



REPUBLIC OF KENYA



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**Okwoyo v Bank of Africa (Cause E072 of 2021)
[2023] KEELRC 1089 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1089 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E072 OF 2021**

**AK NZEI, J
APRIL 20, 2023**

BETWEEN

ZABLON NYAMBANE OKWOYO CLAIMANT

AND

BANK OF AFRICA RESPONDENT

JUDGMENT

1. *Vide* a Memorandum of Claim dated July 26, 2021, the claimant sued the respondent and sought the following reliefs:-
 - a. a declaration that the claimant's termination from employment was unfair.
 - b. Ksh. 1,200,000 for unfair termination (12 X ksh. 100,000)
 - c. costs of the suit and interest.
2. The claimant pleaded that by a contract of employment dated August 28, 2014 and taking effect on October 21, 2014, the claimant was employed by the respondent as a Retail Officer, Mombasa at a gross monthly salary of ksh. 100,000, and was terminated in 2019 when holding the position of Portfolio Quality Management Officer.
3. The claimant further pleaded that he was transferred to Nairobi Head Office vide a letter dated July 9, 2019, and was paid the transfer allowances to which he was entitled, though he left his family at home in Kilifi. It was the claimant's further pleading:-
 - a. that in or about September 2019, the claimant asked for a salary review from the Human Resource Manager due to high cost of living and increased expenditure arising from the claimant's transfer to Nairobi and the fact that he (the claimant) had not received any salary increment since 2014.



- b. that on October 3, 2019, the claimant was served with a suspension notice for alleged discrepancies in the information given by him to his supervisor and the (the respondent's) Managing Director relating to the claimant's family and financial status in support of his desired salary increment.
 - c. that on October 22, 2019, the claimant was served by the respondent with a disciplinary hearing notification form dated October 22, 2019, for a meeting to be held on October 24, 2019, to which the claimant responded vide a letter dated October 22, 2019 and subsequently attended the disciplinary hearing.
 - d. that the claimant was summarily dismissed from employment by the respondent vide a letter dated November 20, 2019, without following proper procedure and without valid reasons contrary to Section 41,43,44 and 45 of the Employment Act 2007.
 - e. that the termination was unfair.
4. Documents filed by the claimant along with the Memorandum of Claim were a verifying affidavit sworn by the claimant on July 26, 2021, the claimant's written witness statement and a list of documents, both dated July 26, 2021. Documents listed on the claimant's list of documents included a contract of employment dated August 28, 2014, confirmation of employment letter dated 12/1/2016, letter of appointment dated 27/5/2016, appreciation letter dated 12/9/2019, request for salary review (dated 23/9/2019), suspension letter dated 3/10/2019, disciplinary hearing notification form dated 22/10/2019, response to disciplinary hearing notification form dated 22/10/2019, extension of suspension letter dated 22/10/2019, termination letter dated 20/11/2019, letter of appeal (from) termination dated 21/11/2019, letter of resignation dated 22/1/2020 and Deed of Release Discharge dated 15/1/2020.
 5. The respondent entered appearance on 11/8/2021 and subsequently filed a statement of Response on 26/8/2021. The respondent admitted having employed the claimant by an appointment letter dated 28/8/2014 whereby the claimant was earning a gross monthly salary of ksh. 100,000, whereupon the claimant rose in ranks to the position of the respondent's Portfolio Quality Management Officer.
 6. The respondent further pleaded:-
 - a. that pursuant to Clauses 13.1 and 13.2 of the respondent's Human Resource Policy, the claimant was transferred from his duty station in Mombasa to the Respondent's Head Office in Nairobi in the same position of Banking Officer – Portfolio Quality Management vide a letter dated 9/7/2019, with the transfer taking effect from 10/6/2019.
 - b. that vide a letter dated 23/9/2019, the claimant asked for a salary increase from the respondent's Managing Director.
 - c. that on 2/10/2019 the claimant saw the respondent's Managing Director on his request for a salary review and stated that his children were out of school due to lack of school fees, that he was unable to sustain his wife and children in Nairobi after the transfer and had relocated them to Kisii to stay with his mother, that his wife was not working, that his rental expense for a 2 bedroomed house was ksh. 18,000 and that his Masters Programme had been disrupted due to lack of funds.
 - d. that there were discrepancies between the information the claimant had previously shared with his immediate supervisor and what he told the Managing Director on 2/10/2021.



- e. that a meeting was subsequently convened the following day on 3/10/2019 between the claimant, the Managing Director, Deputy Managing Director, Head of Human Resources and the claimant's immediate supervisor to discuss the issues; and that the claimant admitted during the meeting that there were indeed discrepancies between the information shared with his supervisor and with the Managing Director.
- f. that the claimant's immediate supervisor (Mr. John Mageto) recorded a written statement dated 3/10/2019 detailing the discrepancies. That the claimant had informed his supervisor that he had rented a house at Kabete at ksh. 7,000, that his children were schooling in Mombasa and living in Kilifi in a house financed by the respondent, that he had cleared fees arrears with his June 2019 salary and that during the period he had been in Nairobi, he had made six trips to Mombasa to visit his family.
- g. that it became apparent that the claimant was dishonest in his letter of 23/9/2019 and his discussion with the Managing Director on 2/10/2019.
- h. that Clause 2.13 of the respondent's Human Resource Manual requires employees to demonstrate honesty and integrity in all their dealings.
- i. that given the seriousness of the apparent discrepancies in the information given by the claimant while seeking salary review, the respondent suspended the claimant from duty with full pay by a letter dated 3/10/2019 from even date to 18/10/2019 in order to further investigate the issue, which suspension was further extended to 24/10/2019 vide a letter dated 22/10/2019.
- j. that by a letter dated 9/10/2019, the claimant admitted having given incorrect information which led to his suspension.
- k. that by a disciplinary notification and show cause letter dated 22/10/2019, the respondent invited the claimant for a disciplinary hearing on 24/10/2019, and asked him to submit his written representation by 23/10/2019.
- l. that the claimant was informed of his right to interpretation and representation by an employee of his choice; and to call witnesses.
- m. that the claimant attended the disciplinary hearing and was given another opportunity to make his oral representation.
- n. that having failed to satisfactorily respond to issues set out in the show cause letter, the claimant's employment was terminated by the respondent vide a letter dated 20/11/2019 with immediate effect.
- o. that the claimant was given an avenue to appeal and appealed vide a letter dated 22/11/2019, and offered to resign should the bank uphold its decision of termination.
- p. that the respondent upheld the decision to terminate the claimant's employment, but accepted his request for the letter of termination to be substituted with a resignation taking effect from 20/11/2019.
- q. that the claimant tendered his resignation letter dated 21/10/2019 and signed a Deed of Release and Discharge dated 10/12/2019, indicating that he had signed the same voluntarily and willingly.



- r. that the respondent acknowledged receipt of the claimant's resignation and confirmed payment of ksh. 196,898.23 to the claimant.
 - s. that termination of the claimant's employment was for valid and fair reasons, and was in line with the provisions of Sections 41,43,44 and 45 of the Employment Act.
7. Other documents filed by the respondent included a written witness statement of one Eva Naisae Kipasha dated 28/3/2022 and a list of documents dated 21/3/2022. Documents listed by the respondent included the claimant's job description as Portfolio Quality Manager, the respondent's Human Resource Management and Procedure Manual, the claimant's transfer letter dated 9/7/2019, claimant's supervisor's (John Mageto's) statement dated 3/10/2019, the claimant's apology letter dated 9/10/2019, minutes of the disciplinary hearing held on 24/10/2019, the respondent's response to the claimant's appeal, the respondent's employees' Code of Conduct, documents on payment of the claimant's transfer allowance (July 2019 payslip) and payment of the claimant's terminal dues advice.
8. When trial opened on May 9, 2022, the claimant adopted his written witness statement as his testimony and produced in evidence the documents referred to in paragraph 4 of this judgment. The claimant further testified:-
- a. that when he (the claimant) applied for salary increment, he first approached his immediate supervisor, John Mageto, who referred him to the Head of HR, and since nothing happened, the claimant approached the Managing Director as the last resort.
 - b. that the Managing Director listened to the claimant and told him that he would look into the issue.
 - c. that later a meeting was called of the claimant, his supervisor, the Deputy Managing Director and the Managing Director whereby the claimant was accused of giving false information to the Managing Director, which did not tally with what the claimant's Supervisor said. That this is what led to the claimant's termination.
 - d. that the claimant was invited for a disciplinary hearing and the charge stated in the letter against the claimant was discrepancies in the information given by the claimant to his supervisor and the Managing Director relating to the claimant's family and financial status.
 - e. that the claimant attended the hearing and was terminated on 24/10/2019, and his appeal was not considered.
 - f. that the termination letter was signed by the Managing Director and the Head of HR, and the decision on appeal was made by the Managing Director who had accused the claimant of lying to him, and who had terminated his employment.
 - g. that the claimant had not received any salary increment during his employment, had never received any warning and his performance had no problem
9. Cross-examined, the claimant testified that the letter of suspension accused him of discrepancies in information given by him to the Managing Director, while the termination letter accused him of misrepresentation to the Managing Director with a view to seeking salary review.
10. The respondent called one witness, Eva Naisae Kipasha (RW-1) who adopted her written witness statement as her testimony and produced in evidence the respondent's documents referred to in paragraph 7 of this judgment.



11. Cross-examined, RW-1 testified that the claimant was dismissed because it was discovered that he was seeking salary review based on inaccurate information given by him in a meeting held on 2/10/2019, which RW-1 did not attend. That at the meeting, the claimant was not informed of his right to have a witness, as it was not a disciplinary hearing.
12. RW-1 further testified:-
 - a. that what happened in the meetings of 2/10/2019 and 3/10/2019 is what gave rise to what the claimant was charged with in the disciplinary hearing; that the two meetings were just fact-finding meetings and what happened there formed the basis of the disciplinary matter/hearing.
 - b. that the two meetings of 2/10/2019 and 3/10/2019 were attended by the claimant, his supervisor, the respondent's Managing Director, Deputy Managing Director and the Human Resource Manager (HR).
 - c. that the disciplinary hearing notification was sent by the HR after the two meetings.
 - d. that the Managing Director and the Deputy Managing Director did not record any statements on the two meetings of 2nd and October 3, 2019.
 - e. that the claimant was not dismissed because he sought salary increment, but because of discrepancies in the information he gave in seeking salary increment.
 - f. that clause 14 of the claimant's contract of employment is on annual salary increment.
 - g. that for the five years that the claimant worked for the respondent, he never had any disciplinary issue, and his dismissal was not based on performance.
13. Re-examined, RW-1 told the Court that under Clause 14 of the claimant's contract of employment, salary increment was at the bank's discretion.
14. Having considered the pleadings filed and evidence adduced by both parties, the single issue that presents for determination, in my view, is whether termination of the claimant's employment by the respondent was unfair.
15. Unfairness in terminating an employee's employment may be either procedural or substantive. It was stated as follows in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
16. Section 41 of the *Employment Act* 2007 sets out, in mandatory terms, the procedure that must be adhered to by any employer contemplating termination of an employee's employment. The section provides as follows:-
 - “(1) 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.



(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

17. The foregoing procedure must be adhered to from the beginning to the end in any disciplinary proceedings falling within the purview of an employer-employee relationship, and the reason and/or reasons for the contemplated termination must be made known to the employee, and he or she must be given reasonable time to respond to the charge or charges levelled against him or her, and to be heard on the same, before any disciplinary action can be taken against him or her.
18. A charge sheet in labour laws is a memorandum of charges (acts and omissions) alleged to have been committed by the employee, and consists of allegations and facts which the person issuing it wishes to establish against the employee. A formal charge sheet (formal accusation) of alleged misconduct, negligence, acts of omissions) in labour laws seeks to fulfil one of the basic principles of natural justice that a fair and reasonable opportunity of being heard must be given to a person alleged to have misconducted himself or committed a breach of the law or set regulations. This principle cannot be achieved unless the person is specifically told of the accusations levelled against him. The person must know about his alleged guilt for him to state his views in response thereto.
19. A fair hearing pre-supposes a precise and definite catalogue of charges so that the person charged may understand and effectively meet it. If the charges are not precise and are indefinite, the person charged cannot understand them and cannot defend himself effectively, and the resulting enquiry would not be fair and just. (*G. Chandrakanth v Guntur District Milk Producers' Union Ltd*, represented by its General Manager Sangam Diary [1994] LLR-983).
20. In the instant case, it was a common ground that on 23/9/2019, the claimant wrote a letter to the respondent requesting for a salary review and stated in part:-
- “ following my internal workstation transfer from Mombasa to Nairobi Head Office, I seek a review of my salary as am now struggling to make ends meet bearing in mind that;
1. My cost of living in Nairobi has since doubled; Rent payment – a new expense in addition to mortgage loan instalment High school fees amount in the Nairobi school as compared to the ones I was initially paying Increased expenditure as the cost (general cost) items (sic) food stuffs is generally higher in Nairobi.
 2. I have not received any payrise since I joined the bank five years and have been adjusting finances accordingly to absorb the inflation rate of the period.
- Consequently, I request an increase of my current remuneration by at least 40% to caution (sic) me against this inevitable increased expenditure.”
21. The claimant testified that upon writing the foregoing letter, he approached his immediate supervisor, who referred him to the Head of the Human Resource, and that when nothing came out of that, the claimant approached the respondent’s Managing Director who listened to him and told him that he would look into the issue.



22. It was the respondents' case that there were discrepancies in what the claimant told his immediate supervisor (one John Mageto) and what he told the respondent's Managing Director. This was said to have been the beginning of the claimant's tribulations.
23. It was a common ground that as a result of the alleged discrepancy in information given by the claimant, meetings, attended by the claimant, his said immediate supervisor, the respondent's Managing Director, Deputy Managing Director and the Head of Human Resource, were held on 2nd and October 3, 2019. Indeed, the respondent's witness (RW1) testified in Court that what happened in the two meetings of 2nd and October 3, 2019 is what gave rise to what the claimant was charged with in the disciplinary hearing. RW-1 further told this Court that at the time of the meetings, the claimant had not been informed of his rights.
24. It is worthy noting that the claimant was suspended from duty on October 3, 2019, and that his evenly dated suspension letter reads in part:-
- “Re: Suspension From Duty
- The above refers, pursuant to the discussions between yourself, your PQM supervisor, the DMD, Managing Director and the Head Human Resources over two days; i.e. 02 and 03 October 2019. The discussions were over the authenticity of information you shared with management, and any discrepancies in this information.”
25. The aforesaid letter, which was signed by the respondent's Managing Director and Head of Human Resources, clearly show that as at the time the meetings of October 2, 2019 and October 3, 2019 between the claimant and the respondent's top management were held, the respondent already had an accusation against the claimant, yet no formal and/or specific charge had been communicated or presented to him, and the claimant had also not been informed of his rights under Section 41 of the *Employment Act*. This was quite unfair on the part of the claimant as the two meetings were, indeed, disciplinary proceedings.
26. No minutes of the two meetings were produced in Court by the respondent. All that was produced was the claimant's suspension letter referring to “discussions” in the two meetings. Discussions that led to the claimant's suspension from duty.
27. Under Clause 28.4 of the respondent's Human Resource Manual (2010 Edition) which the respondent produced in evidence, suspension of an employee from duty is a form of disciplinary action. The clause states:-
- “ a) A member of staff may be suspended from duty with half pay or without pay for breach of any of the rules and procedures for a period not exceeding 30 days.
- b) after a suspension, a further breach of rules within a period of 12 months that would itself merit a further suspension, will be ground for termination of service.”
28. According to the letter of suspension from duty dated October 3, 2019, the claimant was send on suspension from the date of the said letter (October 3, 2019) upto October 21, 2019, and the suspension was on October 22, 2019 extended upto October 24, 2019. The claimant is not shown to have committed any other alleged breach during the suspension period.



29. On October 22, 2019, however, the respondent issued and served the claimant with a Disciplinary Hearing Notification Form which stated in part:-

“you are notified to be present at the hearing to be held at BOA House.

Venue: BOA House Date 23th October 2019: Time 10.30am

Reasons for hearing:

Please note that the following allegations have been levelled against you:

Discrepancies in the information you gave relating to your family and financial status to both your supervisor and the Managing Director.

These charges arise out of your actions/performance/behavior on various dates in the discussions held with your supervisor. However, your discussion with the Managing Director was on October 3, 2019...”

30. From the foregoing, the subject of the disciplinary hearing notified in the foregoing disciplinary notification was the same as that shown to have been discussed in the disciplinary meetings held on 2nd and October 3, 2019, and pursuant to which the claimant was suspended from duty as already stated in this judgment. Was the Disciplinary Hearing Notification issued and served on the claimant meant to sanitize the procedural iniquities and unfairness involved in the disciplinary proceedings held on 2nd and October 3, 2019”
31. RW-1 testified that the foregoing disciplinary notification arose from the meetings of 2nd and October 3, 2019. Further, the respondent’s witness testified that the claimant’s dismissal was not based on performance, but was because of discrepancies in the information he gave while seeking salary review.
32. It was an act of unfairness and unfair labour practice for the respondent to subject the claimant to double jeopardy by subjecting him to two Sets of disciplinary proceedings over the same allegations.
33. Further, and for record purposes, the Disciplinary Hearing Notification served on the claimant on October 22, 2019 requiring him to respond to the same by October 23, 2019 and to attend a disciplinary hearing on October 24, 2019 was unreasonably short. An employee who has been called upon to respond to charges levelled against him must, in all situations, be given adequate time to make his response and to prepare for the hearing. Preparation includes getting a fellow employee or union official (where the employee is unionized) to accompany him to the disciplinary hearing. In my view, a period of between three to seven days notice would be adequate.
34. Further, in my view, a show cause letter setting out charges levelled against an employee ought not to be combined with a disciplinary hearing notice. The two serve different purposes, and should be issued separately, each giving the employee adequate time to deal.
35. In view of all the above, it is my finding that the procedure adopted by the respondent in initiating and conducting disciplinary proceedings against the claimant was unfair; and that the resultant termination of the claimant’s employment was also unfair. I so declare.
36. The alleged admission of wrong doing by the claimant on October 9, 2019 after the illegal and procedurally unfair disciplinary proceedings/meetings of 2nd and October 3, 2019 was of no legal consequence, and so is his alleged resignation on January 21, 2020 in substitution of termination, as nothing lawful or valid can flow from an illegal or procedurally flawed process. Out of nothing flows nothing. The claimant’s alleged admission of the alleged discrepancies and alleged subsequent resignation upon appeal could not legally validate an illegal process.



37. Having made a finding that termination of the claimant's employment was procedurally unfair, I will not interrogate the issue of whether the respondent had a fair and valid reason to terminate the claimant's employment, as that will be a mere academic exercise.
38. The claimant sought reliefs as set out in paragraph 1 of this judgment. I award the claimant the equivalent of ten months' salary as compensation for unfair termination of employment. It was a common ground that the claimant was earning a gross salary of ksh. 100,000 at the time of his termination.
39. Consequently, and having considered written submissions filed by counsel for both parties, judgment is hereby entered for the claimant against the respondent for ksh. 1,000,000 being compensation for unfair termination of employment. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
40. The claimant is also awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH APRIL 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

