



**Ndung'u v Equity Bank (K) Limited (Cause 116 of 2019)
[2023] KEELRC 1303 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1303 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 116 OF 2019
B ONGAYA, J
MAY 25, 2023**

BETWEEN

WILSON MWANIKI NDUNG'U CLAIMANT

AND

EQUITY BANK (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on February 25, 2019 through V.H. Awuor & Company Advocates. He prayed for judgment against the respondent for:
 - a. In lieu of termination notice Kshs. 85,100.00.
 - b. Twelve months' compensation Kshs.1, 021, 200.00.
 - c. Unpaid overtime Kshs. 7, 299,280.82.
 - d. Unpaid rest days (Sundays) Kshs. 967, 643.44.
2. The claimant's case is that the respondent employed him on May 7, 2007 as a bank clerk with basic pay of Kshs. 30,000.00. he was promoted to a Branch Accountant in May 2012 and he served in several branches including the Luanda Branch. His case is that between January 9, 2016 and January 16, 2016 while working at Luanda Branch he received schedules from the credit office duly authorised by the then Branch Manager Ellon Chebuche for a refund to various accounts. He acted on the schedules and submitted them back the Credit Officers Fred Maelo and Edwin Agoya as was required of him for their onward filing. The claimant's role was limited to posting the schedules while the group's officers and Credit Manager's role was to verify the authenticity of the schedules.
3. Further in June 2018 the respondent's security officers visited the claimant at his station of work at Kilimani Branch and questioned him about the said transaction at Luanda Branch. The claimant states he requested for the relevant authorised schedules from Luanda Branch but the respondent neglected



to provide them. Two years had lapsed since the transactions in issue and the claimant states that he could not sufficiently and competently respond to the questions that were being required of him to answer. He sought to retrieve the schedules filed at the Kapsabet Branch but was unable to get them. He received a show cause letter on August 14, 2018 from the Human Resource Department alleging irregular debit of Kshs. 52, 575.00 from Group Account No. 0290190xxxx credited to a non-member account No. 11201943xxxx at Luanda Branch through the use of wrong menu option between January 9, 2016 and 16.01 2016. Further was an alleged processing of salary payments in the absence of savings refund schedules. He was to respond by 16.08.2018. the respond replied by his letter undated letter. He was invited to attend disciplinary hearing by the letter dated 25.08.2018. He attended the disciplinary hearing on 28.08.2018. subsequently he was dismissed by the respondent's letter dated September 7, 2018. He was dismissed as culpable of the allegations being posting of a sum of Kshs 52, 575 using a wrong menu option between January 9, 2018 to January 16, 2018 (but essentially being an error in dates, correct ones being January 9, 2016 to January 16, 2016).

4. It is pleaded for the claimant that the summary dismissal was unlawful, wrongful and unfair because the allegations were not proved as the reasons for the dismissal; the respondent withheld material information that the claimant needed to use in his defence despite the claimant requesting for the same; the respondent did not avail for cross examination by the claimant the Credit Manager at Luanda Branch and the officers in charge of filling away payment schedules both in Luanda and Kapsabet Branches; and the respondent gave the claimant extreme deadlines for preparing his response to the respondent's letters. Further, the Credit Manager and the officers in charge of filing and with distinct roles in the transactions in issue were never dismissed. The claimant further alleged that he worked through lunch hours and further extra hours on designated Sundays but he was not paid at all.
5. The respondent filed the statement of response on 30.04.2019 through Messr Mukiri Global Advocates LLP. The respondent admitted employing the claimant as pleaded and that the claimant received the notice to show cause, he responded, he attended the disciplinary hearing and was thereafter summarily dismissed. The reason for the summary dismissal was the claimant's irregular debit of Kshs. 52, 575.00 from the stated Group Account Number and crediting it to the stated non-member account at Luanda Branch through the use of an inaccurate menu option between January 9, 2016 to January 16, 2017. Further the disciplinary hearing was undertaken per provisions of the Employment Act and the contract of service. Due process had been followed as pleaded for by the claimant. The respondent denied that nit withheld material information or calling of relevant witnesses. He was given sufficient time to prepare for the response and attend the disciplinary hearing. The respondent admitted that the claimant earned Kshs. 85, 100.00 per month. The respondent prayed that the statement of claim be dismissed with costs.
6. The claimant testified to support his case. The respondent's witness (RW) was Wycliffe Ontumbi, the Human Resource Manager in charge of employee exists. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.
7. To answer the 1st issue for determination the Court returns that parties are in agreement that they were in a contract of service particulars of which have been accurately pleaded by the claimant and admitted by the respondent. The claimant's last monthly salary is agreed to have been Kshs. 85, 100.00 per month.
8. To answer the 2nd issue for determination the Court finds that the disciplinary process was consistent with the standards of due process especially the notice and hearing per section 41 of the Employment Act, 2007. The evidence was that the claimant was informed the allegations levelled per the show cause letter, he responded by his undated letter, he attended the disciplinary hearing, the letter of summary dismissal issued and he opted not to administratively appeal because he had no fresh or further evidence



to offer. The respondent's case and submissions in that regard are upheld. The court further returns that the claimant testified that he had no evidence to show that he requested for information such as the schedules in issue but was denied. The further evidence was that the claimant testified that he did not appeal because he had no further or fresh evidence – inconsistent to the allegation that he had requested and not been provided the information such as the schedules in the transactions subject of the show cause letter.

9. To answer the 3rd issue the court returns that the respondent has established that as at time of the summary dismissal the reason for the termination existed as valid or genuine per section 43 of the Act, and, they related to the claimant's conduct, compatibility and the respondent's operational requirements as per section 45 of the Act. In particular, the claimant testified that he used SALPAY to do group refunds and to pay salaries – but the established respondent's policy or operational requirements being that SALPAY was exclusively for paying salaries and not to be used to do group refunds as the petitioner admitted to have used it. Indeed, as submitted for the respondent, the claimant in his undated letter in response to the letter to show cause the claimant stated that he regretted and was apologetic for the loss of the Kshs. 52, 575.00 due to his use of SALPAY menu option in transactions that were group refunds as opposed to paying salaries. At the disciplinary hearing the claimant testified that he knew SALPAY menu was exclusively for paying salaries and he admitted to have used it in the impugned transactions not being salary payment but group refunds. The Court returns that the summary dismissal was not unfair in substance or merits.
10. The 4th issue is on remedies. The dismissal has been found not to have been unfair in procedure or merits. The respondent was entitled to dismiss with no or shorter notice than was contractual or statutory in view of the gross misconduct per section 44(1) of the *Employment Act*, 2007. Pay in lieu of termination notice is found unjustified. Similarly, 12 months' compensation for unfair or unlawful termination and under section 49 of the Act is unavailable as no unfair or unlawful dismissal has been established. The claim for overtime is speculative as appears to be a mere afterthought devoid of a grievance in that regard throughout the subsistence of the contract of service. Clause 9.0 on working place and hours provided thus, "You will be notified of your work station upon successful completion of induction program. Normal working hours are from 8.00am to 5.00pm Monday to Friday, and 8.00am -12noon on Saturdays. The nature of your work however may require some variation and extension of these times. Your Branch Manager/Unit Head will advise you of the applicable timings immediately upon reporting." The Court finds that the parties are bound by that clause on working place and hours. In absence of the claimant's reported grievance about implementation of that provision, it is clear that the nature of the work was agreed to require extensions and which under that clause were sandwiched as normal agreed behaviour of the working hours rather than amounting to overtime now purportedly claimed for by the claimant. In any event there is no evidence to show that the claimant worked all those hours as claimed for. It cannot be said that in the circumstances, the overtime claims have been strictly proved as required of claims of special or liquidated damages. The prayer will as well fail as unjustified and not established as required. As submitted for the respondent, similarly there was no agreement that the claimant works on rest, off days or Sundays. No evidence of working on rest days was provided, and the claim and prayer will fail especially for being outside the agreed place and hours of work. It is submitted for the claimant that the Windows Daily Log was not provided by the respondent and therefore an adverse inference be made against the respondent and in favour of the claimant. However, the Court finds that the Windows Daily Log are nowhere in clause 9.0 of the contract but what parties agreed upon was a likely variation or extension of working hours as may be advised by the Branch Manager or Head of Unit. The claimant never asked for production of such advisories and indeed never pleaded material particulars about such contractual advisories to work extra hours or on off days and thereafter, he was not paid within the terms of such advisories. The



Claim is indeed advance outside the design of clause and the Court accordingly finds that it will fail. It is submitted that the claimant be refunded an unlawful surcharge of Kshs. 52, 575.00 but which appears not to have been part of the claims and reliefs in the memorandum of claim. The same is declined and as submitted for the respondent, parties must be bound by their own pleadings.

11. The court has considered the long time the respondent took (of about two years) from the date of the transactions to the date of initiating the disciplinary process. The long delay appears not well explained and in a sense it was prejudicial to the claimant. In that consideration, each party to bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25TH MAY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

