for Safaricom Limited to furnish the police with the details of MPESA transactions from the claimant's cell phone.
  - g. That upon the order being issued and the transaction details of the claimants M-PESA being furnished to the police, it was evident that indeed the claimant had received money from the two complainants despite denying the same.
  - h. In specific response to 5(i) of the memorandum of claim, the respondent avers that in the spirit of a fair hearing, it wrote to the claimant requesting him to respond to the aforementioned allegations against him.
  - i. The respondent denies the contents of paragraph 7 that the claimant's termination of employment was contrary to the prevailing employment law and that is not in consonance with the Staff rules and Regulations and puts the claimant to strict proof thereof.
  - j. In further response to paragraph 7 of the memorandum of claim, the respondent avers that the claimant's dues were calculated as hereunder;
    - a. 3 months' salary in lieu of Notice .....262,152.30
    - b. Less 10 days, 22<sup>nd</sup> – 31<sup>st</sup> December .....28,188.40
 Total 233,963.00
  - k. In further response to paragraph 7 of the memorandum of claim the respondent avers that the claimant was indebted to the respondent to a tune of Ksh. 2,589,005.65 at the time of his dues as itemized in paragraph 15 above and were applied to recover part of his liabilities with the Bank.
3. At the oral hearing the claimant stated in the main that he was employed on 21<sup>st</sup> June, 2007 and confirmed on 11<sup>th</sup> July, 2008 on permanent and pensionable terms. In 2012 he was at Meru CBK when he was served with a show cause letter. This was on 18<sup>th</sup> September, 2012. The letter was given to him at 6.30pm and was to respond by close of business on 19<sup>th</sup> September, 2012.
  4. It was his evidence that he responded to the letter and later summoned to a disciplinary hearing at the respondent's headquarters in Nairobi. He appeared on 23<sup>rd</sup> September, 2022 in company of one of his colleagues Mr. Kogo but Kogo was turned away. According to the claimant, he was asked so many questions most of which were not true. It was his evidence that he was accused of soliciting money from one Lodis who was working at Meru Police Station. According to him Lodis requested him to assist her with Ksh.10,000/= which he did and when he asked for repayment Lodis said she could only



- pay back Ksh.5,000/= immediately. Later Lodis came to his place of work and complained why he stopped communicating with her. He told her that he was disappointed about the money.
5. The claimant further stated that Lodis and him were in a relationship. She accused him of soliciting Ksh.2000/= to get her a job at CBK. The manager asked him to pay Lodis Ksh. 20,000/- to withdraw the case.
  6. Concerning one Jocelyn, he stated that she was at KMTC Meru and that she was from Elgeyo Marakwet and that he knew her through a police officer. Jocelyn later called him and told him she was a widow and if he could help her. They became friends and Jocelyn later asked him for Ksh. 30,000/= to be refunded later. He did not have the money so she got annoyed. He later went to deposit money in his Mpesa account and Jocelyn accompanied him and complained that he was depositing money yet he has refused to give her some. He stated that he later came to learn that Jocelyn was a married woman so he terminated the relationship. Jocelyn later came to his place of work and complained he took Ksh.30,000/= from her. It was his evidence that he attended the disciplinary hearing in Nairobi and was told to go back and wait. On 19<sup>th</sup> December, 2012 he was served with a dismissal later.
  7. The claimant complained that no investigation was done and that he was given only one day to respond to the allegations against him. He further stated that Lodis withdrew the complaint against him saying she was misled by a colleague to complain against him.
  8. In cross-examination he stated that he attended the disciplinary hearing and that Lodis and Jocelyn never knew each other. He further stated that he never complained about the time he was given to respond to the show cause letter.
  9. Mr. Yano stated that he was never aware of the statements by the complainants. He further denied writing the statement at page 11 of the respondents bundle but admitted to writing the one at page 12. About his dues, he stated that these were used to settle the loan he owed the respondent.
  10. The respondent's witness Ms. Elizabeth Njogu stated that she worked for the respondent in the Human Resource Department. She recorded her statement on 12<sup>th</sup> August, 2016 which she relied on as her evidence in chief she also relied on the documents filed with the claim.
  11. According to her investigations were conducted and that they were captured from page 2 to 34 of the respondent's bundle of documents. The claimant was issued with a show cause letter and responded. A disciplinary hearing was scheduled thereafter which the claimant attended. The committee after the hearing recommended claimants dismissal. He appealed the dismissal. The appeal was heard and dismissal upheld.
  12. In cross-examination he stated that she was not part of the investigative committee but she sat in the Secretariat. According to her, the claimant answered questions from the investigation team. It was further her evidence that she was not aware if the claimant was made to pay the complainants.
  13. Regarding the show cause letter, it was her evidence that the claimant was granted one day to respond to the same. The show cause letter never informed the claimant that he was entitled to be accompanied by a colleague.
  14. Regarding the complaints, it was her evidence that they were received in 2011 and that the investigations were intended to aid the administrative process. It was her evidence that the respondent established that they were fraudulent activities.



15. The claimant herein was accused in the main that he got himself in fraudulent activities to wit, he obtained money from the two ladies under the pretext that he was in position to obtain employment for them with the respondent.
16. The claimant was issued with a show cause letter dated 3<sup>rd</sup> May, 2012 and required to respond to the same by close of business the same day. The claimant was thereafter called for a disciplinary hearing and thereafter summarily dismissed. He appealed against the dismissal but the same was upheld on appeal.
17. Under section 47(5) of the *Employment Act* the burden of proof that an unfair termination or wrongful dismissal has occurred is on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal is on the employer.
18. The claimant herein was accused of fraudulent activities by obtaining money from one Dorcas Cheruto Lodis, a Police Officer at Meru Police station with a promise to secure her an attachment as a police officer at CBK. He was further and similarly accused of extorting money from one Jocelyne Jemutai Kemboi a student at KMTC Meru after promising her an attachment at CBK. Ms. Kemboi paid the claimant Ksh.25,000 cash and Ksh.5,000/= via M-pesa on March 25,2012.
19. The claimant responded to these accusations stating in the case of Lodis that they were involved in an intimate relationship and that she had requested him to assist her with Ksh. 10,000/= which he did but when he sought repayment Lodis said she could only pay Ksh.5000 immediately. According to him he thereafter cut communications with Lodis. When she came to his place of work looking for him he alleged that he told her that he was upset over the money.
20. Lodis then accused him of soliciting Ksh.2000/= from her and his manager told him to pay Lodis Ksh.20,000/= to close the matter which he did.
21. A similar explanation obtains for Jocelyne who he said he knew through another police officer whom he did not name. Jocelyn was stated to be a student at KMTC and was from Elgeyo Marakwet. According to the claimant, Jocelyne told him she was a widow and needed help. She asked for Ksh.30,000 which he did not have. Later on he when he wanted to deposit some money into his Mpesa, Jocelyne offered to accompany him and when she saw him deposit money she complained why he was depositing money but had refused to assist her. According to him he later discovered Jocelyne was a married woman and cut off links with her. Jocelyne just like Lodis came to his place of work and accused him of taking her Ksh.30,000/=.
22. The respondent on its part conducted investigations around these allegations and recorded statements from the complainants.
23. The respondent further obtained Mpesa records (pages 23-27 of the respondents bundle of documents). The Mpesa statement of Dorcas Cheruto Lodis showed that on 27/6/2011 the claimant received Ksh.5,030 from her. Further, the Mpesa Agent Sheet showed that on 25/3/2012 he deposited Ksh.30,3000/=.
24. The above quite coincides with the allegations by the complainants against the claimant. Whereas the claimant in both cases claim the complainants were jilted lovers who became upset because he could not give them money, he did not on his part produce any credible evidence that he indeed advanced them money. For instance, in the case of Lodis, the claimant did not provide or state in what form he gave Lodis the Ksh.10,000/= of which she could now only refund Ksh.5,000/=. It was also inconceivable and strangely coincidental that the claimant could be depositing the very amount or approximate to the money Jocelyn asked him for. Further was it prudent to ask someone who has asked him for money to accompany him to deposit the same amount of money.



25. Employment cases are civil claims and the standard of proof is therefore on a balance of probability. The guilt of an employee need not be proved to the standard required in criminal cases. It is enough once it is reasonably demonstrated that it is more probable than not that the employee was involved or guilty of the act or omission he or she is accused of.
26. Casting the above observation against the provisions of section 47(5) of the Act, the Court is persuaded that the respondent had valid and justifiable reasons to summarily dismiss the claimant and further that due process was followed while carrying out the dismissal.
27. The claim is therefore found without merit and is hereby dismissed with costs.
28. It is so ordered

**DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF FEBRUARY, 2023**

**ABUODHA NELSON JORUM**

**JUDGE ELRC**

