



**Mathenge v Equity Bank (Kenya) Limited (Cause 1471 of 2016)
[2023] KEELRC 1734 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1734 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1471 OF 2016
MN NDUMA, J
JULY 13, 2023**

BETWEEN

PETER ANTHONY MATHENGE CLAIMANT

AND

EQUITY BANK (KENYA) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 27/7/2016 praying for the following reliefs:
 - (a) A declaration that the Claimant's dismissal from employment was unlawful, unfair and malicious.
 - (b) Twelve (12) month's salary as compensation for unlawful and unfair termination calculated at Kshs.87,500 x 12=1,050,000.
 - (c) Costs of this suit with interest thereon.
 - (d) Any other order and/or relief this Court may deem fit and just to make and/or grant.
2. CW1, the claimant testified that he was employed by the respondent as a Bank Clerk on 30/7/2007 at a monthly salary of Kshs.25,000. The claimant was inducted and on 13/8/2007, was posted to Narok Branch to work as a Bank clerk.
3. That the claimant worked diligently and on 17/3/2008 was confirmed to his position with effect from 8/1/2008. That on 20/3/2008, the respondent reviewed the work benefits of the claimant by upgrading his medical cover and pension scheme.



4. That the claimant was interviewed and promoted to the position of Senior Relationship Officer in Accounts Opening on 1/1/2009. The salary was increased to Kshs.42,500. On 23./8/2010, the designation of the job held by the claimant was changed to Agency and Acquiring Champion.
5. That on 1/1/2011, the claimant was promoted to the position of Agency Supervisor and the salary was increased to Kshs.50,000 per month.
6. That on 15/5/2012, the claimant was transferred to Enterprise Road Branch from Narok Branch with effect from 25/6/2012.
7. On 1/1/2013, the claimant was promoted to the position of Relationship Manager – Agency and the salary was increased to Kshs. 75,000 and the medical cover reviewed to Kshs.2,000,000 per year and the leave allowance increased to Kshs.12,000 per year.
8. On 11/1/2014, the claimant’s salary was increased to Kshs.87,500. The claimant attributes this positive trajectory to his good performance at work.
9. CW1 testified that on or about 4/3/2015, he was summoned by the Branch Manager at Enterprise Road, one Samuel Munga and was invited to a meeting at the Head Office at the request of General Manager Operations Mr. Joseph Ng’ang’a.
10. The claimant attended the meeting on 5/3/2015 where three people including General Manager Operations; General Manager Human Resource and Training and the Human Resources Manager were present. The persons inquired from the claimant the nature of his relationship with one Eva Wanjiku Mwangi, a former employee of Equity Bank, Narok Branch.
11. CW1 testified that he explained that he knew Eva Mwangi as a former employee of Equity and a colleague at the Narok Branch. CW1 told them that he had last communicated with Eva in September, 2014, on a Sunday when he was desperately calling anybody in his phone book due to sickness of his two months old son.
12. CW1 explained that he also called other friends including one Antony Kariuki, their Operations Manager, Mbita Branch who assisted him with part of the Kshs.10,000 he required and took his son for further treatment.
13. The panel then asked the claimant to go to a separate room and write down the conversations he had with Eva. CW1 presented the information to the panel and they told him that they had lost faith in him and had decided to terminate his employment. The claimant was issued a termination letter on 6/3/2015 before leaving the head office on 5/3/2015. The letter was copied to the Branch Manager and General Manager - Agency.
14. The termination letter made reference to “decisions held between me and the management on 5th March, 2015 regarding fraud prevention which the claimant allegedly concealed.” CW1 testified that no such discussions were held with him at the meeting on 5/3/2015 except questions on his relationship with Eva.
15. On 7/3/2015, CW1 appealed against the decision to terminate his services and sought audience with management to understand why his employment was terminated.
16. On 4/5/2015, the claimant was invited to attend an appeal hearing on 7/5/2015.
17. At the hearing, CW1 testified that he restated what he had told the three managers on 5/3/2015 and that no discussion on “fraud prevention” occurred at that meeting as stated in the letter of termination.



18. The Appeal panel upheld the termination by a letter dated 8/5/2015 stating that CW1 had failed to raise any new information to support his appeal.
19. The claimant wrote a demand letter to the respondent through his advocate dated 19/5/2016. The demand was not heeded, hence the suit.
20. Under cross-examination by Counsel for the respondent, Mr. Onyango, CW1 stated that he was aware that Eva had been dismissed from employment by the respondent but he did not know the reason for the termination.
21. CW1 stated that he was not associated with anything Eva did at the respondent and did not know what she had done. CW1 explained that the respondent did not inform the staff, the reason why Eva's employment was terminated and so he did not know. CW1 said he was not aware that Eva's termination was because of Fraud.
22. CW1 stated that he did not get any warning letter or a Notice to Show Cause regarding his communication with Eva.
23. CW1 stated that his shares with Equity Bank were due to be redeemed and he suspects he was victimized for wanting to redeem his shares.
24. RW1 Wycliffe Ontumbi, the Human Resource Manager of the Respondent testified that he was employed by the respondent on 1/6/2022 and so was not involved in the disciplinary matter of the claimant.
25. RW1 stated that he was not aware of any Notice to Show Cause issued to the claimant. RW1 stated that from the records available to him, the claimant's record was clean. That on 5/3/2015, the claimant was called to a meeting and on 6/3/2015, the claimant was issued with a letter of termination. RW1 stated that he had no record of who was present at the meeting of 5/3/2015 but the letter of termination was issued by the General Manager, Talent Acquisition.
26. RW1 stated that from the termination letter, the claimant was called to explain why he was in constant communication with an ex-employee named Eva who had been suspended by the Bank due to fraud.
27. RW1 stated that the reason for the termination of the employment of the claimant was concealment of information regarding his interaction with Eva. That the respondent had consequently lost trust and confidence in him.
28. RW1 stated that the Bank staff are to be careful with who they relate to. That the bank was not comfortable with the relationship between the claimant and Eva hence lost trust in the claimant. That Eva's employment had been terminated for fraud.

Determination

29. The parties filed written submissions which the Court has carefully considered together with the evidence adduced by CW1 and RW1. The Court has delineated the following issues for determination.
 - i. Whether the respondent had a valid reason to terminate the employment of the claimant.
 - ii. Whether the respondent followed a fair procedure before terminating the employment of the claimant.
 - iii. Whether the claimant is entitled to the reliefs sought.



30. Disciplinary processes at the work place have incrementally improved with the continuous guidance given by Employment and Labour Relations Court decisions that have variously interpreted the provisions of the *Employment Act*, 2007 as augmented by the relevant provisions of the *Constitution of Kenya, 2010* especially Articles 27,41, 47 and 50 thereof. The Employers have also developed in-house policy manuals for that which cover operations; discipline; grievances; HIV and Aids; sexual harassment inter alia, to create certainty and uniformity in the relationships between the Employers and employees. The respondent is a leader on many fronts in the investment and employment sphere in the country.
31. From the testimony of both CW1 and RW1, the process that led to the termination of employment of the claimant on 6th March, 2015, did not start with a notice to show cause to the claimant asking him to explain the various allegations or charges made against him.
32. The claimant was simply summoned to a meeting on 5th March, 2015 with no idea why he had been summoned. He appeared before three (3) senior managers and was accused of matters that were not placed on record previously or at the said meeting.
33. Indeed, no minutes of the meeting between the claimant and the three senior managers were recorded or produced before Court. CW1 told the Court he was simply asked to explain his relationship and previous conversation with a former colleague at Narok Branch of Equity Bank by the name Eva. The claimant explained the relationship but no minutes were taken of his explanation. He was then asked to go to a separate room and put down in writing the matters he had discussed with Eva since she had left employment of the respondent.
34. RW1 produced a sheet of handwritten paper, wherein the claimant had scripted the matters he could recall having discussed with Eva.
35. The matters set out in the note, are personal in nature between Eva and CW1. The respondent did not refer to those matters at all in the letter of termination issued to the claimant immediately upon presenting the note to the officers.
36. In the absence of any explanation by the respondent, the Court is unable to relate the matters set out in the handwritten note by the claimant with the reasons given by the respondent for terminating the employment of the claimant in the letter of termination dated 6th March, 2015, which the claimant told the Court was handed to him on 5th March, 2015 before he left the meeting at the head office of the respondent.
37. Section 43(1) (2) provides:-
- “43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”
38. Section 45(1) on the other hand provides:-
- “45
- (1) No employer shall terminate the employment of an employee unfairly.



- (2) A termination of employment by an employer is unfair if the employer fails to prove:-
- a. that the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason:-
 - i. Related to the employees conduct capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - (c) That the employment was terminated in accordance with fair procedure. [emphasis added]

39. The contract of employment between the claimant and the respondent dated 8th July, 2007 on the basis of which various other promotions were made does not expressly provide for the manner in which an employee of the respondent should relate and or communicate with ex-employees of the respondent. It is a fact that Eva served in the same, Narok Branch of Equity with the claimant before the claimant was transferred to Enterprise Road Branch at Nairobi. The claimant told the Court that though he was aware that the employment of Eva had been terminated by the respondent, he did not know the actual reason why the employment was terminated.
40. The respondent did not adduce any evidence to show that they had informed their staff including the claimant reasons why the employment of Eva was terminated. The respondent did not also provide any evidence that they had warned the staff not to remain in communication with former employees of the respondent, whose employment had been terminated for whatever reason.
41. Simply put, the respondent did not provide any reason why the claimant ought not to have kept his relationship with a former colleague namely Eva. The respondent did not provide any evidence that the communication between the claimant and Eva, related to the respondent and in what way if at all, was detrimental to the respondent to warrant termination of the employment of the claimant.
42. Accordingly, the Court finds that the respondent failed to prove that it terminated the employment of the claimant for any valid reason.
43. Furthermore, RW1 admitted that no notice to show cause was issued to the claimant before he was ambushed on 5/3/2015 by three senior managers to explain matters he had not been made aware of. The respondent did not record the meeting between them and the claimant. The claimant was not given any opportunity to prepare to answer the allegations if any made against him and was not given opportunity to bring to the hearing a union member or a colleague of choice to help him in the matter. The conduct by the respondent violated Section 41 of the Employment Act, which provides:-

41(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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

44. Accordingly, the termination of the Employment of the claimant violated the provisions of Sections 41, 43(1) and 45(1) (2) (a) (b) (i) and (c).
45. The respondent had no valid reason to terminate the employment of the claimant and did not follow a fair procedure in terminating the employment of the claimant. The termination was therefore unlawful and unfair and the claimant is entitled to compensation in terms of Section 49(1) (c) as read with subsection (4) thereof.
45. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal held:-
- There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
46. The respondent failed in all the above respects, hence the termination was both substantively and procedurally unfair.

Compensation

47. The claimant had served the respondent from 30th July, 2007 starting as a Bank clerk and had a meteoric rise within a relatively short period. At the time of the unlawful termination, the claimant was a Relationship Manager – Agency earning a salary of Kshs.87,500 plus other benefits. The claimant lost a most promising career without any lawful justification. It is the Court’s objective finding that the claimant did not knowingly contribute to the unlawful termination. The claimant was terminated without notice, had a young child and family at the time and suffered immense loss and damage as a result of the termination. The claimant had served for a period of about eight (8) years diligently and as confirmed by RW1 without any adverse record at all.
48. The claimant was not compensated for the sudden loss of employment but was however paid his terminal benefits.
49. Having considered all the facts of the case, the Court considers this an appropriate case to award the claimant the equivalent of ten (10) months’ salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.875,000.
50. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-
- (a) Kshs.875,000 being equivalent of ten (10) months’ salary in compensation.
 - (b) Interest at Court rates from date of judgment till payment in full.
 - (c) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 13TH DAY OF JULY, 2023.

MATHEWS N. NDUMA



JUDGE

Appearances

M/s Mwae for claimant

M/s Odongo for Respondent

Ekale: Court Assistant

