



**Yarrow v National Bank of Kenya Limited (Cause 50 of 2020)
[2023] KEELRC 1410 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1410 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 50 OF 2020
NJ ABUODHA, J
JUNE 9, 2023**

BETWEEN

ISMAEL YARROW CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. Through a statement of claim filed on June 26, 2019, the claimant averred inter alia that:
 - i. At all material times to this cause, the claimant was employed by the respondent.
 - ii. The Claimant avers that he was Relationship Manager Islamic Division – Eldoret Branch at the time of his dismissal from employment.
 - iii. The claimant avers that he was issued with a show cause letter dated March 18, 2019 to show why disciplinary action should not be taken against him by the Respondent herein
 - iv. The claimant avers that the show cause letter was based on allegation that the claimant:-
 - a. That he forwarded fraudulent account opening instructions to open an account in favour of Kenpoly manufactures limited.
 - b. He had in his possession fraudulent account opening instructions to open an account in favour of Riara Group of Schools.



- c. He colluded with a teller aided a transaction in the customer account without an express authorization by the customer.
- d. He violated the banks policies and procedures and acted in disregard to the bank's policies and procedures.
- e. Exposed the Bank to reputational loss.
- v. The said notice to show cause was illegal and without any legal force hence void ab initio.
- vi. The Claimant avers that he was served with suspension letter on the March 18, 2019 dated March 15, 2019 from the Respondent indicating that he was suspended from his duty.
- vii. The Claimant contends that from the said letter the suspension was with regard suspicious transaction in the account of one Joseph Mwebi Nyaboro Account Number 012012xxxx800 dated February 6, 2019 for an amount of Kshs.287,000/=.
- viii. The Claimants further contends that the reason for the purported suspension is totally different from the reasons advanced for him to show cause hence clearly demonstrating smacks of malice on the part of the Respondent.
- ix. The Claimant avers he was served with a letter dated March 27, 2019 on 1st April, 2019 to appear to a disciplinary hearing which was to be held on April 3, 2019, 6th Floor, Human Resource Conference Room.
- x. The Claimant through a letter dated April 1, 2019 through his lawyers responded to the said notice giving reasons why the Claimant was not going to attend the meeting as scheduled on April 3, 2019 and the said reasons are as herein under.
- xi. The notice was too short since he was served on April 1, 2019 as a hearing was scheduled for April 3, 2019.
- xii. The Claimant was also attending court to answer charges instigated by the Respondent,
- xiii. He had not been supplied with any information materials and evidence to be relied during the disciplinary hearing pursuant to section 4 of the *Fair Administrative Action Act* No. 4 of 2015.
- xiv. he Claimant contends that the said disciplinary notice was illegal for the following reasons:-
- xv. That the aid notice did not advice the Claimant of the consequence of the disciplinary hearing.
- xvi. That the Claimant was not advised in writing at least three days in advance.
- xvii. That the said notice did not give the Claimant the right of representation.



- xviii. The Claimant avers that he has never been invited into a disciplinary proceedings since he was kept busy by the Respondent attending Court on Criminal Charges which were instigated by the Respondent.
- xix. The Claimant avers that avers that the Respondent unlawfully terminated his service.

2. The Respondent filed a response to the claim and averred that:

- i. The Respondent aver that indeed the Claimant is its former employee having worked for the Respondent from August 17, 2013 on a probationary status to April 18, 2014 when his status as an employee were confirmed. Subsequently the Claimant served in the capacity of a relationship manager Islamic Banking and was posted to the Eldoret Branch. However, following a severe breach of the employment contract, misconduct, negligence, poor performance and deliberately being engaged in activities predestined to defraud the Respondent and its customers, the Claimant's services with the Respondent were terminated on April 26, 2019. In doing so, the Respondent strictly adhered to the Constitution, the Employment Act, employment policies and the Respondent's Human Resource Manual that ensured that none of the Claimant's rights were violated.
- ii. The Claimant's role encompassed; to provide strategic leadership and Market positioning of Islamic Banking by enabling the team to operationally deliver on strategy and key performance priorities within the segment which supports overall Corporate and Retail Markets strategic objectives by taking full responsibility for the strategy, profit and loss, operations and growth within the area (Eldoret).
- iii. Moreover, as a manager, he was to ensure compliance with the Bank policies, legislation and regulations in the financial industry.
- iv. Indubitably, the Claimant's position came with great responsibility and would require one to not only be vigilant and diligent but also conscientious in the performance of his duties due to the sensitive nature of the Respondent's Business. It is imperative to note that integrity is a mandatory requirement for any employee in the Banking industry and the financial industry as a whole keeping in mind the Banking industry is founded on trust.
- v. However, on February 12, 2019, the Respondent learnt that there was a possible fraud pattern at the Eldoret Branch where the Claimant was based. At the said Branch, account opening staff/employees were deliberately and consciously issuing account opening forms to fraudsters who would thereafter re-submit the forms accompanied with fake Know Your Customer (KYC) documents. The complicit staff/employee would then pass the KYC documents as genuine and the accounts would be cleared for transaction.
- vi. Based on this, the Respondent lodged an internal investigation in an effort to unearth the syndicate involved and its illegitimate activities. It was during this investigation, that the Respondent discovered numerous accounts irregularly opened. One such account was under the name Joseph Mebi Nyaboro



Account Number 0120121\$\$\$\$xxx which was connected to the Claimant and which had been used by the Claimant to conduct fraudulent activities. The said fraudulent account was opened on February 6, 2019.

- vii. The Direct Sales Representative Mr. Evans Boswony, who facilitated opening of the account affirmed that the fraudulent and duplicitous customers were referred to him by the Claimant and that he gave the Claimant the Account Opening forms for the purported customers to complete and return to him. The account opening forms were returned two days later by the Claimant who gave Mr. Evans Boswony Kshs.2,000.00 to deposit into the account as activation deposit.
- viii. The account had received five credit deposits totalling to Kshs.428,765.15 from Image Registrars and three cheques being KCB dividends totalling to Kshs.26,766.25. Upon the said account being credited, the Claimant proceeded to withdraw Kshs.287,000.00 from the said account on 6th February 2019 by issuing falsified instructions to the cashier one Mr. Moses Angolesya. On the said date, the Claimant was captured by CCTV cameras transacting from the fraudulent account.
- ix. Noting that the Claimant's conduct was criminal in nature, the Respondent reported the matter to the Department of Criminal Investigation as required by law and also instituted its disciplinary procedures.
- x. In accordance with the Respondent's Human Resource Policy and good employment practices, natural justice and Employment laws the Claimant was issued with a notice to show cause dated March 15, 2019 to answer to the following;
 - i. Why he forwarded fraudulent account opening instructions to open an account in favor of Kenpoly Manufactures Limited;
 - ii. Why he had in his possession fraudulent account opening instructions to open an account in favour of Riara Group of Schools;
 - iii. Why in collusion with a teller he aided a transaction in the customer account without an express authorization by the customer;
 - iv. Why he violated the Banks policies and procedures and acted in disregard to the bank's policies and procedures;
 - v. Why he exposed the Bank to reputational loss by his action.
 - vi. Why disciplinary action should not be taken against him.
 - xi. This was accompanied with a suspension letter to enable proper and adequate investigations keeping in mind the sensitive nature of the Respondent's business. During the suspension period, the Claimant received all benefits entitled to him.



- xii. As is the policy, the Claimant was required to respond to the Notice to show Cause by March 19, 2019 but deliberately and calculatingly failed and or ignored to respond.
- xiii. Upon completion of its internal investigations, the Claimant was invited for a disciplinary hearing scheduled for 3rd of April, 2019 vide a Notice dated October 27, 2019.
- xiv. The Claimant protested that the notice was too short. Subsequently, the hearing was rescheduled to 5th of April 2019 and was later moved again to 12th of April, 2019 to give the Claimant adequate time. However, as was the character of the Claimant, he failed to show up in all the dates the matter was scheduled.
- xv. Being left with no option, the disciplinary committee reviewed the uncontroverted evidence before them and they found the Claimant culpable and he was dismissed in accordance with the Respondent's Human Resource policies and procedures and the employment laws.
- xvi. The Claimant cannot claim malice on the part of the Respondent as he has not been cleared from the criminal case which is currently ongoing and further that there were justified reasons to believe that the Claimant was engaged in the said fraudulent activities in the cause of his employment.
- xvii. In further response to paragraph 14 of the Memorandum of Claim, the Respondent avers that all notices as drawn by the Respondent met legal requirements. Noting that the disciplinary hearing was postponed twice at the request of the Claimant and that it allowed the Claimant to be accompanied to the hearing in addition of setting out the consequences of non-attendance of the said hearing.
- xviii. The notice sent to the Claimant set out the allegation in the simplest manner to allow the Claimant provide adequate information, explanation, justification and/or defence to the allegations raised against him. It also requested the Claimant to be accompanied by a representative in case he needed one.
- xix. In response to paragraph 22 of the Claim, the Respondent avers that it does not owe the Claimant any terminal dues including unpaid leave days as the Claimant was paid what was due to him in full.
- xx. The Respondent avers that the Claimant was accorded a free and fair disciplinary process in compliance with the Bank's Human Resource Manual, policies and the set out employment laws.

3. At the trial the Claimant stated that he recorded a statement on June 25, 2019 which he relied on as his evidence in chief. He also relied on the documents filed with the claim. It was his evidence that he



was employed on October 18, 2013 and worked until April, 2019. He was working as a relationship manager Islamic banking. He received a show cause letter on March 18, 2019 and was to respond by March 19, 2019 but instead responded on March 21, 2019. He thereafter received a suspension letter and also arrested and taken to Court the following day.

4. According to him the Branch Manager who signed the show cause letter was not his manager. It was his evidence that he complained that he was not given adequate time to respond to the show cause letter because he was under arrest. The show cause letter accused him of being involved in suspicious transactions in customer's accounts.
5. It was also his evidence that he received a disciplinary hearing notice dated March 27, 2017 and that he received it on 1st April 2019 and the session was to take place on April 3, 2019. He responded to the notice stating on 3rd April, 2019 he would be attending Court. He further asked to be furnished with the account opening forms. He never received any other notice thereafter.
6. Concerning opening of accounts he stated that to open an account, one needs an identity card, he then fills the account opening forms and supply KRA PIN and the bank does KYC diligence.
7. In cross examination he stated that the show cause letter was issued concurrently with the suspension letter. It was his evidence that he never responded to the six questions raised in the notice to show cause. The letter from his advocate answered the show cause letter.
8. According to the Claimant, he never received any other call after 1st April 2019 and that he never received any response to his letter seeking postponement of the disciplinary hearing are that he never followed up. He never attended any disciplinary hearing before dismissal. He learnt of his termination through the branch manager. The manager called and told him there was summary dismissal letter. It was sent to him on WhatsApp. He never collected the same, it was his evidence that the letter stated grounds for dismissal and that they were the same as in the show cause letter. He was further informed of his terminal dues in the letter. He took a loan while in employment and that he knew the consequence of the dismissal on the loan.
9. In re-examination he stated that he responded to the show cause letter and that he could not respond on time because he was attending to the charges he was facing and further that he never received any other letter or notice apart from the one he received on 1st April. He used to receive notices from the Branch and thus he used to be called to come and pick them.
10. The Respondent called two witnesses. The first witness Mr. Stephen Opiyo Obongo stated that he was working for the Respondent as Head of Employees Relations. He recorded a statement on 24th September, 2021 which he relied on as his evidence in chief. He also relied on the documents filed with the claim.
11. It was his evidence that the show cause letter could be signed by the Branch Manager to staff under them. The authority was denoted by the Human Resources Manager.
12. Mr. Obongo further stated that they never received the Claimant's response to the show cause letter and that the Claimant received the notice of invitation to attend disciplinary hearing on 27th March, 2019. Further that when employees were on post, the documents were delivered physically through the line manager.
13. It was his evidence that the Claimant was still an employee when the notice was issued. The Claimant's letter dated 1st April, 2019 seeking postponement was received by the Respondent. The meeting was postponed and a new date set. The Claimant was issued with and received the new notice but declined to acknowledge the same. The comments to that effect were minuted on the face of the letter. The



- hearing was rescheduled to 5th April, 2019 but the Claimant never attended. The hearing however proceeded in his absence and a decision was made to dismiss him. This was communicated to the claim but he refused to acknowledge the dismissal letter.
14. In cross examination he stated that line managers could issue show cause letters. He further stated that the show cause and suspension letter were issued on the same. The suspension was based on the allegation of fraudulent accounts.
 15. He stated that he knew the issues about the accounts in the investigation report and that he does not receive accounts opening forms and deposit slip. On reaching staff he stated that they could be reached on phone or through the branch. For those who could not be reached, they were contacted through their last known address or their next of kin. He further stated that an employee is required to acknowledge acceptance of documents. Where an employee refuses to acknowledge the documents, it will be minuted on the face of the document. He further stated that he did not have in court the register showing the Claimant came to the bank on 3rd April.
 16. In re-examination he stated that the Claimant never responded to the show cause letter. He further never attended the disciplinary hearing.
 17. The Respondent's second witness Ms. Angela Ngava stated that she was ICT Risk Manager and that she adopted the statement of Bridget Mugambi dated October 18, 2021 as her evidence in chief.
 18. It was further her evidence that she was asked to investigate an incident which had been brought to their attention by a whistleblower. After the investigation, they made certain findings which included that the Claimant was involved in the setup of two fraudulent accounts and recommended disciplinary action against the staff involved.
 19. In cross examination she stated that the Claimant was working for Islamic Banking Section and that fraudulent transactions did not take place in the Section. The evidence that was produced during the investigations were in the appendices. The report did not have annexures but they were noted in the report. Annexure 2 of the Respondent's bundle of documents were the account opening forms.
 20. According to her money was withdrawn from the accounts and that the withdrawal slips were with the Claimant. The investigation was based on witnesses they interacted with, documents they saw and CCTV footage. They further extracted bank statements from the fraudulent accounts.

Determination

21. In a claim for unfair termination of employment the onus of proving the validity of the reason for termination or dismissal lies with the employer.
22. Section 43(2) of the *Employment Act* provides that reason for termination are matters the employer at the time of termination genuinely believed to exist and which caused the employer to terminate the employee. Lord Denning in the case of *British Leyland UK Ltd v Swift* [1981] I.R.L.R stated that the reasonable test was that "Was it reasonable for the employer to dismiss him?" If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair."
23. The Claimant herein was accused of involvement in fraudulent activities. That is to say the Respondent suspected possible fraud at Eldoret Branch where the Claimant was working. Account opening staff were deliberately issuing account opening forms to fraudsters who would resubmit the same accompanied with fake KYC documents. The staff would then pass the KYC documents as genuine and the accounts would be cleared for transaction.



24. Internal investigation was launched which revealed among others that the Claimant withdrew some Kshs.287,000/= from one for the fraudulent accounts on February 6, 2019 by falsifying instructions to the cashier one Mr. Angolesya. The Claimant was captured on CCTV transacting from the fraudulent account. The Claimant was further found in possession of duplicitous account opening forms for one of the accounts.
25. The Claimant was suspended and issued with a show cause letter. Further the Claimant was arrested and charged with a criminal offence related to the fraudulent transactions. The show cause letter set out the accusations against the Claimant and called upon the Claimant to provide explanation over the allegations. The Claimant alleges that he responded to the show cause letter. However no such response was made available to the Court for perusal. According to the Respondent, the Claimant did not respond to the show cause letter.
26. The Claimant was subsequently invited for disciplinary hearing on April 3, 2019 through a letter dated March 27, 2019.
27. According to the Claimant he received the letter but requested for another date because on the 3rd he was scheduled to attend Court over the criminal charges. The Respondent acceded to the request and by a letter dated April 1, 2019 rescheduled the hearing to 5th April 2019. This was not collected by the Claimant. From the remarks on the face of the letter, the Claimant is said to have come to the bank on 3rd at about 10.30 am to acknowledge receipt of the letter but refused to do so stating that he did not agree with the contents of the letter and further that he needed to consult with his lawyer before receiving the same but never did so. The disciplinary hearing proceeded on the rescheduled date at the conclusion of which the Claimant was issued with summary dismissal letter.
28. The Court takes cognizance of the fact that the Claimant was working for the Respondent which is a financial institution dealing with customers' funds. The respondent was therefore engaged in a very sensitive business where trust, fidelity and honesty are critical. The Claimant was accused of involvement in activities that jeopardized the Respondent's business and public image. Investigations were conducted and revealed that the Claimant was actively involved and complicit in the fraudulent activities. He was issued with a show cause later but chose not to respond to the same. He was further issued with a notice for disciplinary hearing but sought for another date which the Respondent agreed to and rescheduled the hearing. The Claimant refused to acknowledge the re-issued letter and further failed and or ignored to attend the disciplinary hearing.
29. This far the Court is reasonably persuaded that the allegations against the Claimant were serious and required his response both to the show cause letter and at the disciplinary hearing. He therefore squandered his chance to defend himself against the allegations levelled against him by the Respondent.
30. The concern of this Court on accusations by the employer especially where such accusations are also subject to criminal prosecution, is not whether such accusation and evidence in support can sustain a conviction or not.
31. The claim before the Court is a civil claim and the standard of proof is on a balance of probabilities and not beyond reasonable doubt as in criminal trial. The Court therefore is of the view that the allegations against the Claimant and his subsequent conduct of refusing to address them were reasonable enough to justify his summary dismissal.
32. The court therefore finds and holds that the claim has no merit and is hereby dismissed with costs.
33. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF JUNE
2023**

ABUODHA J. N.

JUDGE

In the presence of:-

.....for the Claimant

.....for the Respondent

