



Ndzai v Century Micro Finance Bank Ltd (Employment and Labour Relations Cause 383 of 2016) [2023] KEELRC 435 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 435 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 383 OF 2016
AN MWAURE, J
FEBRUARY 16, 2023
(BEFORE HON. LADY JUSTICE ANNA NGIBUINI MWAURE)**

BETWEEN

ERIC KOMBE NDZAI CLAIMANT

AND

CENTURY MICRO FINANCE BANK LTD RESPONDENT

JUDGMENT

1. The claimant filed amended memorandum of claim dated October 25, 2021.

Claimant's case

2. The claimant says he was a bonafide employee of the respondent having been employed as a Business Development Manager and was later promoted to executive officer and he held that office till December 31, 2015 when he was illegally terminated.
3. The claimant says he was engaged from March 2, 2015 earning a salary of Kshs 150,000/- which was 80% and 20% would be paid as commission upon satisfaction of the supervision based on parameters and weightings as per performance guide agreed between the claimant and his superior and same was to accrue beginning after his probation which was June 2, 2015.
4. The claimant says he performed his job very well and was promoted to general manager from May 2015 and Acting Chief Executive Officer and his salary was Kshs 250,000/-.
5. He says that at no time did the respondent inform him that he did not meet the respondent's parameters and weighting, to make him not earn his commission.
6. He says his employment was terminated abruptly on December 30, 2015 and was told not to report to work the following day.



7. He says the reason given in his termination letter were frivolous and do not amount to any justification.
8. He says there is no regulation from Central Bank to the effect that he could not work in the respondent's financial institution.
9. He says there was no letter from Central Bank to show there was a vetting going on and in any event there was a case in court relating to the claimant and ultimately judgment was delivered in his favour.
10. He says the respondent was always aware of the criminal case against him which had commenced in 2011 but he otherwise avers he had no disciplinary issues at work.
11. Further he says he was appointed as acting Chief Executive officer from May 2015 and yet was never paid commensurate salary which the former CEO was earning of Kshs 550,000/- and current CEO is earning Kshs 600,000/-.
12. He further says he was not paid December 2015 salary and two months' salary in lieu of notice.
13. He says he had 18 days of accrued leave and same was never paid.
14. The claimant says his demand letter by his advocate dated January 7, 2016 has not been responded to and that his termination was substantially and un procedurally unfair.
15. He makes prayers as listed in paragraph 25 of his amended memorandum of claim.

Respondent's Case

16. The respondent filed the amended memorandum of response and counter claim dated December 22, 2021. The respondent states that claimant as a senior officer was subject to vetting and approval by the respondent's regulator and the claimant failed necessitating summary dismissal.
17. He says the reasons for termination of the claimant were communicated prior to the termination as per the letter dated December 30, 2015.
18. The respondent states that the Central Bank regulation requires any senior person in a bank must be vetted and approved and it was in this respect they got a letter from Central Bank on October 12, 2015 declining to approve the claimant as a general manger. Hence the respondent says he had to terminate the claimant from employment.
19. The respondent says he never offered claimant the position of acting chief executive officer and furthermore the salary is usually negotiated with an employee before he is employed. The respondent says there was no negotiation for salary of a CEO.
20. The respondent further states that the respondent had criminal issues and police were investigating him and as well for abuse of office by receiving Kshs 86,000/- and failing to account for Kshs 36,000/-.
21. He was also accused of inducing a junior employee to advance Joseph K Sawe Kshs 100,000/- loan facility for the use of the claimant. The respondent says 68,201/- is still outstanding.
22. He is also accused of advancing his sister Kshs. 80,000 which is still outstanding.
23. The claimant is accused of having committed criminal offence against his former employer which he did not disclose to the respondent.
24. The respondent counterclaim Kshs 267,011/- as particularised above plus interest at court rates and costs.



Claimant's Evidence in court

25. The claimant gave his evidence in court on March 17, 2022. He repeated and affirmed what was in the memorandum of claim same to say his approval by Central Bank was rejected because he had a pending criminal case which was finalised on February 12, 2016 and he was acquitted.
26. He says he did not see the letter from Central Bank of Kenya but only saw it with his advocate. He says the letter was written on October 15, 2015 and he received the termination letter on December 31, 2015.
27. He further said the accusations against him of abuse of office are not backed by any evidence and in any case he was dismissed because Central Bank of Kenya failed to approve his appointment.
28. He also says his sister Constance Ndzai had been given a loan by the respondent on December 16, 2014 before he was employed by the respondent.
29. He says the counterclaim against him for Kshs 267,011/- was money for an office meeting on August 17, 2015 to August 20, 2015 and he had not reconciled the float before he was terminated. He says he also had not received the invoice of the service provider before the termination.
30. The claimant says he was entitled to his commission after probation. He also says they used to pay police some dues for escorting customers.
31. The claimant says he was entitled to 18 days leave for the period he served and as well two months' pay in lieu of notice. He says he did not receive acting allowance though he acted as the CEO.
32. He says he was never paid per diem or gratuity and they are not in his contract.

Respondent's witness evidence

33. The respondent witness says he was the CEO of the respondent bank when claimant was working there. He says that usually the Central Bank has to approve employment of a senior employee and if not approved then the person cannot be given a contract.
34. The witness says they informed claimant the reason for his termination alongside the human resource manager. He says they showed him the letter from Central Bank of Kenya. He says they had minutes of that meeting but they have not produced them in court.

2nd Respondent witness

35. The human resource manager of the respondent produced exhibits in court and admitted he joined the respondent after claimant had left.
36. He says claimant was not terminated for disciplinary issues but was because the Central Bank of Kenya declined to approve his appointment. He says the letter from Central Bank was issued on October 5, 2015 and he was terminated on December 31, 2015 since the board had to be referred to and board sits four times in a year.

Claimant submissions.

37. The claimant in his submissions says that the respondent used the reason on a letter received from Central Bank of Kenya to terminate the claimant. The letter however does not state claimant should be terminated. Instead it states they could reconsider his suitability once he was cleared from an ongoing criminal case then.



38. The claimant says the reason for his termination was therefore frivolous as the case they are alluding to was still ongoing even when they employed the claimant and that apparently the respondent still knew about it.
39. Claimant says there is no disciplinary issues raised against him by the respondent.
40. The claimant therefore submits his termination was unfair and procedural as no reason was given to terminate him. The letter of Central Bank of Kenya never recommended he should be terminated.
41. For the foregoing reasons the claimant prays tht the court uses its wisdom to find his termination was unfair and enter judgment in his favour together with costs.

Respondent's submissions

42. The respondent in his submissions says that the Central Bank of Kenya regulatory framework provide that persons wishing to hold senior positons in the banking industry must be vetted and approved for appointment of such senior positions by the Central Bank of Kenya and this has also been provided for under the [Banking Act](#).
43. They further state that the said framework section 32A also provide that Central Bank of Kenya where it deems necessary must carry out an assessment of the professional and moral suitability of the persons managing or controlling institutions.
44. So section 48 of the said framework provide that any person who continues to act as an officer of an institution after he has been disqualified by virtue of this section shall be guilty of an offence. They rely on the case of *Kenya Airways Limited vs Satwant Singh Flora (2013) eKLR* where court held that an illegal contract is:

' A contract that is prohibited by statue (eg one between traders providing for minimum resale prices) or is illegal at common law or on the ground of public policy.' So the respondent submits that a court ought not to enforce an illegal contract.
45. They therefore state that the claimant having been disqualified by operation of law had now to cease holding office. This is provided in section 9A (5) of the Act.
46. They further submit that it was upon the claimant to inform the bank of the outcome of the case so as to reconsider his suitability of the position. They also aver that acquittal in a criminal court does not justify a defence of suspected misconduct. They rely on the case of *Kenya power & Lighting Company Limited vs Agrey Tukurito Wasike (2017) eKLR* where Court stated that standard of proof of a criminal case is different from standard in a disciplinary process.
47. It is their submissions therefore that the claimant dismissal was in accordance to fair procedure under section 45 of the [Employment Act](#).
48. They also say their counterclaim of Kshs 267,011/- being money lost during the claimant's tenure is justified. They rely on case of *Wycliffe Munyasia vs Agric Farms Inputs & Credit (K) (2020) eKLR* where court ruled the claimant was responsible for money lost during his watch. They pray they be allowed to recover the lost sums.
49. They conclude that the respondent being a regulated financial institution is bound by [Banking Act](#) and Central Bank of Kenya regulatory framework and so had to terminate the claimant's employment once Central Bank of Kenya declined to approve his appointment.



50. They state that all in all the claimant's termination was valid and he should also be ordered to pay Kshs 267,011/-.

Determination

51. The main issues for determination are:
1. Whether the claimant's employment was terminated by operation of law and whether it was fair and lawful.
 2. Are reliefs sought by the claimant merited?
 3. Are reliefs sought by the respondent also merited?
52. The claimant from the pleadings and the evidence adduced in court was employed by the respondent as a Business Development Manager from March 2, 2015. Subsequently he was promoted to the position of General Manager with a probation period of 6 months. This was on May 1, 2015.
53. The law of employment is very clear on the process of terminating an employee from employment. The provisions of sections 41 and 45 of the *Employment Act* among others are not suggestions but are trite law that must be complied with to the letter. Section 45(1) of the *Employment Act* provides:
- ' No employer shall terminate the employment of an employee unfairly.'
54. The claimant having been in the respondent's employment still deserved to be taken through the legal mandate provided in the law. He was not being recruited as a new employee and clearly the respondent should have done their due diligence with the investigation agencies to confirm if claimant had any criminal matters or records. They should also have sought the Central Bank clearance before offering him an employment. As it is the claimant was ambushed with a dismissal letter with no valid reasons as to why he was being dismissed.
55. Indeed in his evidence in chief he says he did not even see the letter of Central Bank before termination. In fact he says he only saw it with his advocates.
56. Following the same argument even if the claimant was operating under an illegal contract as averred by the respondent still they still should have given him an opportunity to defend himself. Section 41(1) of *Employment Act* provides clear process that an employer must follow before terminating an employee section 41(1) of *Employment Act* states:
- '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.'
57. There are numerous authorities in view of the above sections to the effect that now an employee cannot just be handed a termination letter one morning and told 'your employment with our organisation is terminated.' The employee must be given a valid reason or reasons for terminating and must be given a chance to defend himself.



58. The claimant if anything could even have been informed the reasons why Central Bank of Kenya had refused to approve his appointment as a General Manager. The termination letter dated December 30, 2015 is at the best quite vague. It merely states:

' Following the issues raised by the Central Bank of Kenya during your vetting process, I regret to inform you that your services with Century microfinance bank Limited have been terminated effective Thursday December 31, 2015.'

59. It is clear from this letter that the respondent flouted the procedure and the legal framework in place in dealing with termination of an employee. In the case of *Co-operative Bank of Kenya Limited vs Yator Civil Appeal No 87 of 2018* three bench judges sitting in the Court of Appeal had this to say.

' That notwithstanding even where an employee has committed gross act of misconduct which acts warrant summary dismissal the law requires tht before such sanction is undertaken an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employer in defence such must only be in exceptional circumstance which the employer must demonstrate.'

60. It is clear that following the law in terminating an employee is clear and there is no short cut. In the case of *Standard Group Limited vs Jeneny Lyesby Civil Appeal No 291 of 2014* where the Appeal Court agreed with the trial court that;

' There are no exceptional circumstances that have been established by the respondent that the case against the claimant was so severe that he could not be accorded the basic minimum. That is notice and a hearing made before the summary dismissal.'

The judges observed that the procedure under section 41 of the Act is mandatory.

61. Even if the claimant had conducted misdeeds that deserved disciplinary action be taken against him still the respondent was bound to follow the laws and the right procedure.

62. Flowing from the above the court is convinced the respondent flouted the employment laws in terminating the claimant without giving him a valid reason and following the right procedure. Subsequently judgment is entered in favour of the claimant.

Remedies

63. The claimant having succeeded in his claim is awarded the following remedies:

- a. One month salary for December 2015 seems to have been paid being Kshs 70,000. Respondent need to produce a breakdown of the same as his salary was Kshs 250,000/-.
- b. Two months' salary in lieu of notice as per his contract Kshs 500,000/-.
- c. Accrued leave for 18 days less 5 days already taken as per documents in court. The parties to confirm amount due.
- d. Prayer for unpaid salary for acting as CEO is disallowed as there is no documents to establish that position and amount of acting allowance.
- e. For compensation he is awarded Kshs 250,000/- for one month. Total awarded is Kshs 750,000/- subject to clarifying prayer a and prayer c.



- f. Costs are awarded to the claimant plus interest at court rates from date of judgment till full payment.
- g. Certificate of service to be issued within 14 days.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

ANNA NGIBUINI MWAURE

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 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.

A SIGNED COPY WILL BE AVAILED TO EACH PARTY UPON PAYMENT OF COURT FEES.

ANNA NGIBUINI MWAURE

JUDGE

